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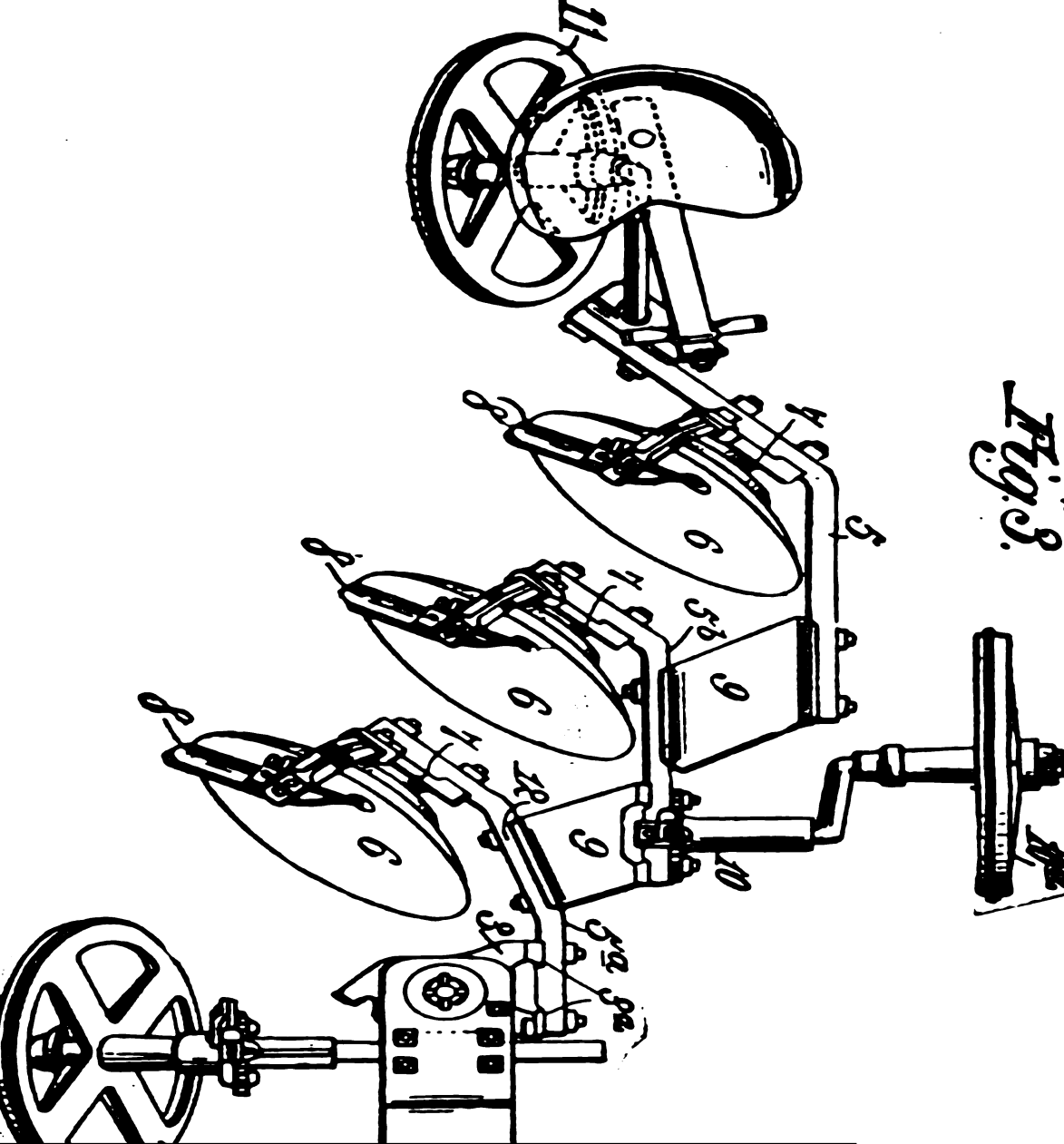
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THE
FEDERAL REPORTER.

VOLUME 128.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

APRIL—MAY, 1904.

ST. PAUL:
WEST PUBLISHING CO.
1904.

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* Appointed to succeed Simonton, Circuit Judge.

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* Appointed to succeed Judge Shiras.

* Resigned.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

LOUISVILLE & N. R. CO. v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit, February 2, 1904.)

No. 1,268.

1. RAILROADS—RIGHT OF WAY—EASEMENT BY PRESCRIPTION.

Where a railroad company has the charter power to acquire a right of way for railroad purposes, and it enters upon lands with the consent or license of the owner, and builds its railroad, expending money in the prosecution of the work, and holds it continuously for a period of more than 40 years, running trains over it daily, and exercising the acts of ownership that are necessary to keep the roadbed in proper condition during all that time, it acquires a right of way by prescription.

2. INJUNCTION—GROUNDS—PROTECTION OF EASEMENT.

Equity has jurisdiction by injunction to prevent interference with easements or their destruction, and a bill by a railroad company against a number of defendants, alleging that as owners of lands through which its road runs they are interfering with its right of way, denying its right to the same, threatening suits, and preventing it from keeping its roadbed in repair, states a cause of action for equitable relief.

3. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—HOW DETERMINED.

In a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constitutes the value in controversy for jurisdictional purposes.

4. PARTIES—JOINDER OF DEFENDANTS—SUIT TO ENJOIN INTERFERENCE WITH EASEMENT.

Different landowners may be joined as defendants in a single suit by a railroad company to enjoin interference with its use of its right of way and with the maintenance of its track, where the right asserted is the same against each defendant.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

¶ 1. See Railroads, vol. 41, Cent. Dig. § 142.

¶ 3. Jurisdiction of circuit courts as determined by the amount in controversy, see notes to 19 C. C. A. 75, 36 C. C. A. 459.

The appellant, a Kentucky corporation (complainant below), brought this suit against Mrs. M. E. Smith and 14 others, appellees (defendants below), all citizens of Alabama. The averments and purpose of the bill are sufficiently shown in the opinion. The defendants demurred to the bill, making the objections which are stated and discussed in the opinion. The circuit court sustained the demurrers and dismissed the bill, and its decision and decree are assigned as error.

John W. Judd (John B. Keeble and Chas. B. Stark, on the brief), for appellant.

W. R. Walker (Thomas C. McClellan, on the brief), for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. 1. It is shown by the bill that on December 19, 1853, the Legislature of Alabama passed "An act to incorporate the Tennessee and Alabama Central Railroad Company." Acts 1853-54, p. 298. The act provided that the railroad to be built should extend from Montevallo, in Shelby county, Ala., through the town of Decatur, crossing the Tennessee river; thence through Limestone county to some point on the boundary line between Alabama and Tennessee, and there to connect with other railroads. The charter authorized the company to contract for and receive conveyances for the right of way not to exceed 150 feet wide, and for the material necessary to build the road. It also made provision for the condemnation of the right of way where it could not be contracted for. Work began on the building of the road in 1856 or 1857, and it was finished through Limestone county to the Tennessee line in the year 1859. It is alleged on information and belief that the railroad company either acquired the right of way upon and through the defendants' lands under provision of the charter, or that it acquired such right by "let" and license of the owners through whose lands the railroad was constructed. After the completion of the road through Limestone county, and through the lands now owned by the defendants, its operation was begun in the year 1859, and it has since been continuously operated by the complainant, and those under whom it claims, up to the time of the filing of the bill. It is alleged that since July 1, 1872, and up to the present time, the complainant has claimed, owned, held, operated, and maintained the railroad continuously without hindrance from any one, and that it is now holding, maintaining, operating, and claiming to own and operate it. These averments are emphasized in an amendment to the bill, in which it is averred that the right of way in question is continuous, extending through Limestone county, a distance of 26 miles, and was acquired and taken possession of more than 40 years ago, and that the complainant and those under whom it holds "has claimed, used, occupied, and been in possession of said right of way all this time, continuously running its trains over the same, and continuously, wherever necessary, building switches and turnouts, ditching, grading, and doing all manner of work necessary to keep its roadbed and right of way in suitable condition and repair for the safe operation of its trains, both freight and passenger, and this use of said right of way has never been questioned or denied until the interference by the defendants." We think these

averments are sufficient to show that the complainant has acquired an easement or right of way across the lands in question. In Alabama an action to recover lands, tenements, or hereditaments is barred by the statute of limitation of 10 years. Code Ala. 1896, § 2795. The ancient doctrine of prescription required a use from time immemorial. But now, in most jurisdictions (and certainly in Alabama) the prescriptive period is the same as the local statute of limitations for quieting titles to land. *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412. Where a railroad company has the charter power to acquire a right of way for railroad purposes, and it enters upon the lands of the owner, with his consent or license, and builds its railroad, expending money in the prosecution of the work, and holds it continually for a period of more than 40 years, running trains over it daily, and exercising the acts of ownership that are necessary to keep the roadbed in proper condition during all that time, it acquires by prescription a right of way. *Texas & Pacific Railroad v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; *National Water Works v. Kansas City (C. C.)* 65 Fed. 691; *Cogsbill v. Mobile & Girard Railroad*, 92 Ala. 252, 9 South 512; *Midland Ry. v. Smith*, 113 Ind. 233, 15 N. E. 256.

2. It is unquestionably settled that equity has jurisdiction by injunction to prevent the interference with easements or their disturbance or destruction, actual or threatened. This doctrine has been applied in a great variety of cases, such as preventing the diversion of water, preventing the obstruction of a private right of way, preventing the pollution of a stream, preventing the obstruction of a public right of way, etc., and (in *Cairo V. & C. Railroad v. Brevoort [C. C.]* 62 Fed. 129, 135, 25 L. R. A. 527) in the prevention of obstructions or interference with a railroad's right of way. Every disturbance of an easement, actual or threatened, will be restrained whenever, from the essential nature of the injury or from its continuous character, the legal remedy is inadequate. *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Hacke's Appeal*, 101 Pa. 245; *Gardner v. Trustees*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Nashville, etc., Railroad v. M'Connell (C. C.)* 82 Fed. 65; 3 Pom. Eq. Jur. (2d Ed.) § 1351, and notes. It is shown by the bill that the defendants are denying the right of the complainant to the right of way, and are insisting upon their right to cultivate the lands up to the ends of the cross-ties of the complainant's roadbed and track, and are denying the complainant the right to go upon the lands included in its right of way for the purpose of reconstructing its roadbed and banks and cutting or repairing ditches therein as the same are needed in the proper maintenance and operation of the road. The complainant has been warned by the defendants not to do the work necessary on the right of way to keep the same in proper condition, and other wrongs and threatened wrongs are alleged in the bill; and it is then stated:

"The action of the defendants is such that the complainant is unable to keep and maintain its track and roadbed in proper and safe condition so as to suitably and safely operate its trains. That said defendants are continually threatening this complainant and its employes with suits, both civil and criminal, for entering upon its right of way contiguous to their land in the performance of the work necessary to be done in the maintenance and operation of the road."

These averments, taken in connection with the others in the bill, are amply sufficient to give a court of equity jurisdiction to protect the alleged rights of the complainant. Jones on Easements, § 879 et seq.

3. The defendants contend that it does not appear from the bill that the suit involves property exceeding \$2,000 in value, and that, therefore, the circuit court was without jurisdiction. The bill shows that the complainant is the owner of a railroad known as the Nashville & Decatur Railroad, 119 miles long, extending from Nashville, Tenn., to a junction with the Southern Railway near Decatur, Ala., including the roadbed, tracks, switches, side tracks, rails, ties, bridges, etc. The exhibits to the bill showing rental values for long terms of years, and amount of taxes paid, show that the entire railroad is of great value, worth several millions of dollars. The railroad runs through Limestone county, Ala., a distance of 26 miles, and for a distance of about 20,000 feet through lands in that county which are owned in separate tracts by the defendants. It is averred that for the last 45 years the complainant and those under whom it claims has used the track, and is now using it, by running trains of cars over it. The complainant asserts the right to continue so to use the road, and claims that its right of way is 150 feet wide—75 feet on each side from the center of its track. The purpose of the bill is to protect the complainant in the use of this right of way against the unlawful interference of the defendants. The property claimed by the complainant in the bill is an easement or right of way. The easement extends from one end of its road to the other. After stating these facts, the complainant alleges that "the value of the property, as mentioned in this bill as claimed by it, and which is in controversy in this suit, exceeds the sum and value of \$2,000, exclusive of interest and costs." The construction placed on the bill by appellees' counsel can be best shown by a sentence from their argument: "Plaintiff cannot join in a single suit in a federal court claims against several parties, and sustain the jurisdiction of the court by reason of the fact that the total amount involved exceeds the amount necessary to give the court jurisdiction." The railroad, as we have said, passes through the different tracts of defendants' lands for about 20,000 feet, varying in length through the separate tracts from 200 feet to 4,150 feet. The learned counsel for the appellees evidently construes the bill as involving, as to amount, not more than the value of a strip of land 150 feet wide across the respective tracts of the defendants. And, placing that construction on the bill, it is argued that the value of the several strips across the several tracts cannot all be added together to make the jurisdictional amount. If that construction of the bill were correct, unless the value of the strip on each defendant's land exceeded \$2,000, the court would be without jurisdiction, for it has been often held that distinct claims against several defendants cannot be united to make up the amount necessary to give the court jurisdiction. *Walter v. Northeastern Railroad*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044; *Russell v. Stansell*, 105 U. S. 303, 26 L. Ed. 989; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083; *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552;

Seaver v. Bigelow, 72 U. S. 208, 18 L. Ed. 595. But the bill in this case does not assert distinct claims against several persons, and seek to aggregate them to make up the jurisdictional amount; nor is it a suit to condemn or appropriate a right of way across defendants' lands. It is specifically alleged that the plaintiff many years ago "acquired and now holds" the right of way as a perpetual easement. The property involved, and which the complainant seeks to protect, is the easement or right of way acquired many years ago—the right to run its trains along its railway. The value of the thing involved in this suit cannot be ascertained by aggregating the value of the several strips of land covered by the right of way across the tracts owned by the defendants. That becomes clear when we consider that one defendant—the one whose land on one side joins the right of way for only 200 feet—can damage the complainant as much by obstructing its right of way as all of the defendants owning the other 19,800 feet. A permanent impediment on 10 feet of the road would be as injurious and disastrous to complainant's rights as an impediment on 10 miles of it. When the pleader says that the "property claimed by it" and "which is involved in this suit" is worth more than \$2,000, he means, not that several and distinct claims against the several defendants are to be valued and added together, but it means the one indivisible right to run its trains on its right of way. That is the right it seeks to protect by its suit praying for an injunction. In a suit to abate a railroad bridge as a nuisance the Supreme Court held that the value of the right to maintain the bridge, and not the amount of complainant's damage, determines the jurisdiction of the court. The question was disposed of with much brevity:

"But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern." *Mississippi, etc., Railroad v. Ward*, 67 U. S. 485, 492, 17 L. Ed. 311.

In an injunction suit by a railroad company to maintain its scheduled rate against attack by numerous actions in state courts it was held by this court, citing the case last quoted, that the amount in dispute was the value of the object to be gained by the bill. *T. & P. Railway v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503. The same principle has been announced in other cases. *Whitman v. Hubbell* (C. C.) 30 Fed. 81; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Humes v. City of Fort Smith* (C. C.) 93 Fed. 857; *Nashville, etc., Railroad v. McConnell* (C. C.) 82 Fed. 65. In a case where the plaintiff sought an injunction against several defendants diverting water from a river, it was held that it need not appear that the amount involved as to each defendant exceeded \$2,000. The matter involved was the injury to the plaintiff's property. If the injury sought to be enjoined was of the jurisdictional amount, that was sufficient. *Pacific Live Stock Co. v. Hanley et al.* (C. C.) 98 Fed. 327. A recent decision of the Supreme Court sustains this view. The plaintiff was a dealer in imported liquors. The defendants—several constables—threatened to seize and destroy all liquor imported by him into the state. Objection was made to the plaintiff's bill on the ground that the value in controversy did not exceed the sum of \$2,000. The record showed that he intended to import liquors of a value ex-

ceeding that sum, and that the right to deal in such liquors was of a greater value than \$2,000. This appears in evidence by an agreed statement. The court held that:

"Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail." *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648.

It must be remembered, too, that this question is before us on demurrer, and that the value is not liquidated or fixed by law. The alleged value, therefore, must govern. *Texas & Pacific Ry. v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503. Taking the averments of the bill as true, as we must do on demurrer, we think it is shown that the value of the right involved in the suit is sufficient to confer jurisdiction.

4. The appellees contend that there is a misjoinder of parties defendant. There has been much controversy in recent years as to the circumstances under which a plaintiff may join many defendants in a suit in equity to prevent a multiplicity of suits. Some courts have held that Mr. Pomeroy (1 Pom. Eq. Jur. §§ 245-273) has unduly enlarged the rule. *Tribette v. Railroad Company*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642; *Turner v. Mobile*, 135 Ala. 73, 33 South. 132. But there are other authorities that fully indorse the views of the text-writer. Harlan, Circuit Justice, in *Osborne v. Wisconsin Railway Co.* (C. C.) 43 Fed. 825; *De Forest v. Thompson* (C. C.) 40 Fed. 375; *Ritchie v. Sayers* (C. C.) 100 Fed. 520; *Keese v. City of Denver*, 10 Colo. 113, 15 Pac. 825; *Carlton v. Newman*, 77 Me. 408, 1 Atl. 194. If the position taken by Pomeroy and the authorities last cited be correct, there is no misjoinder of parties defendant, because equity would have jurisdiction of the case on the sole ground of preventing a multiplicity of suits. But in this case we are not required to take either side in that controversy. Here the jurisdiction in equity, as we have seen, is not dependent alone on preventing a multiplicity of suits. There are other and distinct grounds for equitable interference. The complainant seeks by injunction to prevent an obstruction to and interference with its right of way under circumstances, as we have shown, that confer equity jurisdiction from the inherent nature of the case, aside from the fact that the interposition of the equity court may prevent a multiplicity of suits. As to the alleged misjoinder of the defendants, the question here is, when may defendants be joined in a suit by a complainant, the bill stating other grounds for equitable interference, and not depending for its equity on the doctrine of preventing a multiplicity of suits? The rule, we think, is plain that when the matter in litigation is entire in itself, and does not consist of separate things, having no connection with one another, it is not necessary that each defendant should have an interest in the suit coextensive with the claim set up by the bill. He may have an interest in a part of the matter in litigation instead of the whole. There can be no reason why one complainant, who has the same right against a number of persons—that right being such that it confers equity jurisdic-

tion—may not have that right determined as to all the parties interested by one suit. The plaintiff's claim is an entirety. It is a suit to protect a single indivisible right of way. The right claimed is exactly the same against each one of the defendants. All of the defendants are interfering in the same manner with the same right of way. As the case is one on the averments of the bill within the jurisdiction of a court of equity, there can be no reason for requiring the complainant to file 15 bills, one against each defendant. It is no objection that the several defendants each have a right to make a separate defense against the claim of the complainant, provided the complainant's assertion of right is the same against each, and there is only one general question to be settled, which pervades the whole case. It is enough if the purpose of the bill is to establish a single right between the complainant and the several defendants. *Hyman v. Wheeler* (C. C.) 33 Fed. 629; *Pacific Live Stock Co. v. Hanley et al.* (C. C.) 98 Fed. 327; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Nashville, etc., Railroad v. M'Connell* (C. C.) 82 Fed. 65; *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 Fed. 73; *Pillsbury-Washburn Mills v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Prentice v. Duluth Forwarding Co.*, 58 Fed. 437, 7 C. C. A. 293; *Sang Lung v. Jackson* (C. C.) 85 Fed. 502; *American Central Ins. v. Landau*, 56 N. J. Eq. 513, 39 Atl. 400; *Cadigan v. Brown*, 120 Mass. 493; *Kerr on Injunctions* (Ed. 1880) 522.

We do not deem it necessary at this time to decide other questions. The complainant contends that the width of the right of way should be fixed at 150 feet, the charter of the company having authorized the obtaining of a right of way of that width. The defendants assert that a right of way acquired by prescription does not exceed in width the land occupied and used as a right of way. Clearly, this question, though elaborately argued here, is not necessarily involved in a decision of the demurrers, which are addressed to the whole bill.

The decree of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrers.

H. C. JUDD & ROOT v. NEW YORK & T. S. S. CO.

(Circuit Court of Appeals, Third Circuit. February 12, 1904.)

No. 18.

1. EVIDENCE—COMPETENCY—ADMISSIONS OF ONE NOT A PARTY TO THE RECORD.

In an action by the owner of goods against a carrier to recover for a loss of goods through the alleged negligence of the defendant, in order to render admissions of an insurer of the goods, as against its interest, admissible (if admissible under any circumstances), it must have been a party to the suit, either on the record or otherwise, in complete control of the litigation. It must not only have paid to the insured in full and unconditionally the indemnity for which it had become liable, but it must have actually asserted its right of subrogation by bringing and controlling the suit in the name of the assured, before it can be invested with such an interest as a real party as to render its admissions competent evidence in behalf of defendant. The fact that it has a contingent or collateral interest in the result of the suit growing out of its contract with plaintiff, with which defendant has no concern, cannot render its admission competent evidence to relieve defendant from liability under its contract with plaintiff.

2. SAME—RELEVANCY.

In an action against a carrier to recover the value of goods destroyed by fire while in defendant's custody through its alleged negligence in placing them in a warehouse adjoining one which was at the time subject to special hazard from fire because of its contents and the conditions existing, the fact that the insurer of the goods lost, with other companies, had at some previous time established a uniform rate of premiums for insurance on both warehouses, is irrelevant to prove an admission by the insurer that defendant was not negligent in the respects alleged, conceding that the admission, if proved, would be competent evidence.

Acheson, Circuit Judge, dissenting.

On Rehearing.

For former opinion, see 117 Fed. 206.

GRAY, Circuit Judge. The plaintiffs in this case brought suit against the defendant for the recovery of damages resulting to them from the loss by fire of a large amount of wool, stored in the sheds of the defendant while awaiting transportation. The plaintiffs alleged and adduced evidence tending to show negligence on the part of the defendant, in storing this wool in a shed adjoining another shed, not in its ownership or control, containing a large amount of jute, alleged to be exceedingly inflammable, and which, as the shed was an open one, was exposed to the sparks of passing locomotives. There was also evidence tending to show that it was the rendezvous of a number of tramps, idle boys and men, who loafed and slept on top of the jute bales, where they were frequently seen playing cards and smoking pipes. It was also testified that no watchman was employed by those who owned this adjoining shed, and there was evidence tending to show that these conditions were known to the defendant, when it stored the wool of the plaintiffs in its own shed.

At the trial in the court below, the learned judge gave a peremptory instruction to the jury to find for the defendant, and upon a writ of error to the judgment entered on that verdict, this court reversed the same and ordered a new trial, on the ground that the testimony tending to show extraordinary hazard to which the wool of the plaintiffs had been exposed by the defendant, while performing his contract of transportation, and the consequent alleged liability on its part to the plaintiffs for its loss, should have been submitted to the jury. It was upon this general view that the judgment below was reversed and the new trial ordered. There was, however, another assignment of error, as to which this court in its opinion said (117 Fed. 206, 212, 54 C. C. A. 238):

"It would not be necessary to notice the second assignment of error, were it not that the disposition of this case will involve a new trial, and it is important that the views of this court should be expressed in regard to the subject matter of that assignment. Evidence was admitted, against the objection of the plaintiffs, to show that the wool was insured in the Insurance Company of North America, and that the insurance money had been paid to plaintiffs, under an agreement that the money should not be repaid, unless plaintiffs were able in this suit to recover it. This evidence was offered by defendant, avowedly for its bearing upon the question of negligence. It was to show that the insurance company was the real plaintiff, and that as it, with other insurance companies, had a uniform rate of premium for insurance on the sheds, it was estopped, as real plaintiff, from saying that the risk was unusually hazardous. The payment made by the insurance money to the plaintiff was, as shown by

the receipt in evidence, a conditional loan, and not a payment. It did not destroy plaintiff's right of action against the defendant, nor put the insurance company in the situation of a real or nominal plaintiff, so that its admissions or conduct could be taken in anywise to affect the real plaintiff by estoppel or otherwise. Even if the loss had been out and out paid, the equitable right of subrogation inuring to the insurer, would only authorize him to use the name of the insured in an action against one whose failure of duty to the insured caused the loss. There is no contract or privity between the insurer and the defendant. In *St. Louis R. R. Co. v. Commercial Union Insurance Company*, 139 U. S. 223 [11 Sup. Ct. 554, 35 L. Ed. 154], the court says: 'By the strict rules of the common law, it (the right of the insurer) must be asserted in the name of the assured, but in any form of remedy, the insurer can take nothing by subrogation, but the rights of the assured, and if the assured have no right of action, none passes to the insurer.' The rights in litigation in this case are those which accrue out of the contractual relations existing between the plaintiffs and the defendant company. No others are the subject of discussion or determination, and nothing that passed between the plaintiffs and the insurance company can affect those rights. The transaction between the insurance company and the assured was, therefore, without relevancy, and was incompetent as evidence in the case."

It is as to the soundness of the views here expressed upon this single point, that a rehearing was asked for and granted. We have carefully considered the argument of counsel at the rehearing, and find no reason to change the opinion expressed by this court, as to the impropriety of admitting the evidence as to the transaction between the plaintiffs and the insurance company, and as to the rates imposed by that company and other insurance companies upon buildings of a like character and situation to that in which the wool was destroyed.

The testimony admitted by the court below, against the objection of the plaintiffs, was, first, that the wool was insured by plaintiffs in the Insurance Company of North America, and that the amount of the insurance money had been paid by the company to the plaintiffs as a loan, to be held as security for the liability of said company to the plaintiffs, if they should fail to collect from the carriers of the wool insured the loss of the same, but that in the event of success in collecting the said loss, the said money so loaned to be repaid to the insurance company; second, that the said insurance company, together with other insurance companies, had fixed a uniform rate for goods stored in all the sheds or warehouses situated along the said water front of Galveston, including that of the defendant, in which the wool was stored, and the adjoining shed where the jute was stored and the fire originated. Assuming for the moment the relevancy of the facts thus introduced, we will consider the legal propriety of the evidence by which they were sought to be established. A fact may be relevant, while the testimony by which it is offered to be proved may be inadmissible. A fact, though relevant, cannot, as a general rule, be proved by hearsay testimony. In this case, it is sought to avoid this objection by the contention that the offered testimony is within the exception to this rule, as being an admission against interest of those who, while not parties of record, were yet so interested in the subject matter of the suit, as to be the real parties plaintiff. The ground alleged, upon which it was and is contended that this particular testimony was admissible, is, that the payment of the insurance money to the plaintiffs, though in form of a loan, was an absolute payment, which made the Insurance Com-

pany of North America the real plaintiff and party in interest, and being such, the fact that it had charged certain rates for insurance, as stated, was, in effect, an admission that there was no extra hazard, in its opinion, attached to the storing of the wool in the shed of the defendant, under the circumstances stated; or, in other words, that it was admissible upon the ground that such conduct was an admission against interest of the real party plaintiff in the suit, or at least of a party so identified in interest as to make its admissions, under the circumstances, evidence in the case.

The principal authority cited by the defendant below, in support of this contention, is this statement made by Greenleaf, in his work on Evidence, volume 1, § 180:

"The law, in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight, as though they were parties to the record. Thus the admissions of the cestui que trust of a bond; those of the persons interested in a policy effected in another's name, for their benefit; those of the shipowners, in an action by the master for freight; those of the indemnifying creditor, in an action against the sheriff; those of the deputy sheriff, in an action against the high sheriff for the misconduct of the deputy; are all receivable against the party making them. And, in general, the admissions of any party represented by another, are receivable in evidence against his representative."

But it is not every collateral, incidental or contingent interest in the result of a suit, that furnishes legal ground for the introduction of hearsay testimony, as being the admission of a party in interest. For instance, take the cases cited by Greenleaf, in the passage just quoted, and we find the kind of interest, which makes the admissions of a person evidence in a case in which he is not a nominal or real party, very different from that of the interest of the insurance company in the result of the suit in the case before us. Thus, the interest of the cestui que trust of a bond, in a suit by the trustee, is an original interest, and not a mere incidental interest in the result of the suit; so also, the interest of persons in a policy effected in another's name, for their benefit. This is another case of trustee and cestui que trust; so also of the shipowners, in an action by the master for freight; the interest of the shipowners and master is identical and original in the thing itself that is sued for, not a mere incidental interest in the result of a suit; so also the interest of the indemnifying creditor, in an action against the sheriff for trespass; the creditor controlled the writ under which the sheriff acted, and the sheriff committed the alleged trespass by the direction of the indemnifying creditor. The same is true as to the action of a deputy sheriff, in a suit against the high sheriff, for the misconduct of the deputy.

The last clause of the citation from Greenleaf shows the character of the interest which, in the opinion of the learned author, will justify the reception of the admissions to which he refers. It is this: "And in general, the admissions of any party represented by another are receivable in evidence against his representative." In no sense are the plaintiffs in this case the representatives of the insurer, in the suit brought by them against the wrongdoer. The liability of the latter to the plaintiffs arose out of a contractual relation between them, to which the insurance company was in no wise privy, and the contract be-

tween the plaintiffs and the insurance company was solely collateral thereto. The insurance company, by reason of its insurance, had no original relation to the contract between the plaintiffs and the defendant in this suit, or to the tort which constituted the cause of action. Without undertaking to define with exactness the interest which one must have in the subject-matter of the suit, to render his admissions evidence against either plaintiffs or defendant, it is obvious that the interest described by Greenleaf as sufficient for this purpose, in the passage cited, grows out of conditions very different from those existing in the case before us.

Again, it is to be observed that the so-called admissions in this case were not made with reference to the particular negligence charged against the defendant. Indeed they could not have been so made, as the goods had only been stored two or three days in the defendant's shed when the fire happened. They must, therefore, have been made sometime before the negligence in the storing could have occurred, as alleged. That is to say, the negligence, owing to which the goods were destroyed, had not happened at the time the uniform rates of insurance testified to were fixed, and the so-called admissions were not part of, or related to, the *res gestæ* out of which this litigation arose. Certainly they were not made with reference to that happening, and it is easy to see the pertinency of the statement by Greenleaf, in section 179 of the volume already quoted from, viz. :—

"The admissions, which are thus receivable in evidence, must, as we have seen, be those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party."

Lamar v. Micou, 112 U. S. 452, 465, 5 Sup. Ct. 221, 28 L. Ed. 751.

But, however this may be, the inadmissibility of these so-called admissions does not rest on this ground alone. We have considered the interest of the insurance company in this suit, as an indemnitor of the plaintiffs, without regard to whether it has paid to the plaintiffs the amount for which it had become liable under its contract. It could make no possible difference to the steamship company, the wrongdoer and defendant, whether the insurance company had made good its contract of indemnity to the plaintiffs, or not. Its liability to the plaintiffs could in no wise be affected by what occurred in that regard between the plaintiffs and their indemnitor. The defendant in the suit could not have interposed as a defense the receipt by the plaintiff, from the insurance company, of full indemnity for the loss sued for. The plaintiffs, notwithstanding such receipt, could have recovered in their suit against the wrongdoer, and thus have obtained possession of the money recovered from the latter, in addition to the money received from the insurance company. It is true, that the insurance company, in the latter case, would have a claim against the assured to recoup itself, in full or pro tanto, for the indemnity it had paid. If the insurance company had never paid a penny to the assured, but stood by, knowing that if the assured recovered from the wrongdoer, it would be relieved from payment, its interest in the suit would be precisely the same, in its essential nature, as though it had paid in full and unconditionally, (provided it had not availed itself of its right of subrogation) knowing

that it could recover from the assured the amount he obtained by suit from the wrongdoer.

It is contended, however, by the defendant in error, that the advance of the amount of the insurance, by way of loan or indemnity, constitutes the insurer the real party in interest, whether it shall appear from the record that the insurer has, or has not, in the exercise of the right of subrogation, actually brought the suit in the name of the insured, or is, or is not, in control of the litigation. In this connection, the doctrine of subrogation was much discussed by counsel for the defendant in error. It is, of course, true, that where an insurer has paid to the insured, unconditionally and in full, the indemnity contracted for, he has the equitable right to be subrogated to all the remedies which the assured had for the recovery of the loss insured against, and may therefore bring and control, in the name of the assured, a suit against a wrongdoer who has occasioned the loss. As we have already said in our former opinion, quoting the language of the Supreme Court, the right of the insurer must be asserted in the name of the assured, and in any form of remedy, the insurer can take nothing by subrogation but the rights of the assured.

It is not necessary that we should in this case determine what the effect upon the question before us would be, if the insurance company had paid, unconditionally and in full, the amount of its insurance to the assured, and was by subrogation in control of the suit against the steamship company. The doctrine of subrogation has no relation to the question to be here determined. It cannot be invoked until the insurance company, as the one secondarily liable, has absolutely and unconditionally paid in full the amount of the indemnity for the loss in question. It would have then, and only then, under this doctrine, a right to assert in its own favor the rights and remedies of the insured. Had it done so, it would be material to consider what its relation, in a suit brought for its benefit and under its control, would have been to the alleged default of the transportation company, and the competency of its own admissions as evidence in the case. In this suit, not only was there nothing affirmatively to show that the insurance company was in control thereof, and no evidence showing that it was in a situation, even, to assert a right to control, but, the receipts put in evidence by the defendant absolutely negative the right of the insurance company to invoke the doctrine of subrogation, inasmuch as they show no absolute and unconditional payment of the indemnity, but a receipt by the insured of money from the insurance company "as a loan without interest, to be held by the undersigned as a security for the liability of the said company to the undersigned, if the undersigned shall fail to collect from the carriers of the wool insured the loss of the said wool while in the custody of said carrier, and in the event of success in collecting said loss from said carrier the said money so loaned is to be repaid to said insurance company by the undersigned." Certain it is that there could be no right to subrogation without an absolute payment by the insurance company of the indemnity, and the intention of the parties shown on the face of the receipts, clearly precludes any constructive conversion of the loan into a payment of such a character as to permit the operation of the doctrine of subrogation, until after

the stage in the case had been passed when the evidence objected to was admitted. There is nothing in the provisions or nature of the receipts suggestive of fraud or unfair dealing toward the steamship company or any one. It was a matter of no concern to the alleged wrongdoer what arrangements were made as between the plaintiffs and the insurance company, with respect to the contract of indemnity. The plaintiffs and the insurance company were at liberty to enter into such stipulations as they thought proper, touching that subject-matter, without in anywise affecting the primary liability of the steamship company, for which the suit was brought. In order to render any admissions on its part as against its interest admissible, (if admissible under any circumstances) it must have been a party to the suit, either on the record or otherwise, in complete control of the litigation. It must not only have paid to the assured, in full and unconditionally, the indemnity for which it had become liable, but it must have actually asserted its right of subrogation, by bringing and controlling a suit in the name of the assured, against the wrongdoer, before it can be invested with such an interest as a real party as would render its admissions competent evidence in behalf of the defendant. Instead of putting itself in this position, the insurance company chose to deal with the assured in the manner set forth in the record; to pay an amount equal to the insurance money, as a loan or security (which it had a right to do) and thus put itself in the situation of one who had a merely contingent and collateral interest in the suit brought by the assured, and not of one who had a direct and immediate interest therein, of such character as that any recovery had against the steamship company would of itself entitle it to receive the moneys recovered. No case or authority has been cited by the able counsel for the defendant in error, in direct support of his contention in the premises, or inconsistent with the view here taken.

But another vital, and, indeed, underlying, question, as to the admissibility of this evidence, is one of relevancy. Assuming the mode of proof to be unexceptionable, what bearing has the fact so offered to be proved upon the issue between the plaintiffs and defendant in this suit? The fact offered to be proved is the conduct of certain insurance companies, including the Insurance Company of North America, in fixing a uniform rate of insurance upon the sheds along the water front of Galveston, in one of which the loss in question occurred. The fact itself is colorless and irrelevant. Its only value is as the foundation of an inference, more or less probable, that the Insurance Company of North America was of the opinion that there was no extraordinary hazard in storing the goods of the plaintiffs in one of those sheds. It was not offered to prove that the insurance company had expressed this categorical opinion, or one to that effect. The thing proved was the fact, as above stated, from which an inference was at best only arguable. This, surely, is too remote to be brought within any fair construction of the rule as to relevancy. Not only is it too remote, but the inference which the defendant in error asks us to draw is not a necessary one, nor even a probable one. The reasons for fixing this alleged uniform rate, do not appear. They may have been determined upon, as covering the very conditions out of

which the fire risk arose. We find, in the testimony of one of the witnesses produced by the defendant in error, as an expert insurance agent, to prove this alleged uniform rate of insurance, the following:

"Q. Did or did not the rate which you have just testified to apply to all of the sheds and warehouses on the wharf front in Galveston? A. It did apply, with one exception, and that exception was, where a day and night watchman were kept constantly on duty, a lower rate was charged."

This testimony is nowhere contradicted or qualified. We thus have the fact proved, that this alleged uniform rate was meant to cover the special risk that existed where no day and night watchman were employed. But the very gravamen of the case of the plaintiffs, was, that this special risk was caused largely by reason of the fact, known to defendant, that no watchman, either by day or night, was employed in the shed where the jute was stored, directly adjoining that of the defendant, where the wool of the plaintiffs was stored. So we see how unjust it would be to ask that the inference contended for by the defendant in error, should be drawn, in the face of the fact that the insurance companies themselves considered the nonemployment of day and night watchmen a special hazard to be covered by a higher rate of insurance. There were other special circumstances of risk proved by the plaintiffs, such as the daily and nightly gathering of tramps and loafers, in the shed where the highly inflammable jute was stored, who smoked pipes and cigars while lying on top of the bails. These conditions were not necessarily permanent, and did not presumably enter into the question of the rates to be charged by the insurance companies. This special hazard, from which most probably the fire actually occurred, could not have been taken into consideration in fixing the uniform rates of insurance. The admission of such testimony would not, in our opinion, tend to the elucidation of the truth, in determining the question of negligence or no negligence on the part of the defendant, but could only tend to confuse the minds of the jury, and lead them away from the real issue in the case.

The question of relevancy must largely depend upon the opinion of the judge or the court to whom it is presented. In this case, we have no hesitancy in saying that, in our opinion, the relevancy of the facts sought to be proved, is too remote to be recognized.

Adhering to the opinion already expressed upon this point, the judgment below is reversed and a new trial ordered.

ACHESON, Circuit Judge. I dissent from the views and conclusion of the majority of the court above expressed.

SAUNDERS v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. February 17, 1904.)

No. 1,235.

1. CARRIERS—LOSS OF BAGGAGE—CONTRACT LIMITING LIABILITY.

It is the settled law that a common carrier may contract for a reasonable limitation of its common-law liability for loss or damage to either freight or baggage not resulting from its own negligence or that of its servants.

2. SAME—CONTRACT IMPLIED FROM SALE OF TICKET—BAGGAGE.

A contract to carry without additional compensation a reasonable amount of personal baggage is implied from the sale of a ticket by a carrier to a passenger, but such implied obligation is limited to such articles of personal baggage as are reasonably required for the comfort or convenience of the passenger and his family.

3. SAME.

A passenger is required to act in good faith, and if he obtains carriage on his ticket as personal baggage of merchandise or articles not properly such baggage, without disclosing the fact, the carrier will not be liable for their loss or damage; but if such articles are accepted without deception by the passenger, and with notice, the liability will arise to safely carry and deliver.

4. SAME—CONTRACT LIMITING LIABILITY.

The general liability of a carrier for the baggage of a passenger is that of an insurer, but this common-law liability may be limited by an agreement, fair and reasonable between the carrier and passenger, against all loss and damage not resulting from the negligence of the carrier or its servants. Such a contract, however, must have been accepted by the passenger with knowledge of its terms, and such knowledge will not be implied.

5. SAME—ARTICLES NOT PERSONAL BAGGAGE—THEATRICAL PROPERTIES.

Stage costumes, scenery, etc., making up the paraphernalia of a traveling theatrical company, do not constitute personal baggage which a carrier impliedly contracts to carry without compensation on the tickets of the company as passengers, unless a general custom to do so is shown; and they must be shipped as freight under the customary regulations, or by special arrangement therefor.

6. SAME—CONTRACT RELEASING FROM LIABILITY—QUESTION FOR JURY.

Plaintiff, who was manager of a theatrical company of 14 members, through his advance agent, applied to defendant railroad company for rates for his company, baggage, and stage properties from Birmingham, Ala., to Lexington, Ky., by way of three other cities, where he desired to stop. He was told that by buying 18 tickets at company rates he would be entitled to a car for the baggage and other properties free, which offer was accepted. A week later plaintiff bought the tickets from there to Atlanta, and was given the car. A regulation of defendant and other southern railroads required the purchaser in such cases to sign a release exempting defendant from liability for "any loss or damage" to baggage. Neither plaintiff nor his agent was informed of such regulation, but his property man, after loading the car, was required to and did sign such release without his knowledge. At Atlanta plaintiff again bought tickets through to Lexington, with stop-over privilege at the two other cities. He was not then told of the regulation, but was later asked to sign the release, and refused. His car was taken on, however, until the time he left the

¶ 1. Limitations of liability of carriers for injuries to passengers and for baggage, see note to *Clark v. Geer*, 32 C. C. A. 301.

¶ 4. See *Carriers*, vol. 9, Cent. Dig. §§ 1544, 1548, 1549.

last point before reaching Lexington, where, on his refusal to sign the release, the car was held, and caused him to lose his engagement at Lexington. After 12 hours he signed the release under protest, and the car was forwarded. *Held*, that plaintiff was not bound by the regulation unless he had notice of it before the contract was completed by his purchase of tickets; that, in the absence of actual notice, it could not be imputed to him through his property man; that it might be presumed from the generality of the regulation, the length of time it had been in force, and his experience in the business, but that under the evidence such presumption could not be drawn as matter of law, but was a question for the jury.

7. SAME—CONSTRUCTION OF RELEASE.

A contract releasing a carrier from liability "for loss or damage to baggage" does not in terms release it from liability for negligence, and, being capable of a construction which will render it legal, will be so construed, and *held* to exclude loss or damage so arising.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action to recover damages for breach of a contract for the carriage of the Tim Murphy Theatrical Troupe, their baggage, scenery, stage properties, etc., from Atlanta, Ga., to Lexington, Ky., with the privilege of stopping over at Chattanooga and Knoxville. There was a plea of not guilty. The plaintiff was proprietor and manager of a traveling theatrical troupe, consisting in all of 14 persons. The troupe had been traveling in Texas, Louisiana, and Mississippi, and from a point in Mississippi expected to go to Birmingham, Ala.; thence to Atlanta, Chattanooga, Knoxville, and Lexington, Ky.

The bill of exceptions states, among other things, that the following facts were proven:

"Plaintiff's advance agent was a man by the name of Coltman, who traveled about one week in advance of the company, and whose duty it was to contract for railroad rates, and fix terms with opera-house owners or managers, and to arrange rates and terms with transfer companies, and see to the advertising. When Coltman reached Birmingham, about one week in advance of plaintiff's company, in 1902, he opened negotiations with Freeman, who was the local passenger agent of defendant company at that point. Freeman replied that he would communicate with the head office of the company, which, for this territory, was the office of Assistant General Passenger Agent Benscoter, at Chattanooga, Tenn. This Freeman did, and reported to Coltman, giving rates of transportation for a company of eighteen persons, with the privilege of stopping over at Atlanta, Chattanooga, and Knoxville, and ending at Lexington, Ky., which carried the right of a separate car, without extra charge, for baggage, stage scenery, and effects. At the same time Freeman gave Coltman a schedule of trains for the movement of his company. This baggage and stage scenery consisted of a lot of trunks containing the personal baggage of the individuals, fourteen persons in all, composing the troupe, and also stage scenery and effects, embracing drop curtains, furniture for the stage, and the necessary tools and stage paraphernalia usually used by theatrical companies.

"The sale of a ticket for eighteen persons carried with it, as above shown, the privilege of the baggage car for said baggage and stage effects, without extra charge, but a ticket for a less number of persons than eighteen would not carry that privilege and would subject the members to excess baggage charges if any individual had more than 200 pounds of baggage or scenery in addition thereto. This excess would apply to all personal baggage for each individual containing over 200 pounds. Ordinarily individual passengers are entitled to 150 pounds of personal baggage, but individuals of theatrical troupes are entitled to personal baggage of 200 pounds to the individual on railroads. By the terms of transportation for said company given by said Freeman to said Coltman said baggage car was to be transported on the same train with plaintiff company, or in a train in advance; and the dates of performance at Atlanta, Chattanooga, Knoxville, and Lexington were made

known to Freeman, and the baggage car and company were to reach those points in time for those dates.

"In accordance with the arrangements thus made between Coltman and Freeman, the defendant's agent, Benscoter, issued to each of the company's agents at Birmingham, Atlanta, Chattanooga, and Knoxville a document called an 'Itinerary,' worded as follows:

"Chattanooga, Tenn., Jan. 25, 1902.

"Tim Murphy Theatrical Company.

"Mr. A. B. Freeman, T. P. A., Birmingham; Mr. C. P. Jackson, T. P. A., Birmingham; Mr. J. C. Lusk, T. P. A., Chattanooga; Mr. J. L. Meek, T. P. A., Knoxville; Mr. J. J. Gray, T. P. A., Meridian; Mr. F. H. Hart, B. A., Meridian; Mr. L. J. Johnson, T. A., Birmingham; Mr. J. J. Mullins, B. A., Birmingham; Mr. J. E. Shipley, C. T. A., Chattanooga; Mr. J. H. Waite, D. T. A., Chattanooga; Mr. W. H. Brown, B. A., Chattanooga; Mr. J. T. Moffett, T. A., Knoxville; Mr. J. M. Gore, B. A., Knoxville:

"Gentlemen—Tim Murphy Theatrical Company, eighteen or more people requiring one fifty-foot baggage car for their scenery, will move as follows:

Jan. 31.	Lv. Meridian.....	6.40 a. m.	
	Ar. Birmingham.....	12.25 noon	153 miles
Feb. 1.	Lv. Birmingham.....	6.00 a. m.	
	Ar. Atlanta.....	11.30 a. m.	107 miles
Feb. 2.	Lv. Atlanta.....	7.55 a. m.	
	Ar. Chattanooga.....	1.00 p. m.	138 miles
Feb. 4.	Lv. Chattanooga.....	9.55 a. m.	
	Ar. Knoxville.....	1.10 p. m.	111 miles
Feb. 5.	Lv. Knoxville.....	9.50 a. m.	
	Ar. Lexington.....	5.51 p. m.	211 miles

"Baggage car to be handled, Chattanooga to Knoxville, on No. 12, Feb. 4th, and from Knoxville to Harriman Jct. on freight train No. 73, Feb. 5th, if No. 73 on time, that date.

"The advance agent has been ticketed through to Lexington, and you may sell the company, eighteen or more people, on one ticket, at rate of 2 cents per mile per capita, which is to cover movement of baggage car.

"Usual release should be taken on regular theatrical baggage, Form 239. Agents will be held personally responsible for these releases.

"Yours truly,

C. A. Benscoter, A. G. P. A.

"Mr. Dodson, Mr. Reddle, Mr. Frazier, Mr. Heyden, Mr. Vaughan, Mr. Ewing, Mr. Rinearson, Mr. Harwick, Mr. Taylor.

"Transportation department please note and protect movement as outlined above. This confirms my joint telegram 23d. inst. Please acknowledge receipt."

This "itinerary" was issued at the request of Freeman, the Birmingham agent of the railroad company, who at the same time informed Benscoter that Coltman would call and see him on reaching Chattanooga. It was not shown that Coltman did do so, or that he ever had any conference with Benscoter. Coltman reported to plaintiff the transaction with Freeman, and "recommended the purchase of the ticket for eighteen persons, with said baggage car privileges." He was himself furnished with transportation to Lexington as one of the plaintiff's company, and went in advance about one week, and did not himself buy any ticket for the company. Neither was it shown that Coltman was ever notified of any requirement that a release should be executed for the company's stage baggage, scenery, etc., nor that he was ever furnished with or saw the "itinerary," as above set out, though it was shown that he was given a "schedule of trains for the movement of his company." What this "schedule" was, does not further appear. Plaintiff himself, a week later, bought at Birmingham a solid ticket for 18 persons from Birmingham to Atlanta. But nothing was then said to him about signing a release as a condition of getting special transportation for the company's baggage. After a performance at Birmingham the baggage and company paraphernalia was taken to the depot by the company's "property man," one Davenport, and was by him loaded into a baggage car furnished for use of the troupe. He was then asked to sign, and did sign, a release in the following words:

"Form 239.

"Southern Railway, Birmingham, Alabama, Station, Feb. 1, 1902.

"Theatrical Baggage Release.

"In consideration of the carriage upon special conditions by the Southern Railway Company, and connecting lines, car, baggage and scenery, four pieces checked Tim Murphy Theatrical Company, from Birmingham, Alabama, to Atlanta, Georgia, the undersigned, acting as property man for the said Tim Murphy Theatrical Company, hereby releases and forever discharges the Central of Georgia Railway Company and other transportation companies which together compose the through line between the points above named from all liability for any damage or loss which may happen to baggage while in their possession.

Ed. Davenport."

To induce him to do so, he was shown the itinerary set out above, and his attention called to the necessity of doing so, and told that the baggage would not be forwarded unless he did sign. On reaching Atlanta, and before the performance the same night, the plaintiff bought another solid ticket for 18 persons to Lexington, Ky., with right to stop over at Chattanooga and Knoxville. Nothing was said to him about any release, and he knew nothing of the demand made on Davenport at Birmingham, or that he had signed the release set out, nor had he then been furnished with or shown the "itinerary" issued by Benscoter. After the performance, the company's baggage, scenery, etc., were taken charge of as usual by Davenport, and loaded in a car furnished for that purpose. He was then asked to sign a release similar to the one above set out. He thereupon telephoned plaintiff, who had, earlier in the evening, refused to sign one, and was directed not to sign. The baggage was, however, forwarded to Chattanooga without a release. At Chattanooga a like demand was made and refused, but the car forwarded to Knoxville. At Knoxville, after the car had been loaded and locked, a demand was again made that Davenport should sign a release in form like the one set out above, and again told that the baggage would not be forwarded unless he did. This he refused to do. Plaintiff was then called up over the telephone at his hotel, but he refused to allow the release to be signed. It was presented to plaintiff himself the next morning when he went to the station to take the passenger train with his company. He thereupon took the release, and wrote on the face of it the words, "Provided the baggage, etc., is delivered on time and in good order," and signed the paper. The defendant's agents then informed him that they would not "forward the baggage with such a proviso in it." The personal baggage of the members of the company, consisting of five trunks, was, however, sent on by the morning train, but the troupe and company baggage remained in Knoxville until that night, when plaintiff signed the release, under protest, without any proviso, and the company, with its baggage, etc., was carried to Lexington, reaching that place too late for the performance as advertised.

The evidence further showed that an association of railroad companies, operating lines south of the Ohio, known as the "Southeastern Railroad Association," had made rules and regulations for the transportation of regularly organized theatrical companies, concert and opera companies, glee and other clubs, at excursion rates. The defendant belonged to this association. By this agreement parties of from 10 to 24 persons traveling on one ticket were carried for two cents per mile, with free passage for an advance agent. These regulations were embodied in a circular issued to the agents of each company, and they were required to observe the conditions in the sale of party tickets. There was also evidence showing that the sale of theatrical tickets had long been made under special conditions as to price and transportation of company property, and that such baggage was not personal apparel, but stage dress, furniture, scenery, etc., which required special handling; that the loading and unloading was done by the "property man" of the company; and that the scenery, especially, was cumbersome, being sometimes in rolls of 80 to 50 feet in length, and sometimes inclosed between long, thin boards. The evidence also tended to show that the agents and managers of such companies were experienced men, and widely acquainted with the regulations of carriers in respect to the handling of such business, and that the rules and regulations

of the Southern Passenger Association were widely known among people interested in such matters, and had been long enforced, without discrimination. It was also shown that it was the business custom of the defendant to furnish agents and baggage masters with these regulations, and that passenger agents customarily referred to the itinerary when tickets were called for, and showed same to the person applying for tickets. It was also shown that it was not customary for the agent selling the ticket to specially refer to the necessity for executing a release, being regarded as a matter for the baggage master, to whom application is necessarily made for transportation of such articles. This agreement or arrangement for carrying such companies at reduced rates also prescribed the terms upon which company or professional baggage, scenery, furniture, etc., might be carried, and permitted to companies of 18 to 35 persons traveling on one solid ticket the use of a "special baggage car to be transported without additional charge," but that the owner or manager or some authorized agent of the company so moving should sign "a release of liability for any scenery, properties, live stock, or other articles which do not consist of baggage exclusively." Further facts appear in the opinion. Upon the conclusion of all the evidence the court instructed the jury to find for the defendant.

Jerome Templeton, for plaintiff in error.

Jourolmon, Welcker & Hudson, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. It is well settled that a common carrier may contract for a reasonable limitation of its common-law liability for loss or damage to either freight or baggage not resulting from its own negligence or that of its servants. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *York Co. v. Central Rd.*, 3 Wall. 107, 18 L. Ed. 170; *Mich. Cent. Rd. v. Mfg. Co.*, 16 Wall. 318, 21 L. Ed. 297; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Bank v. Adams Ex. Co.*, 93 U. S. 174, 23 L. Ed. 872; *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531; *Hart v. Penn. Rd. Co.*, 112 U. S. 331, 338, 5 Sup. Ct. 151, 28 L. Ed. 717; *Liverpool Steam Co. v. Phenix Co.*, 129 U. S. 397, 441, 9 Sup. Ct. 469, 32 L. Ed. 788; *Constable v. National Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903. This is also the doctrine as recognized by the courts of Tennessee. *Railroad v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018; *Railroad v. Dies*, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871.

2. A contract to carry without additional compensation a reasonable amount of personal baggage is implied from the sale of a ticket. 3 Ency. Am. & Eng. Law, 543; *Angell on Carriers*, § 115; *Isaacson v. N. Y. Central Rd.*, 94 N. Y. 278, 46 Am. Rep. 142; *Bomar v. Maxwell*, 9 Humph. 622, 624, 51 Am. Dec. 682; *Miss. Cent. Rd. Co. v. Kennedy*, 41 Miss. 671.

3. But this implied obligation is limited to such articles of personal baggage as are reasonably required for the comfort or convenience of the passenger and his family, having regard to the circumstances of the traveler, character of the journey, etc. *Hannibal Railroad v. Swift*, 12 Wall. 272, 20 L. Ed. 423; *Railroad v. Fraloff*, 100 U. S. 24, 25 L. Ed.

531; *Bomar v. Maxwell*, 9 *Humph.* 622, 51 *Am. Dec.* 682; *Coward v. E. T. & V. Rd.*, 16 *Lea*, 225, 57 *Am. Rep.* 227.

4. The traveler must exercise good faith, and, if he obtain carriage as baggage of merchandise or articles not within the category of ordinary personal baggage, without disclosing the fact, the carrier will not be liable for their loss or damage. *Humphreys v. Perry*, 148 *U. S.* 627, 13 *Sup. Ct.* 711, 37 *L. Ed.* 587; *Bomar v. Maxwell*, 9 *Humph.* 622, 51 *Am. Dec.* 682. But if articles or merchandise not personal baggage be accepted, without deception by the passenger, and with notice, the liability will arise to safely carry and deliver. *Stoneman v. Erie Ry. Co.*, 52 *N. Y.* 429; *Millard v. M. K. & T. R. Co.*, 86 *N. Y.* 441; *Hannibal Rd. v. Swift*, 12 *Wall.* 262, 20 *L. Ed.* 423.

5. The general liability for the baggage of a passenger is that of an insurer. But this common-law obligation may be limited by an agreement, fair and reasonable, between the carrier and passenger against all loss and damage not resulting from the negligence of the carrier and his servants. 3 *Thompson on Negligence*, § 3455. The rule in respect to baggage is not different from that in relation to freight.

6. When a carrier desires to limit its common-law responsibility, there is nothing unreasonable in requiring that the extent of the exoneration shall be plainly declared, and brought to the attention of its customer in such way as to afford opportunity for acceptance or rejection.

In *New Jersey Nav. Co. v. Merchants' Bank*, 6 *How.* 344, 382, 12 *L. Ed.* 465, it is said:

"The exemption from these duties should not depend upon implication or inference founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

In *N. Y. Central Rd. Co. v. Fraloff*, 100 *U. S.* 24, 27, 25 *L. Ed.* 531, the court said:

"It is undoubtedly competent to carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute, or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk."

In the case of *The Majestic*, 166 *U. S.* 375, 17 *Sup. Ct.* 597, 41 *L. Ed.* 1039, a ticket containing a limitation of liability for baggage printed upon its back was held to be a mere notice, and not a part of the contract, and not obligatory upon the passenger as matter of law, when it appeared that attention had not been called to the conditions, and the passenger was without actual knowledge until after the journey had begun. See, also, *Rawson v. The Penn. Rd.*, 48 *N. Y.* 212, 8 *Am. Rep.* 543; 3 *Thompson on Negligence*, §§ 3455-3457, 3459.

7. It follows from the foregoing that a carrier is not obliged to carry goods, articles, furniture, etc., or anything not fairly to be regarded as personal baggage reasonably required for the convenience and comfort of the passenger as baggage, and may refuse to carry such articles except as freight, and under the customary methods for carrying freight. If, therefore, the traveler wish to have such goods carried as if personal baggage, he can only do so by complying with the rea-

sonable terms and conditions imposed. 3 Ency. Am. & Eng. Law, 539, and cases cited.

8. That stage costumes, scenery, furniture, etc., making up the paraphernalia of a traveling theatrical company do not constitute the personal baggage which a carrier impliedly contracts to carry without additional compensation, and along with the passenger, must be conceded. 3 Thomp. Neg. § 3417; Oakes v. N. P. Rd. Co., 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126. If, therefore, the plaintiff desired to have this company outfit carried with his troupe as if personal baggage, he was under obligation to either specially arrange for their carriage, or rely upon and comply with the reasonable regulations of the carrier in respect of such theatrical baggage, etc. It was therefore competent to prove the custom of railroad companies in regard to the carriage of such articles, and any regulation which had been adopted in that respect. For the purpose of fixing notice of this custom, or of the regulations adopted, upon the plaintiff, it was admissible to show that he was accustomed to manage traveling troupes. Plaintiff had no right to rely upon any implied agreement to carry his stage baggage as if personal baggage, and without additional compensation, unless he could show a general custom, such as exists in regard to personal baggage, and from which general custom an implied contract is presumed. The mere fact, therefore, that he bought a ticket for 18 persons in order to carry 14 does not imply any agreement whatever in respect to the free carriage of articles not properly personal baggage.

9. The difficulty in this case arises out of the fact that Coltman, the advance agent for the plaintiff's company, did apply to the defendant's agents for the terms upon which the defendant would transport plaintiff's company, and was informed that the rate for a company of 18 in one ticket to Lexington, with the privilege of stopping over at Atlanta, Chattanooga, and Knoxville, carried the right of a separate car, without extra charges, for stage baggage, scenery, etc., the car to be carried on the same train or a train in advance.

It was not shown that Coltman was notified then or at any other time that, in addition to buying a ticket for 18 people in order to carry his party of 14, the company must be released from all loss and damage sustained by the company baggage so to be transported with the company. Neither was it shown that either Coltman or the plaintiff was aware of the regulation of the defendant or of the carriers associated as the Southeastern Passenger Association requiring such a release, except as such knowledge may be presumed from the existence of the regulations and of the custom of railroad companies in the matter of such special baggage. Neither was it shown that either Coltman or the plaintiff were furnished with the itinerary set out above, which contained a reference to a release. Coltman informed plaintiff of the terms as given him at Birmingham by the defendant's agent, Freeman, and himself accepted transportation as an advance agent, and continued to travel in advance about one week. About a week after getting the terms of transportation, the troupe reached Birmingham, and plaintiff bought such a party ticket as he had been advised would carry with it a special car for the company baggage without extra cost.

He was not then advised that he must execute a release. That night, when the baggage had been loaded in a car furnished, the defendant's baggage agent demanded that a release should be signed. This demand was made of one Davenport, the company's property man, whose business it was to see to the hauling of the stuff from the theater to the station, and to properly load it into the car furnished for that purpose. Davenport, being shown a copy of the itinerary set out heretofore, signed the release presented. This demand made on Davenport was not communicated to plaintiff, nor did he know that any release had been signed by Davenport until the fact came out in proof. At Atlanta plaintiff bought another solid ticket through to Lexington, Ky., for a party of 18, and paid the party rate as advised by Coltman. He neither then knew, nor was he then notified, that he would have to sign a release before he could have the baggage moved. Before he left Atlanta, but after he had bought his transportation, he was called upon to sign a release of loss and damage, but declined to do so. The baggage was, however, forwarded to Chattanooga, where another demand was made and refused, the baggage being again forwarded without the release. At Knoxville plaintiff refused to sign, and the defendant refused to forward the company theatrical baggage without execution of the release. Twelve hours after, plaintiff signed under protest, and the troupe and baggage went forward, but too late to meet an engagement at Lexington. Excluding imputed notice through Davenport and by means of the alleged notoriety of the regulation here sought to be enforced, plaintiff had a right to believe that he was entitled to the transportation of his company baggage in a special car, and subject to the common-law responsibility of the carrier for loss or injury to that baggage. The only terms known to him when he bought his tickets at Atlanta were those given by defendant's agents to his advance agent, Coltman, whose business it was to arrange for transportation. His rights and the carrier's liabilities were fixed and determined when the tickets were bought, under terms so previously given, covering the matter of baggage transportation. Subsequent notice of a limitation of liability will not alter the rights thus determined, unless he assented thereto upon a sufficient consideration. *Rawson v. Penn. Rd. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Railroad v. Turner*, 100 Tenn. 213, 224, 47 S. W. 223; *Wilson v. C. & O. R. Co.*, 21 Grat. 654; *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.) 24, 43 Am. Dec. 199; 3 Am. & Eng. Ency. Law, 558. If, however, the plaintiff knew, before purchasing his ticket, that the condition under which the baggage of such traveling show was transported without charge was that he should release the company from its common-law liability for loss and damage, the jury would be authorized to presume his assent. His knowledge of the regulation might also be presumed from circumstances, including the generality of the regulation, the time it had been in force, and plaintiff's experience as a traveler with such company. But the evidence upon this matter was not so conclusive as to justify the court in holding, as matter of law, that he knew of this regulation, and had assented to it. Neither did the evidence justify an instruction to find for the defendant upon the ground of Davenport's action at Birmingham.

Coltman was the advance agent of plaintiff, and as such charged with the duty of contracting for transportation. This he did, and upon the strength of the agreement between him and the defendant he was ticketed over the defendant's line, and the itinerary issued to the several agents of the railroad company interested. The terms made were communicated to the plaintiff, and acted upon by him in the purchase, a week later, of a party ticket for 18 from Birmingham to Atlanta, and then from Atlanta to Lexington, Ky. Davenport's duty was to load and unload the company's effects. He was called its "property man." He had no duty in reference to making contracts for the transportation of the company, and still less to agree to the alteration of one after it had been made by the agent of the company charged with that duty. *It was error, therefore, to impute Davenport's knowledge to the plaintiff when he bought his tickets from Atlanta to Lexington. He still had the right to suppose that the defendant's agreement to transport his stage effects was subject to its common-law carrier liability, unless he otherwise is chargeable with notice and assent; and was not obliged to agree to a change or alteration of the terms given his agent after the contract had been closed by buying the tickets at Atlanta.

10. The release which the plaintiff was asked to sign does not, in terms, exclude loss and damage arising from negligence. Nor is it broader than the regulation. Neither is valid as an exoneration for liability for negligence of the company or its servants. *Railroad v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174, 23 L. Ed. 872. Nevertheless the release would have been valid and enforceable as releasing the company from loss and damage not the result of negligence. It is in general words, and does not, in terms, purport to release the company from liability for negligence. It should therefore be construed consistently with law. A release in like terms was construed as not extending to loss arising from negligence by the lessor or his servants in *Railroad v. Lockwood*, 17 Wall. 357, 362, 21 L. Ed. 627, and in *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174, 181, 23 L. Ed. 872, where the court said, "It is not to be presumed the parties intended to make a contract which the law does not allow." But the plaintiff did not refuse to sign the release because too general, or for any reason of form. The ground upon which he acted is indicated by the words he wrote across the release, "Provided the baggage is delivered on time and in good condition." If he had expressed a willingness to sign a release limited in terms as the law would limit this one, we would be slow to hold him in fault for not signing one subject to misconstruction.

Reverse, and remand for a new trial.

TEXAS & P. RY. CO. V. DASHIELL.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1904.)

No. 1,278.

1. INJURY TO EMPLOYÉ—MASTER'S LIABILITY—QUESTION FOR JURY.

Facts in an action against a railroad company for injury to its conductor by a rear-end collision with his train of another train held to require submission of the issues to the jury.

In Error to the Circuit Court of the United States for the Northern District of Texas.

T. J. Freeman and Geo. Thompson, for plaintiff in error.

Ben M. Terrell, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This is an action for personal injuries, brought by the defendant in error, George H. Dashiell, by his next friend and mother, Mrs. Mary J. Dashiell, against the plaintiff in error, the Texas & Pacific Railway Company. The learned judge before whom this case was tried in the circuit court, in his charge to the jury, thus clearly and correctly states the issues made by the pleadings:

"George H. Dashiell, by his next friend, Mrs. Mary J. Dashiell, sues the defendant, the Texas & Pacific Railway Company, for damages alleged to have been sustained by him by reason of personal injuries received on the 24th day of December, 1900, while he was in the service of the defendant company, and conductor of a freight train. It is alleged that while he was in charge of a freight train as a conductor, running in an easterly direction on defendant's road, in Eastland county, the train of which he was in charge, and on which he was riding, was run into and collided with by another freight train following him; that said collision was caused by reason of the negligence and carelessness of the defendant and its agents and employes engaged in operating the train which collided with the one of which plaintiff was in charge. It is alleged that the defendant and its employes operating the train which collided with the one on which plaintiff was riding were guilty of negligence in running the same with the cars in front of the engine, the cars being pushed instead of being pulled by the engine; that the defendant and its employes were also guilty of negligence in not maintaining a sufficient watch or lookout to ascertain the proximity of the train on which he was riding; and, further, that the defendant, at the time and place of the collision, and prior thereto, had enforced, for the government and guidance of its employes operating the colliding trains, rules and regulations substantially to the effect that, when one freight train follows another, it should not do so at a less distance of space and time than five minutes, and that the defendant, its agents and employes, were, at the time of the collision, negligently violating said rules, and were operating the colliding train at a much less distance of space and time than five minutes; and that, by reason of this negligent disregard of the rules of the company, the accident was caused and contributed to. It is charged that by reason of these various acts of negligence the collision was occasioned, and plaintiff injured thereby. Plaintiff alleges that since the accident he has been non compos mentis—that is, his mind is weak and unsound—and that he is incapable mentally of transacting any business, and that such is his condition now. He also charges that he was badly burned and bruised about the legs, sides, back, arms, hands, and head, and that his left eye has become seriously affected by reason of the injury to his head. He alleges that, as a result of the alleged negligence of the defendant, and his injury consequent thereon, that he now suffers and will continue to suffer great physical pain and mental anguish. He also alleges his damages.

"The defendant, the Texas & Pacific Railway Company, answers the petition of plaintiff, and denies each and every allegation contained therein. For special answer, it, in part, says that plaintiff cannot recover in this action for the reason that he was himself guilty of negligence which directly and proximately caused and contributed to his injuries, and that, but for such negligence on his part, the accident resulting in his injuries would not have occurred; that the negligence on the part of plaintiff was as follows: That he, while riding upon the freight train of which he was in charge, had full knowledge that another train was following his train; that he directed and knew, or should have known, that his train was to be brought to a standstill, or the speed of the same slackened, in order that a person who was riding upon the

same might get off; that he negligently and carelessly failed to send any flagman back to warn the train following, or place any torpedo upon the track, or give any signal or warning to the rear train, or use any precaution whatever to apprise the rear train that the speed of the train upon which plaintiff was riding would be or had been lessened; that it was the duty of the plaintiff, under the circumstances, to see that those in charge of the rear train should not approach too near to the train upon which he was riding, and to use all proper signals to accomplish that result; that, had plaintiff used reasonable care in this respect, said accident would not have occurred. The defendant further charges that Dashiell and it made and entered into a certain contract of agreement and release, by which it paid Dashiell the sum of \$30, and for such consideration was released from all liability for damages resulting from said accident and injury.

"The plaintiff, by its supplemental petition and answer to the defendant, alleges that the release made by him was for certain of the injuries so suffered, but did not include the injury occasioned to his mind, nor the injury occasioned to his left eye, by reason of said accident; that these latter injuries were not in contemplation of the parties at the time the contract of release was entered into, and the defendant's liability, therefore, is not released by said contract."

A number of witnesses were called by each of the parties to testify as to the conditions and circumstances under which the injuries complained of were received. In the volume of the testimony there is ample evidence tending to show the negligence of the defendant below (the plaintiff in error). As to the burden of the proof, and the duties and obligations of the defendant railway company, and the practical definitions of the terms "negligence" and "contributory negligence" and "ordinary care," and the liability, or not, of the respective parties in view of these definitions, applied to the proof, these are all covered, and correctly, by the general instructions of the trial judge. The fellow-servant doctrine, as held at common law, does not apply to this case, by reason of the Texas statute of June 18, 1897 (Sess. Acts, 1st Called Sess. 25th Leg.; Laws 1897, p. 14, c. 6).

At the request of the plaintiff in error, the judge gave the following charges:

"(4) In determining the question of the negligence of Dashiell, it is your duty to take into consideration the facts surrounding the situation. You should take into consideration the fact that he knew, or ought to have acted upon the presumption, that a train was following or liable to be following him, and the fact that he had caused the speed of his train to be lessened, and the position and place of the train, and, from all these facts, determine whether or not a reasonably prudent person, in the exercise of ordinary care, would by some proper signal have notified those upon the rear train of this fact. It was the duty of Dashiell to use reasonable care to protect his train, and if he failed in this respect, and such failure caused and contributed to the accident—that is to say, but for such failure on his part the accident would not have occurred—then they will find for the defendant, even though there was negligence on the part of those upon the rear train."

"(7) The duty of the railroad company towards its employes in reference to the running and operating of its trains is that it use ordinary care. Although the jury may find that it would have been safer to run the train with the engine ahead of the cars headed either east or west, yet if they find that the manner in which it was operated was such as a reasonably prudent person, in the exercise of ordinary care, would have operated it, under all the conditions and circumstances, taking into consideration the rules and regulations of practical railroading, then in such respect the defendant would not be negligent, and no liability would arise therefrom."

"(9) The jury are instructed that the fact that some kind of settlement was made with Dashiell with reference to his injuries, or a part of same, is not

evidence of admission on the part of the defendant that any liability existed, and, in so far as determining the liabilities of the defendant, you will exclude that from your consideration, and try the case alone upon the law as given by the court, and the evidence admitted under its ruling; and the same considerations will apply to the fact that Dashiell was not discharged by the company, but retained in its service. These are not matters which you will look to at all, but which you will exclude entirely from your consideration of this case."

In connection with requested charge No. 9, as just shown, the judge, on his own motion, gave this further charge:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff, you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit, injuries to his body, right leg, right arm, and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been received by him, resulting in the impaired mental powers, and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

Besides the requested charge No. 4, as shown above to have been given, the judge, on his own motion, charged the jury, as follows:

"Now, if you believe from the evidence that the plaintiff, Dashiell, failed to send back any flagman to warn the train which was following his train, and failed to have any torpedoes put upon the track, and failed to give a signal or warning to the rear train, or to so use any of the precautionary measures testified about to apprise the train following that the speed of the train of which he was in control had been slackened, and if you believe that his failure to take any one or more of these precautionary steps was negligence on his part, and if you believe that this negligence on his part directly and proximately contributed to the accident which resulted in his injuries, then and in that event it will be your duty to find for the defendant, even though you should find that it, through its agents and servants, was guilty of negligence in any one or all of the respects referred to in this charge. If you believe from the evidence that the injuries and troubles of which the plaintiff now complains are the result of a failure on his part to take proper care of himself in the use by him of intoxicating liquors, then and in that event it will be your duty to find for the defendant."

There was no proof in the case tending to show that the train of which the defendant in error was conductor came to a full stop at any time or place near the happening of the accident. There was conflict in the testimony as to how far its rate of speed was slackened at any time. It was shown beyond dispute that near the place where the accident occurred the rate of speed was slackened sufficiently to allow an employé to alight from the train. There was proof tending to show that the conductor of the following train had been informed that at the place, or near the place, where the employé left the forward train, its conductor had orders to let this employé off.

The defendant requested the court to give its special charge No. 1, as follows: "In this case, under the law and the evidence, the jury will return a verdict for the defendant." This charge the court refused to give, and this refusal is assigned as error. We have carefully examined all of the testimony offered on the trial, and are clear in our view that the court did not err in refusing to withdraw the issues of fact from the jury. The other assignments present the usual ques-

tions raised in actions of this kind, and a careful examination of the briefs of the respective counsel has satisfied us that this case does not call for a reannouncement of rules already settled, or for any illustration of them by pointing out their application to the particular circumstances and conditions which the proof in this case presents.

We have been unable to find any error in the action of the trial judge for which his judgment should be reversed, and it is therefore affirmed.

MASSIE et al. v. BUCK.

(Circuit Court of Appeals, Fifth Circuit. February 18, 1904.)

No. 1,252.

1. FEDERAL COURTS—JURISDICTION—LAND TITLES—CANCELLATION—STATE COURTS—DECREES—ENFORCEMENT—INJUNCTION.

Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], forbidding federal courts to issue an injunction to stay proceedings in any court of the state except in cases where such injunction may be authorized by any law relating to bankruptcy proceedings, does not deprive a federal court of jurisdiction to restrain a defendant from selling, incumbering, or in any way disposing of lands purchased at a sheriff's sale, where such injunctive remedy is ancillary to the granting of relief in a suit to set aside the sheriff's deed, of which the federal court had jurisdiction.

2. SAME—INJUNCTION—DISCRETION—REVIEW.

The granting of a preliminary injunction in the exercise of the judicial discretion of the Circuit Court will not be set aside on appeal unless it clearly appears that the court erred in applying the legal principles which should have guided it, when considered from the Circuit Court's standpoint.

3. SAME.

Where a suit was brought to set aside certain notes and a sheriff's sale of certain lands described in the bill, and injunction was asked restraining the purchaser at the sale from selling, incumbering, or disposing of the lands, etc., and defendant would be fully protected against loss by reason of the injunction, by a proper bond, it was not an abuse of the trial court's discretion to refuse to vacate a temporary injunction issued, on a motion made before demurrer, plea, or answer to the bill.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The following is the statement and opinion of the court below (PAR-LANGE, District Judge):

The bill of complaint of Charles C. Buck, a citizen of Maryland, against Jessie H. Massie and Robert M. White, both citizens of Louisiana, filed March 2, 1903, alleges, *inter alia*: That in 1891 White offered to sell to Buck for \$25,000 a certain tract of land described in the bill, and which White represented to contain about 28,000 acres. That Buck accepted the proposition, and a written agreement was executed by which White agreed to sell to Buck the said lands for \$25,000, of which \$5,000 were to be paid in cash, \$10,000 in stock of a company to be formed to develop said lands, and for the balance notes secured by vendor's lien and mortgage were to be given. That certain capitalists then agreed with Buck to form a company which would buy said lands from him if he succeeded in procuring from White a deed thereto, and

¶ 1. Federal courts enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

that they would pay Buck therefor \$150,000, of which \$120,000 was to be in stock of the company, and the balance in cash and notes. In pursuance with this agreement a company was organized in New Jersey under the name of Plaquemines Tropical Fruit Company, and a resolution was passed authorizing the company to purchase said lands from Buck, on said terms, and Buck was then elected president of the company. That White refused to execute to Buck a deed in accordance with his agreement, and Buck brought suit in this court against White to compel a specific performance of his contract. That White then proposed, by way of compromise, that if Buck would pay the costs of said suit, and would give him the \$5,000 in cash, as provided in the agreement, and notes for \$15,000 instead of \$10,000, secured by mortgage, as provided in the agreement, and give him \$7,000 in the stock of the company instead of \$10,000 of stock, as was provided in the agreement, and would permit him to cut willows on a certain part of said lands for one year, that he (White) would execute the deed for the said lands, and also for another tract of about 4,000 acres adjoining said lands, which offer of compromise Buck accepted. That Buck and White proceeded to the office of a notary for the purpose of having an act of sale to said lands passed from White to Buck, and another from Buck to the fruit company, but it was then suggested by Charles Louque, who was then Buck's attorney, that as Buck was the only officer of said company present in Louisiana, and would therefore have to accept the sale to the company, Buck ought not to be its vendor, and the attorney advised that a third person accept the sale for Buck from White and make the transfer to the company. Thereupon the acts of sale to said lands from White to Louque and from Louque to the fruit company were passed, Louque having no individual interest in the matter, but being merely a party interposed as Buck's representative, with the full knowledge and consent of White. That the consideration of the sale from White to Louque was \$30,000—\$10,000 in cash, and the balance in three notes of Louque, one for \$10,000, and two for \$5,000 each, all secured by vendor's lien and mortgage; and the consideration of the sale from Louque to the company was \$150,000—\$10,000 in cash, and the assumption by the company of the three notes of Louque and \$120,000 in stock of the company. That, in lieu of the \$10,000 cash payment recited in the act of sale, White accepted \$5,000 cash and \$7,000 in stock of the company, and White returned one of the \$5,000 notes, leaving outstanding in his hands the \$10,000 note and the other note for \$5,000. The fruit company at once went into possession of said lands, and began to make extensive improvements thereon, and up to the time of the decision of the suit of the state of Louisiana against said fruit company and Buck, which will be referred to more fully hereafter, had expended more than \$30,000 in improving said land. That in January, 1892, the state of Louisiana brought suit in the civil district court for the parish of Orleans, La., against Buck and the fruit company, claiming that the state was the owner of all the lands first described in the act of sale from White to Louque, lying west of and behind a certain 1,320 acres originally patented to one C. C. Packard. That the defendant company called Louque in warranty, who in turn called White in warranty. That the civil district court rendered judgment in favor of the state, declaring it to be the owner of all of said lands back of said 1,320 acres, but reserving the rights of the defendants, Buck and the fruit company, and of Louque, against White as warrantor. That this judgment was affirmed by the Supreme Court of the state, and the judgment is final. *State v. Buck*, 46 La. Ann. 656, 15 South. 531 et seq. That since the said judgment in favor of the state became final the state has transferred to other parties all of said lands and the fruit company has been evicted therefrom. That the fruit company has not left to it since said eviction even said 1,320 acres, because Buck believes and charges that said tract does not contain more than 700 acres, and maybe less. That subsequently, in the suit of *R. M. White v. Augustus Leovy*, 49 La. Ann. 1660, 22 South. 931, et seq., a decree was rendered in April by the Supreme Court of the state, the effect of which was that White never had title to the tract of 4,000 acres secondly above mentioned. That the result of the two decisions of the Supreme Court of the state is that White had and conveyed title to and Louque and the fruit company acquired less than 1,320 acres out of a total of 32,000 acres which formed the consideration of said sales. That in 1897 White brought suit in the district court for the parish of Plaquemines on the

\$5,000 note of Louque against Louque and the fruit company to foreclose the vendor's lien and mortgage by executory process, and a little later Massie, who acquired the \$10,000 note of Louque from White, after its maturity, instituted a similar foreclosure suit on said \$10,000 note in the same court against the same defendants. That subsequently, and before the trial, White transferred to Massie all his rights as plaintiff, and Massie was duly substituted of record as plaintiff, and the two causes consolidated. The fruit company, through its curators appointed by the court in said two suits, filed a petition against Massie and the sheriff in opposition to the seizure and sale, and prayed for an injunction without bond, and for judgment declaring said notes null and void, without consideration, and not binding on petitioner, and that the mortgage securing the same be canceled, because (1) they are not due, and the consideration for the same has absolutely failed and been extinguished, the company having been evicted from more than 95 per cent. of the lands; (2) because the notes are barred by the prescription of five years; (3) because the notes were obtained through fraud by White, he knowing at the time that he was not the lawful owner of the property sold by him for cash and for said notes. White was also made a party defendant, and judgment was prayed for condemning him to restore the said \$7,000. An injunction without bond was granted, and issue was joined by Massie and White, and after trial on the merits the court, holding that there was no proof of fraud and that the notes were not prescribed, dissolved the injunction, and expressly declined to pass on the plea of want or failure of consideration of the notes, though the same was specially pleaded and strongly urged, but nevertheless dismissed the company's demand. That subsequently, under the writs issued in said consolidated cause, the sheriff of Plaquemines parish, La., advertised for sale on November 3, 1900, and on that day sold and adjudicated to Massie, the plaintiff, for the sum of \$2,000, certain property which the bill describes as containing 1,320 acres, as defined in the decision of the Supreme Court. *State v. Buck*, 46 La. Ann. 656, 15 South. 531, et seq. That, no appeal having been taken by the fruit company from said judgment up to and within three days of the expiration of a year from its rendition, Buck, as a stockholder in said company, and in his individual capacity as the real purchaser from White and the real vendor to the company, took an appeal from said judgment to the Supreme Court of the state, and on December 1, 1902, the appeal was dismissed for failure to cite White. That said judgment dismissing the fruit company's demand as aforesaid was not res judicata as to said company's plea that the consideration of the notes of Louque for \$10,000 and \$5,000, respectively, had failed, and that said notes were wholly without consideration, because the court expressly declined to pass on the same, as appears by the written opinion of the judge of said court. That the fruit company was dissolved in 1896, its charter having been duly declared forfeited by the Governor of New Jersey, and no liquidator, receiver, or other representative has even been appointed to represent it, and said company has no assets or property other than the tract of land herein involved, to wit, that part of said 1,320 acres originally patented by the state to C. C. Packard, which lies west of Grand Pass, of which Buck has for a long time been, and still is, in possession as tenant of said company. That Buck is a large stockholder in said company, being the owner of more than \$50,000 of the capital stock out of a total capital stock of \$163,400, and that as such stockholder he has an interest in all of said company's rights, property, etc., and has the right to protect and preserve the same. That said company, being defunct, and without any legal representative, there is no one to whom Buck may apply to bring this suit or institute such other legal proceedings as may be proper and necessary for the protection of its said property, and so Buck brings this bill in behalf of himself and all other stockholders and persons interested. That Buck was the real purchaser from White and the real vendor to the fruit company, and he is the real obligor on said two notes to Louque, who acted for Buck with the full knowledge and consent of White, and that if said notes are held to be legal, and the said sale to Massie is upheld, Buck, as well as the fruit company, will be indebted by said notes for more than their face value, the proceeds of said sale to Massie, to wit, \$2,000, being insufficient to pay the accrued interest on said notes. That the tract of say 700 acres to which alone White had and conveyed title out of

a total of 32,000 acres was not at the time worth more than \$1,000, and is not now worth more than \$2,000, the amount bid by Massie for the same at the sheriff's sale, and was more than paid for by the cash payment of \$5,000, leaving out of consideration the \$7,000 in stock. That said two notes, and the mortgage given to secure the same, should be declared null and void (for want and failure of consideration on grounds heretofore mentioned and which are reiterated in detail in the bill), and Massie ordered to return said notes to Buck, and that said sheriff's sale to Massie be annulled, and the sheriff's deed to Massie be ordered canceled, and White be compelled to return to the fruit company the \$7,000 of its stock, and so much of said \$5,000 as this honorable court may find to be in excess of the value, at the date of sale, of said tract of land remaining to the fruit company after its eviction. That Buck fears that Massie might attempt to eject him from said property, and take possession of the same, and alienate or incumber it, during this suit, unless enjoined. The prayer was in accordance with the allegations of the bill, and for an injunction.

Opinion.

The only question now before me is whether on the rule nisi a preliminary injunction shall issue. The main, if not the only, objection raised by the solicitor for defendants to the issuing of the writ is the contention that section 720, Rev. St. [U. S. Comp. St. 1901, p. 581], forbids the court from issuing the writ. Several cases have been cited in support of the contention, among them *Barrow v. Hutton*, 99 U. S. 80, 25 L. Ed. 407.

In *Garner v. Bank* (decided by the Circuit Court of Appeals for the First Circuit) 67 Fed., at page 836, 16 C. C. A. 86, Circuit Judge Putnam, as the organ of the court, said, with regard to section 720, Rev. St. [U. S. Comp. St. 1901, p. 581]:

"But it is now so thoroughly settled that this provision of law does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceedings in a state court that the proposition needs no discussion by us."

Specially see Judge Grosscup (now Circuit Judge) in *Terre Haute, etc., Co. v. Peoria, etc., Co.* (C. C.) 82 Fed. 943, the syllabus of which case reads:

"Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], which declares that federal courts shall not by injunction stay proceedings in state courts except in bankruptcy matters, does not deprive a federal court of jurisdiction to enjoin proceedings in a state court as ancillary to granting relief in a case in which the federal court has jurisdiction."

Also notice Circuit Judge McCormick in *Central Trust Co. v. St. Louis, etc., Ry. Co.* (C. C.) 59 Fed. 385.

The doctrine of *Barrow v. Hutton* has been further elucidated by the Supreme Court in *Marshall v. Holmes*, 141 U. S. 597, 12 Sup. Ct. 62, 35 L. Ed. 870.

It is clear to the court that the injunction prayed for is but an incident to the main relief sought by the bill, and that under the settled jurisprudence the issuing of the preliminary injunction does not contravene section 720, Rev. St. [U. S. Comp. St. 1901, p. 581]. The bill states a case which, in the court's opinion, entitles the complainant to the writ, and it therefore should issue.

E. Howard McCaleb, for appellants.

E. B. Kruttschnitt, D. C. Mellen, and J. Ward Gurley, for appellee.

Before McCORMICK and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an appeal taken under section 7 of the act establishing the Circuit Courts of Appeals, as amended June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551]. The bill was filed in the Circuit Court by Charles C. Buck, the appellee, against J. H. Massie and others, the appellants. It is an elaborate and carefully prepared pleading, consisting of nine closely printed pages,

describing certain business transactions between the complainant and the defendants, and asserting complainant's rights growing out of such transactions. The bill concludes with a prayer that two notes of Charles Louque for \$10,000 and \$5,000, respectively, and a sale made by the sheriff of the parish of Plaquemines to the defendant J. H. Massie, and the sheriff's deed to J. H. Massie of certain lands described in the bill, be annulled and canceled; and, after stating other prayers for relief, there is a prayer "that a writ of injunction issue herein, enjoining and restraining the said Jessie H. Massie from selling, incumbering, or in any way or manner disposing of said lands adjudicated to him by said sheriff of Plaquemines parish, Louisiana, as aforesaid, and described in said deed from said sheriff to him, and from attempting to take possession of the same, and from doing, or causing to be done, any other thing which from the filing of this bill may, during the pending hereof, hinder or delay your orator from obtaining adequate relief in the premises, and that upon the hearing herein said preliminary injunction may be made perpetual." The injunction was granted as prayed for.

We learn from the opinion of the trial judge, which is copied in the record, that the main, if not the only, objection made to the issuing of the writ of injunction was that section 720 of the Revised Statutes [U. S. Comp. St. 1901, p. 581] forbids the court from issuing the writ. That section provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

A federal court, in a proper case, has jurisdiction to cancel titles made by authority of a decree of a state court, and this statute (section 720) does not deprive a federal court of jurisdiction to enjoin proceedings in a state court when such injunctive remedy is ancillary to granting relief in a case of which the federal court has jurisdiction. *Terre Haute & I. R. Co. v. Peoria P. U. R. Co.* (C. C.) 82 Fed. 943; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 354.

The bill is the only pleading in the case. No demurrer, plea, or answer has yet been filed. The case has been argued here elaborately, both orally and in the briefs filed, the argument being addressed to the merits of the case. The question arises at once: To what extent ought this court go into an examination of the merits of a case on an appeal from an interlocutory order granting a temporary injunction? Unless there is some strong reason for it, we ought not to decide the merits of the case before they have been decided by the lower court. The granting or withholding of a preliminary injunction is in the sound judicial discretion of the Circuit Court. We ought not to interfere with the exercise of that discretion, unless it clearly appears that the court has erred under the established legal principles which should have guided it. Clearly, the propriety of its action should be considered from the standpoint of the Circuit Court. When a bill is presented asserting claims that raise grave questions of law, and which the court must decide before rendering a final decree, it is within the sound judicial discretion of the court to preserve the existing status until the case is

finally decided, whenever that course is necessary to fully protect the plaintiff. Especially is this true in cases where the defendant can be fully protected against any loss by reason of the injunction by requiring a proper bond of the plaintiff. *City of Newton v. Levis*, 79 Fed. 716, 25 C. C. A. 161. On an appeal from an order like this, the only question is whether or not the injunction has been improvidently granted. "The order of the court will not be disturbed on appeal unless it is violative of the rules of equity that have been established for the guidance of its discretion. *Kerr v. City of New Orleans* (C. C. A.) 126 Fed. 920, and cases there cited.

It does not appear to us that the order granting the preliminary injunction was improvidently made. The judgment of the Circuit Court is affirmed.

SHOUP, U. S. Marshal, v. MARKS.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1904.)

No. 971.

1. JURISDICTION OF COURTS—ACT ESTABLISHING NEW COURTS IN ALASKA—SAVING CLAUSE.

The saving clause of Act June 6, 1900 (Alaska Civ. Code, § 368, 31 Stat. 552, c. 786), preserved the right of all plaintiffs who had commenced actions in the District Court for Alaska to prosecute such actions to final judgment under the law which was in force at the time of the passage of the act or under the provisions of such act, and such right is not lost because at the time the act took effect an action was pending in the Supreme Court of the United States into which it had been removed from the District Court for Alaska by writ of error.

2. EVIDENCE—VALUE OF GOODS SEIZED BY MARSHAL—ADMISSIBILITY OF RETURN TO WRIT.

In an action against a marshal to recover the value of goods taken by defendant from plaintiff on attachments against a third person, the return of defendant showing the seizure and sale of the goods by him, and the price received therefor, is competent evidence on behalf of plaintiff as tending to establish the value of the goods.

3. SAME—RECORD ENTRIES.

Where the return to a writ of execution is competent evidence, it is also competent to prove the issuance of the writ by the clerk's docket.

4. APPEAL—REVIEW—HARMLESS ERROR.

The rejection of testimony offered to contradict testimony of the adverse party, even if erroneous, was harmless error, where, under a subsequent ruling and the instructions of the court, the testimony sought to be contradicted became immaterial.

5. TRIAL—DIRECTION OF VERDICT.

It is not error to direct a verdict where the evidence is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it.

6. TROVER—EVIDENCE TO IMPEACH PLAINTIFF'S TITLE.

In an action of trover against an officer to recover the value of goods seized by him and taken from plaintiff's possession under a writ of attachment against a third person, where it has already been determined that under the statute such seizure was unauthorized and illegal, evidence tending to show that the sale of the goods by the attachment defendant to plaintiff was in fraud of the seller's creditors constitutes no defense by impeaching plaintiff's title, the sale being sufficient to transfer the title to him as between the parties, and as against all others except creditors of the seller proceeding legally under a valid process.

In Error to the District Court of the United States for the District of Alaska.

Arthur K. Delaney and Louis P. Shackleford, for plaintiff in error.

W. E. Crews, Malony & Cobb, and Lorenzo S. B. Sawyer, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. In May, 1898, Joseph Levy, then engaged in business at Juneau, Alaska, transferred his stock of merchandise to one Levine, who transferred the same to Kendall, and the latter transferred it to Antone Marks, the defendant in error. Certain of the creditors of Levy brought actions in the District Court of Alaska against Levy, and in said actions caused writs of attachment to issue, which were placed in the hands of the marshal. The marshal, under said writs, attached and took possession of the stock of merchandise, and upon judgments subsequently rendered in said actions sold the same on execution. The proceeds thereof were delivered to the creditors under an order of the court. The defendant in error brought in said District Court an action of trover against the marshal for the value of the goods so attached and sold. In December, 1898, a judgment was rendered in said action in favor of the plaintiff in error. To review that judgment the defendant in error took the case by writ of error to the Supreme Court of the United States. The Supreme Court reversed the judgment of the District Court on the ground that, inasmuch as it appeared from the undisputed evidence in the record that the goods were in the possession of the defendant in error at the time of the levy under the writs of attachment, the levy and attachment were void, for the reason that the marshal had failed to follow the direction of the laws of the state of Oregon then in force in Alaska (1 Civ. Code Or. [Ed. 1887] § 149, subds. 2, 3), which provided: "(2) Personal property capable of manual delivery to the sheriff and not in the possession of a third person shall be attached by taking it into his custody; (3) other personal property shall be attached by leaving a certified copy of the writ and a notice specifying the property attached with the person having the possession of the same." The cause was remanded for a new trial. Upon the second trial the jury disagreed. Upon the third trial the jury rendered a verdict for the defendant in error in the sum of \$4,426.66. By an order of the court the verdict was reduced to \$3,390.35, and on March 5, 1903, judgment was accordingly rendered for that amount. This writ of error is sued out to review that judgment.

The plaintiff in error contends that the trial court had no jurisdiction to hear said cause or to render said judgment for the reason that the action as brought and as originally tried was in the District Court of Alaska, as the same was created and organized under the act of Congress of May 17, 1884, c. 53, 23 Stat. 24; and that while the cause was pending in the Supreme Court, and prior to the decision thereof, Congress passed the act approved June 6, 1900, c. 786, 31 Stat. 321, entitled "An act making further provision for a civil government for

Alaska and for other purposes," whereby the judicial system of Alaska was reconstructed, and a District Court, consisting of three divisions, with a judge, clerk, and marshal for each, was established. The record shows that the plaintiff in error, before the last trial of the cause in the court below, made timely objection thereto, on the ground that the District Court, Division No. 1 of Alaska, being one of the three courts created by the act last above referred to, had no jurisdiction to hear, try, or determine the same. In support of his contention, McNulty v. Batty, 10 How. 75, 13 L. Ed. 333, and other cases, are cited, which sustain the doctrine that where, pending a writ of error to a Supreme Court of a territory from the Supreme Court of the United States, the territory is admitted into the Union as a state, and no provision is made saving the rights of litigants under pending writs of error or appeals, all authority under the territorial government, including the laws organizing its courts and providing for revision of their judgments in the Supreme Court by appeal or writ of error, become extinguished by the abrogation of the statutes under which the territorial courts were created, and all pending actions are thereby abated. In answer to this, we think it is sufficient to refer to the saving clause in the act of Congress of June 6, 1900, providing as follows: "No person shall be deprived of any existing legal right or remedy by reason of the passage of this act and all civil actions or proceedings commenced in the courts of the district before or within sixty days after the approval of this act may be prosecuted to a final judgment under the law now in force in the district or under this act." 31 Stat. 552, c. 786, § 368. This provision conserves to the defendant in error the right to prosecute his action to a final judgment either under the law which was in force prior to the passage of the act, or under the provisions created by the act, his action having been begun before the approval thereof. See, also, Bird v. United States, 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. 100.

It is assigned as error that the court admitted in evidence a copy of the redelivery bond executed by the defendant in error in the case of the Willamette Tent & Awning Company against Levy, which was offered in evidence as tending to show that the goods levied upon were in the possession of the defendant in error at the time of the seizure thereof by the plaintiff in error. The objections which were made to the introduction of the copy were, first, that the loss of the original was not shown; and, second, that there was no testimony to show the delivery of the original bond to the marshal. These objections were not well taken. The evidence showed that the paper was a true copy of the original. There was evidence also that the bond was delivered to the marshal's deputy, who was in charge of the seized goods at the time. The plaintiff in error was not denied the right to introduce evidence to show, if he could, that the paper was not a true copy of the original, or that the original never came into his possession.

It is contended that the court erred in admitting in evidence the return of the marshal in the same case over the objection that it was incompetent and immaterial. The return showed that on May 6, 1898, the goods in controversy were by the marshal delivered to the defendant in error upon a redelivery bond, by which he and his sureties ob-

ligated themselves to return said property to the marshal, or to pay the value thereof in case the same were adjudicated to be the property of the defendant in the writ, and that subsequently the plaintiff in error, by his deputy, levied upon and took the property from the defendant in error by virtue of two writs, and sold the same on execution for \$2,035.65. It was offered in evidence as tending to show the value of the goods. We think there was no error in its admission for that purpose. The price obtained by an officer at forced sale under an execution, while not conclusive of the value, is competent evidence thereof. *Smith v. Mitchell*, 12 Mich. 180. But there was no error in admitting such testimony, for the further and conclusive reason that the plaintiff in error in his answer to the complaint admitted the value of the goods to be the sum which was realized upon the execution sale.

We find no merit in the contention that the court erred in admitting evidence of the docket entry of the clerk of the court to show that on November 12, 1898, execution issued in the case of *Willamette Tent & Awning Company* against *Levy*. Notice had been served upon counsel for plaintiff in error to produce the marshal's execution docket, but it had not been produced. It being competent to admit in evidence the return to the writ, it was proper to prove the issuance of the writ.

Error is assigned to the exclusion of the evidence offered by the plaintiff in error by his witness *W. D. Grant* as to who was in possession of the store and goods in controversy at the time when he, as deputy marshal, made levy on the same on behalf of the *Powers Dry Goods Company* and the *West Coast Grocery Company*. The witness was asked the question who was in possession of the goods at the time when he went into the store. This was objected to as calling for a conclusion of law, and the court sustained the objection. The witness was then asked who was there when he got there, and he answered, "*Mr. Steffin* and a man by the name of *Adler*." He was then asked if these men were apparently in possession of the store and goods. This was objected to as leading, and the objection was sustained. Witness went on to testify that there was no one else there at the time, that he informed *Adler* and *Steffin* what his business was, and that they made no claim on behalf of the defendant in error to the possession or ownership of the goods. The rulings of the court in regard to the testimony were clearly right. The plaintiff in error obtained by the evidence all that he was entitled to, which was that *Adler* and *Steffin* were in the store at the time when the witness went there, and that they made no claim that they were in possession on behalf of the defendant in error or that he owned the goods.

It is assigned as error that the court excluded the testimony of one *O. H. Adsit*. The defendant in error had testified on his direct examination that when he took possession of the store and the goods he and *Steffin* made an inventory. In order to disprove this, the plaintiff in error asked the witness *Adsit*, who went into the store on the 15th or 16th day of May, the following question: "You may state to the court and jury what you found there in reference to the condition of the goods; that is, whether they had apparently been moved or taken out of the boxes, or whether there was anything to indicate that an in-

ventory or invoice had been made." This was objected to as irrelevant and immaterial, for the reason that the inventory had been taken about May 6th. Counsel for plaintiff in error then stated that he desired to show that the boxes which the defendant in error had testified about were covered with dust, and that the condition of the goods was such as to indicate that they had not been moved for weeks and months. The court excluded the evidence, on the ground that he had confined the plaintiff in error to evidence concerning the possession of the goods. There can be no doubt that the plaintiff in error had the right to call witnesses to contradict any material statement made in the testimony given by the defendant in error. It may be doubted, however, whether the testimony proffered was such as to tend to contradict the statement that an inventory had been made. An interval of 10 or 11 days had elapsed between the date when it was said that the inventory was taken and the time when the witness entered the building. There was no express offer of evidence to show that in that period dust would not accumulate upon the boxes so that they would become as fully covered with dust as they were when the witness saw them, or how it could be demonstrated that an inventory had not been taken. Before it can be said that the trial court erred it must be made to appear that the evidence called for by the interrogation was such that the court could see that it would tend to establish the fact for which it was tendered. But, whatever may have been the value of the proffered testimony, its rejection was immaterial, in consideration of the subsequent action of the court and instruction which was given to the jury. The court permitted the jury to determine only the amount of their verdict for the defendant in error. The rejected testimony could have had no bearing upon the judgment which was finally rendered, because the court, in subsequently reducing the amount of the verdict and confining the judgment to the amount which the marshal realized upon the sale of the goods, stated that he discarded all of the testimony of the defendant in error as to his having taken an inventory. It is apparent, also, from the remarks of the court, that the rejected testimony was deemed to have no value as affecting the question of the possession, for the court intimated that, even if it were shown that no inventory had been taken, the evidence showing possession in the defendant in error was sufficient to justify his instruction to the jury. That instruction we shall presently consider. It is sufficient to say that we are not convinced that the conclusion of the court in that respect was erroneous.

Error is assigned to the instruction of the court whereby the jury were directed to return a verdict for the defendant in error for such sum as they might find him entitled to under the evidence as the value of the goods taken. The court said to the jury:

"I hold that there is no evidence here to show rightful possession in the marshal; that the only evidence now before this court is the testimony showing the possession to be in Marks. Marks has testified that he leased these premises. He has testified that he paid the rent on the premises, and that he was in possession of them before any attempt to levy upon the goods was made. In addition to that, he gave a redelivery bond. That bond is here in evidence, undisputed. Now, upon the case as made, I shall instruct the jury to return a verdict for the plaintiff for such sum as they think him entitled to under the evidence."

The bill of exceptions further contains the following entry:

"The testimony and offers of testimony on both sides being closed, the court gave a peremptory instruction to the jury to return a verdict for the plaintiff."

No exception was taken to the remarks of the court or to the peremptory instruction to the jury. We might dispose of the assignments of error with that observation. But we have given the record careful consideration, and have reached the conclusion that there was no error in the instruction as given. The evidence relied upon by the plaintiff in error as tending to disprove the possession of defendant in error consists in inferences to be drawn from the testimony of Kelly and Adsit and from the testimony of Grant, above considered, in which he testified that he found Steffin and Adler in the store at the time of the levy, and that they made no claim that the defendant in error was in possession of or owned the goods. No inference can be drawn from their silence on that subject. Steffin was the clerk of the defendant in error. Both he and Adler doubtless knew that the goods were being levied on under the claim that they were the property of Levy. It is not to be presumed that they were advised of the legal rights of the defendant in error, or knew that the fact of his possession of the store and goods was an obstacle to their seizure under the writs. Grant admitted that within a few minutes after the levy he was met by the defendant in error and his attorney, and that they demanded the return of the property on the ground that it was the property of the defendant in error and in his possession, and that the levy was therefore void. We find nothing in the testimony of Kelly or Adsit tending to disprove the direct and positive testimony of the defendant in error on the subject of his possession. The trial court may direct a verdict in any case where the evidence is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Pennsylvania R. Co. v. Martin*, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361. We find no ground for holding that the court misapplied the rule.

It is contended that the trial court erred in excluding evidence offered by the plaintiff in error to show that the transfer of the goods to the defendant in error was made for the purpose of defrauding his creditors. If it was fraudulent, as this evidence seemed to indicate, it was void as to the attaching creditors. It is true that in trover, unlike the rule in trespass, the plaintiff must recover on the strength of his title, and that hence title in a third party may be shown in defense, even though the defendant in the action be in no way connected therewith. But in this case the excluded evidence did not tend to show title in a third party. It tended to show a transaction which, although void as to Levy's creditors, was, as between Levy and the defendant in error, sufficient to transfer the title to the latter. Such evidence could constitute no defense to the action, and its exclusion was not error. What is meant by saying that a fraudulent conveyance is void as to the grantor's creditors is that it constitutes no obstacle to legal process issued at the instance of creditors to subject the property to the payment of their demands. No creditor can seize the property, except by

such process, without rendering himself liable to the consequences of an unlawful interference with it. The opinion of the Supreme Court in *Marks v. Schoup*, 21 Sup. Ct. 724, 45 L. Ed. 1002, above referred to, concludes with these words: "It follows that the levy was invalid, and could constitute no defense to the defendant, and the jury should have been so instructed."

We find no error in the record for which the judgment should be reversed. It is accordingly affirmed.

THE CHARLOTTE.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 515.

1. COLLISION—STEAMER AND SAILING VESSEL MEETING—EXCESSIVE SPEED IN Fog.

A steamer which entered a thick fog bank on the York river at a speed of 10 miles an hour *held* solely in fault, on account of her excessive speed, for a collision with an oyster schooner tacking down the river in a light wind, and which was run down and sunk by the steamer before the latter could stop after hearing the schooner's fog horn.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond.

For opinion below, see 124 Fed. 989.

Reuben C. Foster and Robert H. Smith (Herbert J. Lewis, on the brief), for appellant.

Samuel L. Kelley and Thomas H. Edwards, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the District Court of the United States for the Eastern District of Virginia, in admiralty.

R. D. Robbins, administrator of Ulysses L. Robbins, deceased, and Thomas Randal, administrator of Elvin Randal, deceased, each filed his libel against the steamship Charlotte. The two decedents were each drowned as the result of a collision between the Charlotte and the schooner Anna M. Harris in York river. The deceased were members of the crew of the Harris. The two cases were consolidated and tried together. The learned district judge heard the case, the witnesses testifying before him. He found that the collision was the result wholly of the fault of the Charlotte, and gave damages, \$1,600 to Robbins, and \$900 to Randal. An appeal was allowed, and the case is here on the assignments of error.

The steamer Charlotte, of 1,746 tons, runs regularly between Baltimore, Md., and West Point, on the York river, in Virginia, having several landings on that river. The Anna M. Harris is a small, two-mast oyster schooner, 53 feet in length, with 27 tons register. On the morning of 30th August, 1902, the Charlotte, on her way to West Point, left Allmonds Wharf, one of her landings, a distance of 11 miles.

There had been a heavy fog, which had begun to break up in places about the time she left Allmonds Wharf. The fog was thick along the shores of the river, but the channel was more or less clear, so that the navigation of the steamer was not seriously interrupted. Nevertheless she blew her fog signal at regular intervals. The steamer proceeded up the river on a flood tide, with a light wind from the northwest. She was running at a speed of 10 miles an hour. She had an efficient lookout on the main deck near the stem, and in her pilot house were her master, the first officer, and a quartermaster. When she had gotten near Bell Rock Lighthouse, about five miles from Allmonds, the steamer ran into a thick bank of fog. Just as she was on the point of entering this bank of fog, her officers heard one blast of a horn sounded in the fog, off the port bow. This indicated to them that there was a sailing vessel in their vicinity on the starboard tack. With the wind northwest, such a course would have taken the sailing vessel to the westward enough for the Charlotte, provided that she had had room to get out of the way. Immediately after he entered the fog, having heard the horn, the master of the Charlotte gave the signal to stop her engines, ordered his wheel aport, and then gave signal to reverse the engines. Another and a nearer blast of the horn was heard more in the course of the Charlotte, and at once the schooner was seen right under the bows of the Charlotte on the port, and not on the starboard tack. In an inconceivable space of time the stem of the Charlotte struck the schooner on her starboard side abaft the fore rigging, and the schooner sank immediately. A lifeboat was lowered from the steamer, two of the crew of the schooner, the master and a passenger, were picked up, but Robbins, the mate, and Randal, a colored boy, were drowned. The two men who were rescued both swear that the fog horn was being blown at proper intervals, two blasts, from a quarter to 6 until a quarter to 7, when the collision occurred, and that the schooner was on the port tack. They had heard the steamer coming, and entertained no fear of the collision until she suddenly loomed in front of and over them. His honor who tried the case was most favorably impressed with the bearing and conduct of these witnesses, and their evident desire to tell the truth.

What was the proximate cause of the collision? We find the steamer entering a thick fog at the speed of 10 miles an hour, having heard the horn just before she entered the fog. After that, a very short interval, her master gave the signal to stop the engines, followed by a direction to port the wheel, and then the signal to reverse, and the collision. We are of the same opinion as the judge who tried the case—that the collision was caused by the speed of the steamship, and that she was in fault. The *Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148, is like this case in some respects. The collision was in a fog. The steamer was misled by signals from the bark, and ported instead of starboarding, which contributed to the collision. But the court held the steamer in fault for going at seven miles an hour in the fog—an unreasonable speed. In *The Martello*, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637, six miles in a fog was held excessive. In *The Colorado*, 91 U. S. 692, 23 L. Ed. 379, six miles an hour was held excessive speed in a fog. In *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610,

41 L. Ed. 1053, the list of cases is stated, adopting that laid down in *The Great Eastern*, Brown. & L. 287: "It is the duty of the steamship to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." See, also, *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687. Not only is this the rule when a steamer is in the fog, it applies equally to a steamer entering a fog bank. *The Abbie C. Stubbs* (D. C.) 27 Fed. 573; *The City of Alexandria* (D. C.) 31 Fed. 427.

It is contended, however, that the schooner was guilty of contributory negligence, and that the crew share in that. *The Queen* (D. C.) 40 Fed. 694; *The City of New York* (D. C.) 25 Fed. 149. The negligence charged on the schooner is the failure to blow two blasts on the fog horn, indicating the tack she was on. Her one blast was said to have misled the steamer. On this point the finding of fact of the district judge is clear and distinct. He saw the witnesses, and was convinced that the evidence of the master and a passenger on the schooner that the two blasts were sounded is true. We see no reason to differ from him. The defense of the steamer is that, hearing but one blast, and so believing that the schooner was on the starboard tack, it was supposed that she would have passed out of danger, especially as the steamer ported her helm. But the schooner was in a thick fog, tacking against a light wind, with the tide against her. She must have been moving very slowly. So when the steamer at speed broke into the thick fog, and almost immediately ran her down, it could have made no material difference whether she was on the port or starboard tack. The collision would have occurred in any event.

The decree of the court below is affirmed.

TENNENT-STIBLING SHOE CO. v. ROPER et al.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1904.)

No. 1,306.

1. ATTACHMENT—CLAIM BY THIRD PARTY—PROCEDURE UNDER MISSISSIPPI STATUTE.

Under Rev. Code Miss. 1892, §§ 4425-4428, which govern in a federal court in that state, if an attachment plaintiff fails to have an issue made up on an affidavit of claim to the attached property at the term to which the attachment is returnable, the claimant is entitled to an order discharging the levy and releasing him from his bond.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

See 119 Fed. 865, 56 C. C. A. 377.

Before McCORMICK and SHELBY, Circuit Judges, and PARLANGE, District Judge.

R. T. Fant, for plaintiff in error.

C. L. Sivley and Jas. Stone, for defendants in error.

McCORMICK, Circuit Judge. This is substantially the same case that was before us at our last term, under the then title of "*D. W.*"

Miller and H. J. Roper v. Tennent-Stribling Shoe Company." The consideration we then gave it, and our decision therein, are shown in the report of that case as it appears in 119 Fed. 865, 56 C. C. A. 377. It is unnecessary to restate the facts of the case, which sufficiently appear in that report. Of the numerous errors then assigned, this court considered only the first, namely, that the Circuit Court erred "in overruling claimants' written motion to discharge the levy upon the property levied on under the writ of attachment, and in not pronouncing judgment for the claimants, and releasing them from their forthcoming bond, because of the plaintiff's failure to tender issue at the first term, as required by law." After referring to a number of cases in the Reports of the decisions of the Supreme Court of Mississippi, and quoting the language of section 4428 of the Revised Code of 1892, this court said:

"This section seems clear and explicit in its terms. If at the term to which the writ of attachment is returnable the plaintiff in attachment fails to move the court to direct an issue to be made up, and fails to tender an issue to the claimant under the direction of the court, then the plaintiff in attachment is in default, and the claimant is entitled to his judgment discharging him from his bond, and the property is no longer subject to attachment." Citing *Sears v. Gunter*, 39 Miss. 338.

Then, noticing the contentions of the counsel for the defendants in error, to the effect "that the issue directed by the statute need not be made up in writing, that the statute is silent on this point, and that no decision of the Supreme Court of Mississippi can be cited holding that it must be made in writing," the court proceeds to review the case of *Smokey v. Wack*, 57 Miss. 833, in which the sufficiency of the averments in a tender of issue filed by a plaintiff in attachment is passed upon, and thereupon uses this language:

"The statement of this case by the court precludes the possibility of the tender of issue having been other than a formal plea in writing. Besides, it is plainly deducible from the Revised Code of 1892 that the issue shall be made up in writing [referring to sections 670, 671, 681, and 702]. However, in this case the record does not disclose that the plaintiff in attachment tendered an issue, either orally or in writing, and it therefore could not be held to have complied with the law, in any event. In view of the holding on the first error assigned, and its necessary effect on the disposition of the case, it is not deemed material to discuss other questions raised. For the error indicated, the judgment of the Circuit Court is reversed, and the case is remanded for further proceedings."

Our decision just referred to was rendered January 13, 1903. The case having been restored to the docket in the Circuit Court, plaintiffs in error filed a motion in that court on June 1st asking the court to allow them to join and make up the issue on the claimants' issue; and, as such plaintiffs, they averred in that motion that "the goods were at the time of the levy, and at the time when the trial was had, the property of defendant in attachment. Previous making up of issue was waived." On the same day H. J. Roper, one of the claimants, filed his written motion asking the court to discharge the levy upon the property levied on under the writ of attachment in this case, which is claimed by him individually, and to release him from his forthcoming bond, and to enter judgment against the plaintiff in attachment for his default in failing to tender issue in this cause to try the rights of prop-

erty at the December term, 1897; the same being the term to which the writ of attachment was returnable. A similar motion was filed at the same time by D. W. Miller and H. J. Roper, asking the court to discharge the levy upon the property which is claimed by them jointly, and that they be released, etc. These motions, a little more technical in form, are substantially in substance with the motion filed by the claimants on the 2d of December, 1901. At that time their motion was overruled by the court, and a trial was had before a jury, resulting in a judgment against them, the first line of which recites:

"This day came on this cause to be heard upon issue joined upon all the claimants' affidavits filed herein; the claim of H. J. Roper and D. W. Miller and the claim of H. J. Roper being, by consent, tried together."

The motions to discharge the levy, filed June 1, 1903, were acted on the next day, and were granted by the court. Three days afterwards, June 5, 1903, the motion of the plaintiff in error to be allowed "to tender issue in the claimants' issue" came on to be heard, and the order thereon is in these words:

"And it appearing to the court that each of said claimants had filed their motion to discharge the levy, and for judgment by default against the plaintiff in attachment, and that the same had come on to be heard before the plaintiff's motion to be allowed to tender issue, and it further appearing to the court that the plaintiff failed and neglected to tender issue at the return term of the writ, and until the claimants had filed their motion to discharge said levy, and the same had come on to be heard, it is therefore ordered and adjudged by the court that the plaintiff's motion to be now allowed to tender issue be overruled."

It is manifest that the only new element presented by the record now before us is shown by the concluding words of the plaintiff's motion, made June 1, 1903, in reference to making up the issue on the claimants' issue. These words are, "Previous making up of issue was waived." If any proof was made or any effort to offer proof in support of the statement that the previous making up of issue was waived, it does not appear in the record now before us. On the contrary, it seems to be shown that no express waiver had ever been made. In view of our former decision, the Circuit Court did not err in sustaining the motion of D. W. Miller and H. J. Roper to discharge the levy of the attachment upon the property claimed by Miller and Roper, and in refusing to sustain this motion to make up an issue on the claim of these claimants, and in entering final judgment against the plaintiff on the claimants' issue.

The judgment of the Circuit Court is affirmed.

SOUTHERLAND-INNES CO., Limited, v. THYNAS.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1904.)

No. 1,263.

1. SHIPPING—BILLS OF LADING—EXCEPTIONS—PERILS OF SEA—DELIVERY OF CARGO.

Where a charter party exempted the ship from liability for loss by act of God, floods, or any extraordinary occurrence beyond control of either

¶ 1. Loss by perils of the sea, see note to *The Dunbritton*, 19 O. C. A. 465.

party, "and all and every other danger and accidents of the seas," of whatsoever nature and kind, during the voyage, the ship was not liable for loss of timber which had been delivered at the ship's side, and lost, by reason of a violent storm, notwithstanding the utmost care, diligence, and effort on the part of both the claimant and the ship's crew, under another provision of the charter party declaring that the cargo was to be delivered alongside, at merchant's risk and expense, and to be received by the master and secured by the ship's dogs and chains when so delivered, and to be then at the ship's risk.

Appeal from the District Court of the United States for the Northern District of Florida.

Jno. C. Avery, for appellant.

Benj. C. Tunison and Scott M. Loftin, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The pitch-pine charter party which is the basis of this action provides, among other things, as follows:

"Cargo to be delivered alongside at merchant's risk and expense and to be received by the master and secured by the ship's dogs and chains when so delivered, and to be then at ship's risk."

This action is to recover for some 252 pieces of timber which were so delivered, received alongside the ship, but which on the night of January 23, 1903, were lost, through a violent storm of wind and rain in the port of Pensacola, notwithstanding the utmost care, diligence, and effort on the part of the claimant and the crew of said bark, and was by the force of the wind and rain and sea driven from alongside of said bark and scattered and lost. The case admits that the timber was so scattered and lost and it seems to be admitted by proctors on both sides that the violent storm of wind and rain which caused the loss was within the exceptions of ship's liability contained in the following provision of the charter party:

"The act of God, restraints of princes and rulers, public enemies, fire, floods, droughts, strikes or lockouts of seamen or shore laborers, whether partial or otherwise, and any consequence thereof, combinations of any extraordinary occurrences beyond control of either party, barratry of the master or crew, collisions, stranding, and all and every other danger and accidents of the seas, rivers and navigations of whatsoever nature and kind during the said voyage always mutually excepted."

The contention of the libellant below (appellant here) is that, notwithstanding the loss of the timber, within the provisions of the section just quoted, the ship is liable because of the alleged absolute contract, as in the first provision quoted; i. e., that, when timber was received alongside, it should be at ship's risk. The exception of liability quoted applies to all the ship's risks as to cargo—whether loaded or delivered alongside for loading. That it was intended to contract for a greater risk and liability as to cargo delivered alongside than for cargo received aboard, for which bills of lading are outstanding, is not to be presumed. We are clear that if the ship would not have been responsible for loss of the timber in question, under the circumstances conceded in the case, after delivery on board with a bill of lading outstanding, it cannot be held responsible under the contract of charter in this case for timber delivered alongside.

Although the express point was not in issue in *Baldwin v. Sullivan Timber Co.*, 142 N. Y. 279, 36 N. E. 1060, the New York Court of Appeals, in construing a similar charter party, said:

"There is a further provision that the cargo is 'to be delivered alongside at merchant's risk and expense, and to be received by the master and secured with the ship's dogs and chains when so delivered and to be then at ship's risk.' This clause was needless if a mere delivery alongside was a complete delivery to the vessel, for after such complete delivery the liability of the vessel would, of course, attach. The need of the provision lay in the fact that delivery alongside was not a complete delivery, because the merchant was still to remain in possession and control of his lumber for the purpose of loading and stowing it, and before that was accomplished the ship would assume no risk, unless by force of a particular and specific provision, which therefore was added, and which put upon the vessel simply the duty of holding the timber safely alongside to enable the shipper to complete his delivery by loading and stowing."

But *Nottebohn & Co. v. Richter*, 18 Q. B. Div. 63, seems to be the only adjudicated case on the point; and there Lord Esher says, in regard to a risk assumed for cargo before loading:

"This is a charter party under which the ship is to sail from Barbadoes to Fecolutia, there to take a cargo on board and carry it to the United Kingdom. That is one voyage, and that is the chartered voyage, and whatever part of the charter party applies to the voyage applies to the whole of it. The exceptions in the charter party, so far as they can be applied, apply to the whole chartered voyage. The duty of the shipowner is to proceed to the place where the goods are, and to be ready to take them on board. If he is prevented from taking them on board by one of the excepted perils, he is excused from delivery. If this charter party had been in the ordinary form, it would have been the duty of the charterer to bring his goods alongside, so as to deliver them into the ship. The provisions of the charter party would not be applicable to these goods during the transit from the shore to the ship, because they are not at that time brought within the purview of the charter party. If it were not for this exceptional clause, the shipowner would have nothing to do with the goods during transit from the shore to the ship. Supposing that without such a clause the shipowner, not being under any obligation to carry from the shore to the ship, were to agree with the charterer that he would do so, that would be an independent contract, and would certainly not bring the goods within the charter party. In the present case it is put into the charter party that the shipowner will do it, but he does not undertake that he will take the goods at all risks, but at ship's risks. To my mind, it is clear that this means that he will take them at the same risk as the ship would be liable to when the goods were on board. The expression 'at ship's risk' cannot be strictly correct, because the ship has no risk; but I cannot doubt that the meaning is that the shipowner will take the goods, and, when once they are in his possession, treat them, as to risks, as if they were on board the ship. I think that view is supported by what was evidently in the mind of Willes, J., in *Barker v. McAndrew*, with regard to the word 'guaranteed,' which occurred in the charter party in the expression 'guaranteed for cargo in all this month,' which he construed to mean not an absolute guaranty, but a guaranty subject to the shipowner not being prevented by the excepted perils."

The *Ira B. Ellems*, 50 Fed. 936, 2 C. C. A. 85, is not in point. The decree appealed from is affirmed.

FOLGER & MORIARTY v. DOW PORTABLE ELECTRIC CO.

(Circuit Court, D. Massachusetts. February 25, 1904.)

No. 1,618.

1. PATENTS—INVENTION—INSULATOR FOR SPARKING PLUGS.

The Folger, Moriarty, and Jacobson patent, No. 696,670, for an improvement in sparking plugs for electrically igniting the gas in explosive engines, which consists in surrounding the plug with two insulators, one axial and the other radial, thus forming a double insulation, is void, in view of the prior art, which shows both the insulators used singly, and also, in the McCarthy patent, No. 518,373, a combination of axial and radial insulators for the purpose of securing a double insulation.

2. SAME—SCOPE OF CLAIMS.

A claim in a patent for an insulation tube made of a "nonporous vitreous material, preferably glass," as an element of a combination, where the idea of the combination itself had been anticipated, and the only room for patentable invention was in details of construction and choice of materials, cannot be construed to include mica, where at the date of the application the patentees had attempted unsuccessfully to use mica for the construction of such tubes.

In Equity. Suit for infringement of letters patent No. 696,670, for a sparking plug, granted April 1, 1902, to Henry C. Folger, Harry Moriarty, and Edward B. Jacobson. On final hearing.

Nathan Heard, for complainants.

Edward P. Payson, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 696,670, granted April 1, 1902, to Folger and Moriarty, and one Jacobson, assignor to the complainants. The invention relates to improvements in "sparking plugs" for electrically igniting the gas in explosive engines. The patent has four claims, all of which are in suit; but each calls for two parts of insulating material, one surrounding the other, the outer layer consisting of a series of disks, and the inner a tubular part closely surrounding the core. The gist of the invention, it is said—

"Lies in the provision of two insulations compressed together as nearly solidly as possible, one insulation extending in a horizontal plane, and the other insulation extending in a vertical plane—that is to say, the two insulations extend in opposite directions, and each is made up of suitable refractory insulating material, capable of withstanding, without fusion or reduction to another state, the great heat to which the plug is subject; and one of said layers is integral in the direction of the length of the plug, and the other is integral in the transverse direction or radially of the plug."

The first defense is that, in view of the prior art, the claims are void for lack of invention. Insulation consisting of a series of mica washers surrounding a body to be insulated was old; being shown in letters patent No. 482,872, to C. T. Lee, dated September 20, 1892, and No. 467,942, to C. T. Lee, dated February 2, 1892. The patent to C. W. Jefferson, No. 491,708, dated February 14, 1893, discloses the use of insulation practically entirely formed of mica, and the use of a mica insulating tube. In the Patent Office it was conceded by these patentees that the mica insulation is old per se; that the disk (washer) arrange-

ment, taken alone, is also old; and that the tubular arrangement, taken alone, is likewise old. It was contended, however, that, taken together, these elements were new. But the combination of two insulations, consisting of an insulating sleeve with mica washers surrounding it, was also old, in the McCarthy patent, No. 518,373, dated April 17, 1894. In Fig. 2 of that patent is shown a short bolt, covered along its length, clear to the screw thread, with a coherent shell of nonporous insulating material. This bolt, when assembled in the insulator, has compressed mica washers strung upon its insulated part. In the specification the patentee says:

"By the construction which I have just described, I attain what I term a 'double insulation'; that is, the current requires to pass two portions of insulation in order to pass the insulator, and each of the connections, 7 and 8, are not only insulated from each other, but are also each insulated from the case within which they are contained."

Dr. Bell, the defendant's expert, summarizes the matter as follows:

"In fact, insulating sleeves and washers were so familiar in the art that any one skilled in the art of insulation would have been likely to use the two in all sorts of combinations, arranging sleeves and washers as best suited the particular problem in insulation which he had in mind."

It is the contention of the complainants that there is not disclosed in the prior art the double insulation of a "refractory insulating material" called for by the claims of the patent. Just what material is meant by the term "refractory" is not disclosed. The mica tube being old, and the mica disks being old, there hardly could be invention in combining the two in a single insulator, without some substantial evidence as to a new result which was not merely the sum of the results of the two insulators. But the combination of two insulations for the purpose of securing a double insulation, and so that the current would be required to pass two portions of insulation, the inner of which was axial and the outer radial, as shown in the McCarthy patent, completely anticipates any broad inventive idea. McCarthy is criticised on the ground that the two layers of insulation are not applied at all parts of the material to be insulated, and because plastic insulating compositions are more or less porous; but these criticisms do not render McCarthy's invention any less applicable as an anticipation of the idea of using two insulators, one axial and the other radial, in combination.

I find that the first defense is established, and that, in view of the prior art, no invention is covered by the claims, which are void. It becomes unnecessary to consider in detail the other defenses.

Upon a general view of the case, it may be said that what the complainants had succeeded in making at the time of their application, filed December 18, 1900, was a core, upon which was placed a closely fitted tube of glass. Embracing the tube was insulation consisting of a series of washers of mica, coated with an adhesive chemical compound, and compressed under heavy pressure. The complainants were of the opinion that the gist of their invention resided in the mica washers, since in their original application they stated:

"Actual practice has determined that this compressed mica insulation is not affected by the repeated alterations of intensity of current in the electric circuit; the addition of the impermeable tube, 8, further safeguarding the same. It is, of course, evident that the tube, 8, may be omitted without departing from

the spirit of our invention, and it is apparent that this insulation may be useful in other devices."

Claims were made for a method of forming insulation, consisting in forming a series of perforated disks of mica. The applicants were wrong in supposing that there was any novelty in insulation by mica disks; and the only basis for the present patent in the original application consists in the disclosure of a sparking plug comprising a core, a glass tube mounted thereon, and a series of perforated disks of mica embracing the glass tube. While the original application uses the expression, "nonporous vitreous material, preferably glass," what the complainants had used, in fact, was glass. According to their testimony, they had experimented, without success, with mica for the inner tube, and were unable to construct a sparking tube with an inner tube of mica until long after their application. Discovering in February, 1901, that they could have manufactured for them tubes of mica, they then used them instead of glass, which was somewhat objectionable on account of its liability to fracture in the construction of the sparking plug.

The defendant's sparking plug consists of an inner tube of mica surrounded by the mica washers. Dow and Jacobson, one of the patentees, testify that Dow, in the spring of 1900, before the application for the patent in suit, suggested to Jacobson the making of a sparking plug by wrapping a thin layer of mica around the spindle, and putting washers on the outside. Jacobson then thought this impractical. Dow testifies to making several plugs of this character, and is corroborated by Delano and Kelly. This was some time in September, 1900. W. T. Marsh, a manufacturer of motor cycles, testifies to seeing plugs of such construction at the defendant company's office in Boston soon after October 5, 1900, and to using two of such plugs on a motor cycle at about that time. The complainants criticise the testimony of Jacobson, and invoke the doctrine of estoppel; but the criticism is based upon an assumption that the making of a sparking plug consisting of a glass inner tube, and mica washers on the outside, was in fact the invention of a sparking plug consisting of an inner mica tube surrounded by mica washers; and the objection of estoppel by the application oath disappears when we take into consideration the admitted fact that the applicants, at the time of the filing of their application, December 18, 1900, by their own confession, had tried and failed to make a plug with an inner tube of mica. In view of what had been done by the complainants, they were hardly entitled, at the date of their application, to include under the term "nonporous vitreous material, preferably glass," mica, which they had been unable to apply. There was no novelty in the conception of two insulations, one axial and one radial, and there was room only for mere details of construction and choice of material. Upon the proofs, Dow clearly was the first to make a sparking tube of mica, and does not use anything invented by the complainants. The claims are also much broader than would be allowable, even were it proved that the patentees had been, in fact, the first to make a plug with an inner mica tube surrounded by mica washers, and are objectionable under the doctrine of the Incandescent Lamp Case, 159 U. S. 465, 476, 16 Sup. Ct. 75, 40 L. Ed. 221.

The bill will be dismissed.

FRANKLIN & CO. v. ILLINOIS MOULDING CO. et al
(Circuit Court, N. D. Illinois, N. D. February 23, 1904.)

No. 26,358.

1. PATENTS—EFFECT OF SURRENDER FOR REISSUE.

A patentee cannot claim rights under a patent which he has surrendered to obtain a reissue.

2. SAME—REISSUE—SCOPE.

A reissue patent must be for the same invention as the original patent, and cannot include a feature which was withdrawn on the original application to meet a requirement of the Patent Office, or in the rejection of which by the Patent Office the applicant acquiesced.

3. SAME—VALIDITY OF REISSUE—MACHINE FOR ORNAMENTS PICTURE FRAMES.

The Adams second reissue patent, No. 11,980 (original No. 642,059), for a machine for mounting ornamental composition directly upon circular picture frames, claims 11 to 18, inclusive, are void as covering matters not included in the original patent.

In Equity. Suit for infringement of patents.

W. R. Rummeler, for plaintiff.

Chas. G. Page, for defendants.

KOHLSAAT, District Judge. Complainant brings this suit to restrain infringement of surrendered Adams patent No. 642,059 for a "machine for mounting ornamental composition directly upon circular picture frames," granted January 30, 1900, and applied for November 18, 1898; also a surrendered reissue thereof granted on October 28, 1901, and a second reissue thereof on April 8, 1902. Complainant cannot claim rights under the surrendered patent and first reissue. *Reedy v. Scott*, 10 Am. & Eng. Pat. Cases, 133; *Peck v. Collins*, 103 U. S. 660, 26 L. Ed. 512. Complainant appears to concede this rule, and confines the relief sought to claims 11 to 18, inclusive, of the second reissue patent No. 11,980, aforesaid.

The original patent was granted after considerable amendment required by the Patent Office, and calls for, among other things, two pivotally mounted guides, one projecting from the central portion of each crosspiece, "which serve to limit the lateral movement of the picture frame." The specifications (lines 25 to 39) read as follows, viz.: "A guide or stop, irregular, or even an ordinary oval picture frame, would not be sufficient to serve as a guide in the hands of a skilled workman. Two guides or stops placed substantially on line with and above the axial center of large feed roller, D, after many experiments, attain the very highest results in practice in covering with composition both round and long oval frames," etc. In the argument before the examiner it is stated: "The two roller guides or stops are absolutely necessary, and it is absolutely necessary that they be disposed as in the applicant's machine, for the reasons already stated in the amendment." These changes and declarations were brought out by the examiner's references to the Groble patent, No. 430,576, and the British patent to Huppertz, No. 7,163 (1891). From a comparison of these patents with the proceedings in the Patent Office as shown by the file wrapper,

¶ 1. See Patents, vol. 38, Cent. Dig. § 204.

and with the claims of the original patent, defendants' expert testifies that the only difference between said original patent and said Groble patent lay in the difference between the two roller guides of the complainant's original patent, located in front of and behind the rolls and in the same vertical plane therewith, and Groble's two guides, which were located slightly at one side of his rolls, and that even this difference was still further reduced by the citation by the Patent Office of the said Huppertz patent. It should be noted here that in Adams' second amendment to his original application he provided, in claim one thereof, for "a stop adjacent to the wheel and in a line with the axis of the shaft." This claim was rejected by the examiner as describing an inoperative device. The examiner bases his rejection thereof in part upon the citation above set out from argument of Adams' counsel on the application for his first amendment. In this action the applicant acquiesced.

On October 22, 1901, said original patent was surrendered, and re-issued letters patent numbered 11,940 were granted to Samuel Franklin, as assignee of Adams. This reissue patent embraces ten claims, all of which proceed upon the use of two guides. This, it will be seen, transpired about 22 months subsequent to the granting of the original patent. Subsequently, and on April 8, 1902, Franklin surrendered said first reissued patent, and was granted a second reissue patent, No. 11,980, as aforesaid, embracing 18 claims, of which claims 11 to 18, inclusive, are now involved. In these 8 claims complainant, for the first time, sets out a single guide, in language which would seem to cover defendants' device.

There are other matters sought to be included in the reissue, but it seems important to first dispose of the bill as relating to the question of guides. The device employed by the defendant was first used by the corporation defendant in its factory at Chicago, March 8, 1900, or a little more than a month after the granting of complainant's said first patent, and was therefore in use by said defendant two years and one month prior to the second reissue aforesaid, and prior to complainant's first assertion of a claim to be the patentee thereof.

The main defenses urged are (1) that the device is old in the prior art; (2) that it was not involved in the original patent; (3) that complainant is estopped by laches.

These grounds of defense will be considered only with reference to the matter of guides. The prior art relied on by the defendant is embraced practically within the claims of the above-named Groble-Huppertz patents and of the Brausil patent. In his communication to Adams of December 20, 1898, the commissioner of patents sends to Adams the finding of the examiner, in which he states that Adams' assertion that frames have heretofore been ornamented "by hand" must be modified in view of the prior art, citing the Groble and Huppertz patents, and that by the same test the original claims are wholly devoid of patentable novelty. Therefore the claims were rejected. In a like communication of June 26, 1899, the examiner is quoted as follows, viz.:

"Case considered as amended on the 15th inst. The claim is held to lack patentable novelty, in view of patents already of record in the case. The only

appreciable difference between applicant's construction and that shown in the reference resides in the fact that his guides or stops are revoluble on their vertical axis, while those in the Groble construction do not revolve. This feature of the revolubility of the said guide is, however, not only not embraced in the claim, but applicant himself admits that the guides may be made stationary and with rounded faces, which is exactly the form in Groble. Besides all this, the vertically disposed and revoluble guide roller is clearly shown in the British patent to Huppertz, cited. Hence there can be no excuse of originality or novelty in applicant's construction. The claim must be rejected on references of record and for reasons given."

As before stated, all the citations and rejections of the Patent Office were acquiesced in by Adams. Comparing the claims first presented and those finally allowed, it is difficult to see what change was made to effect a change in the mind of the examiner.

However, from an examination of the Groble-Huppertz and Brausil patents, I can discover no anticipation of the two guides of the Adams patent located in alignment with the rollers. The Groble patent shows comparatively long raised guides, located considerably out of such alignment, and on one side of the rollers. The Huppertz device shows one stop or guide located on the outside of the frame to be ornamented, corresponding, generally speaking, to complainant's outer guide. The said Brausil patent, No. 590,200, combines its guide and feeding roller in one, and the action of the disk or table in revolving tends to carry the frame out of position for moulding thereon continuously. If practicable at all, it would seem to require that it be directed by hand in order to accomplish the work. At any rate, I see nothing in any of said cited patents which, properly construed, anticipates the original Adams patent.

2. Was the guide provision of the said claims 11 to 18 of the second reissue patent comprehended in the original patent? A reissue patent must be for the same invention as the original. Walker on Patents (3d Ed.) § 233. In *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 99, 8 Sup. Ct. 38, 31 L. Ed. 100, it is stated that the term "same invention" includes "whatever invention was described in the original letters patent, and appears therein to have been intended to be secured thereby." This statement is reaffirmed in a number of cases by the Supreme Court.

In *Dobson v. Lees*, 137 U. S. 258, 11 Sup. Ct. 71, 34 L. Ed. 652, the court says:

"Hence the reissue cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted. Acquiescence in the rejection of a claim, its withdrawal by amendment, either to save the application or to escape an interference, the acceptance of a patent containing limitations imposed by the patent office, which narrows the scope of the invention as at first described and claimed, are instances of such omission."

As above set out, complainant's assignor distinctly waived all claim to the single guide. Complainant claims and introduces proof to show that this was done through mistake. But a mistake as to the meaning of a disclaimer, limiting the scope of a patent, which is deliberately made to meet a requirement of the Patent Office, and which does meet such requirement, and thereby avoids an interference, is not a mistake or inadvertence, within the meaning of the statute, which may be

corrected by reissue with such disclaimer omitted. *Westinghouse, etc., Co. v. Stanley, etc., Mfg. Co.* (C. C.) 115 Fed. 810.

Nor am I able to see how the substance of said reissue, claims 11 to 18, was logically or actually embraced in the original patent. The purpose of Adams' two guides, as set out in the specifications, is "to limit the lateral movement of the picture frame," and, "by locating the guides just far enough apart to permit the sides of the frame to pass, they will assist in guiding the frame by the slight frictional contact caused thereby." This also appears from the several disclaimers above cited, and lines 30 to 38 of the specifications, claiming the highest results from two guides. Under all the facts of this case, it seems clear that the second reissue, claims 11 to 18, aforesaid, are not proper matter for a reissue patent.

3. In view of the foregoing, it is not necessary to pass upon the question of laches. However, bearing in mind the several rulings of the examiner, the acquiescence therein, and the further fact that defendant began the use of the machines in suit, having one guide more than two years prior to the date of the reissue patent No. 11,980, and in the absence of any evidence of fraud or intention to take advantage of complainant in the premises, I am of the opinion that complainant was guilty of such laches as will estop it from proceeding herein against defendant corporations. *Hoskin v. Fisher*, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759.

There is no case made against the other defendants, and as to them the bill would have to be dismissed in any event.

There are several other features of construction involved, such as supporting devices, tables, etc., but, on a careful consideration of all the evidence, I am satisfied the matter of guides constitutes the substance of the patent in suit.

The bill will therefore be dismissed for want of equity.

McKNIGHT v. METAL VOLATILIZATION CO. et al.
(Circuit Court, E. D. Pennsylvania. January 28, 1904.)

No. 41.

1. PATENTS—REMEDY IN EQUITY FOR REFUSAL—AMENDMENT OF STATUTE.

Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], gave an applicant for a patent a remedy by bill in equity in a Circuit Court whenever his application had been refused by the Commissioner of Patents in interference cases, or by the Supreme Court of the District of Columbia in *ex parte* cases; their decisions being final, so far as the Patent Office was concerned, in such cases respectively. Act Feb. 9, 1893, c. 74, 27 Stat. 434, creating the Court of Appeals for the District of Columbia, transferred the appellate jurisdiction in patent cases to such court, and also provided for an appeal thereto from the decision of the commissioner in interference cases, repealing all acts and parts of acts inconsistent therewith. *Held*, that such act did not repeal section 4915 so far as related to the remedy in equity in interference cases, its only effect being to require the applicant to exhaust his remedy in the direct proceedings by an appeal from the decision of the commissioner before being entitled to proceed in equity.

2. SAME—JURISDICTION.

An applicant for a patent, against whom adverse decisions have been rendered in interference proceedings by the examiners and Commissioner

of the Patent Office and by the Court of Appeals of the District of Columbia on appeal, whose decision governs the further proceedings in the case in the Patent Office, may maintain a bill in equity in a Circuit Court without waiting for the formal action of the Patent Office refusing his application.

In Equity. Suit to compel issuance of patent. On plea to jurisdiction.

Joshua Pusey, for complainant.

A. B. Stoughton, for respondents.

J. B. McPHERSON, District Judge. Before the 3d day of April, 1893, upon which date Act Feb. 9, 1893, c. 74, 27 Stat. 434, 2 Supp. Rev. St. 78, creating a Court of Appeals for the District of Columbia, took effect, the practice concerning appeals in the Patent Office was regulated by sections 4909 to 4914, inclusive, of the Revised Statutes [U. S. Comp. St. 1901, pp. 3390-3392]. These sections are as follows:

"Sec. 4909. Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners-in-chief; having once paid the fee for such appeal.

"Sec. 4910. If such party is dissatisfied with the decision of the examiners-in-chief, he may, on payment of the fee prescribed, appeal to the commissioner in person.

"Sec. 4911. If such party, except a party to an interference, is dissatisfied with the decision of the commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc.

"Sec. 4912. When an appeal is taken to the Supreme Court of the District of Columbia, the appellant shall give notice thereof to the commissioner, and file in the Patent Office within such time as the commissioner shall appoint, his reasons of appeal, specifically set forth in writing.

"Sec. 4913. The court shall, before hearing such appeal, give notice to the commissioner of the time and place of the hearing, and on receiving such notice the commissioner shall give notice of such time and place, in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the commissioner shall furnish the court with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. And at the request of any party interested, or of the court, the commissioner and the examiners may be examined under oath, in explanation of the principles of the thing for which a patent is demanded.

"Sec. 4914. The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question."

An examination of these sections discloses that in the case of every application for a patent, whether the question of interference arose or not, an appeal lay from the decision of the primary examiner, or of the examiner in charge of interferences, to the board of examiners in chief, and from this board to the Commissioner of Patents himself. At this

point the right of appeal ceased in the case of a disputed interference (*Butler v. Shaw* [C. C.] 21 Fed. 321); but the applicant for a patent in an *ex parte* case, if dissatisfied with the decision of the commissioner, might appeal to the Supreme Court of the District of Columbia sitting in banc. That court was required to hear the case anew, but was confined to the evidence produced before the commissioner, and had no power to take additional testimony. The decision of the court was to govern the further proceedings in the case. It is apparent, therefore, that section 4915 [U. S. Comp. St. 1901, p. 3392], which declares that, "whenever a patent on application is refused, either by the Commissioner of Patents, or by the Supreme Court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity," etc., must be construed in the light of the preceding sections, and must be understood to refer to a refusal by the commissioner in cases of interference, and to a refusal by the Supreme Court of the District of Columbia in cases belonging to the other class. It was distinctly decided by the Supreme Court of the District of Columbia that the remedy by bill in equity in the Circuit Court could not be appealed to in *ex parte* cases until the applicant had exhausted the remedies given to him by the sections already referred to.

"After these respective remedies have been exhausted, the patent law, in its supreme indulgence to the claims of investors, by section 4915 of the Revised Statutes, allows a further proceeding by way of bill in equity." *Kirk v. Commissioner*, 37 O. G. 451.

An appeal to the Supreme Court of the District in any other case than a case of interference was therefore compulsory, if it was desired to resort to the equity jurisdiction of the Circuit Court. As the commissioner himself was the highest court of appeal in disputes about interference, his refusal referred to in section 4915 must of necessity mean a refusal in interference cases, and in those alone.

The act of 1893, which repealed all acts and parts of acts inconsistent therewith, made two changes in the practice. It established a Court of Appeals for the District of Columbia, and by section 9 transferred to that court "the determination of appeals from the decision of the Commissioner of Patents now vested in the general term of the Supreme Court of the District of Columbia." This, of course, could only refer to appeals in *ex parte* cases, for the right to appeal from the decision of the commissioner in interference cases did not yet exist; but the same section immediately went on to remedy this defect, if defect it was, by providing, "And in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals." The effect of this section, therefore, upon sections 4911 to 4914, inclusive, was to substitute the Court of Appeals for the Supreme Court of the District, wherever the Supreme Court had been referred to, and to add the right of appeal to the newly created court in cases of interference. Its effect upon section 4915 was to substitute the Court of Appeals for the Supreme Court of the District, and practically to strike out the words "either by the Commissioner of Patents," for his decision was now no longer final even in interference cases, and there was apparently no reason why the rule of *Kirk v. Commissioner* should not be held to apply to such cases also, and to compel

the applicant to exhaust his new remedy as well as the old. It was so decided not long afterward by Judge Wales, of this circuit, in *Smith v. Muller* (C. C.) 75 Fed. 612, and in accordance with these two decisions it is settled that every applicant in either class of cases who may be dissatisfied with the decision of the commissioner is obliged to pursue his remedy in the court of the District of Columbia. If he is successful there, he will have no occasion to invoke the remedy by bill in equity in a Circuit Court, but, if the Court of Appeals decides against him, he is then entitled to bring his action in the appropriate circuit under section 4915. It seems to me that there is no difficulty about this construction, and that the very capable argument of the defendants' counsel to the effect that the act of 1893 has repealed section 4915 so far as to take away the remedy in equity in cases of interference cannot be allowed to prevail. The point has been expressly decided against the repeal in *Bernardin v. Northall* (C. C.) 77 Fed. 852, and I shall not attempt to add anything to Judge Baker's satisfactory opinion in that case. I see no irreconcilable conflict between the two statutes, and, indeed, upon the construction suggested there is not even an apparent conflict.

The facts of the present controversy are briefly these: An interference was declared in the Patent Office between the complainant and two other persons, who afterwards assigned their interest to the Metal Volatilization Company; and this dispute was decided against the complainant by the acting examiner in charge of interferences by the board of examiners in chief, by the Commissioner of Patents, and by the Court of Appeals for the District of Columbia. No further step has been taken by the Patent Office, and the remaining question raised by the plea is whether this court has any jurisdiction of the pending bill in view of the fact that the complainant's application has not yet been formally refused, and that a patent has not yet been actually granted to the defendant company. The complainant's position is that the proceedings thus far taken are, in effect, a refusal of the patent, and it seems to me that this position is correct. It can hardly be supposed that, after the question has been four times examined and four times decided against the complainant, a change of opinion in the Patent Office is likely to take place. Moreover, since the decision of the Court of Appeals is to govern the further proceedings in the case, as provided by section 4914, no change of opinion in the Patent Office could affect the decree of the court, and it has not been suggested that any application has been made to that tribunal for a hearing. I think, therefore, it would be sticking in the bark to insist upon the formality of a refusal, which has in essence been already made, for this would simply mean that the complainant must begin over again after a few superfluous words have been entered upon the records of the Patent Office.

The plea to the jurisdiction is overruled, and the defendants are directed to answer the bill within 20 days from this date.

NUTTER et al v. MOSSBERG et al.

(Circuit Court, D. Massachusetts. February 25, 1904.)

No. 1,288.

1. PATENTS—INFRINGEMENT—BICYCLE BELLS.

The Ericson patent, No. 491,012, for a bicycle bell, was not anticipated, shows patentable invention, and is valid. Claims 1, 2, 3, and 4 also held infringed by the bell of the Mossberg & Brink patent, No. 622,159.

In Equity. Suit for infringement of letters patent No. 491,012 for a bicycle bell granted to Lewis E. Ericson, January 31, 1893. On supplemental bill filed by defendants. For former opinion, see 116 Fed. 488.

James E. Maynadier and George A. Rockwell, for complainants.

William R. Tillinghast, Benjamin Phillips, and Alfred H. Hildreth, for defendants.

BROWN, District Judge. The opinion previously filed in this case (116 Fed. 488) held that claims 1, 2, 3, and 4 of the Ericson patent, No. 491,012, were valid and were infringed. By supplemental bill the prior art was enlarged by the introduction of the Hill & Tolman bell. In this bell the striking mechanism is located inside the gong, and certain advantages—compactness, simplicity, and durability—are secured. The very close analysis which defendants' counsel have made of the claims of the Ericson patent, and of the various mechanisms, serves to confirm the opinion that Ericson made an invention of merit, since, after all that has been so carefully shown, it still appears that Ericson did what had not been done before, and that what he did involved invention and constituted an improvement in the art. It also appears that his claims, distinctly considered, are fair and valid, and are infringed.

The Hill & Tolman bell is a complete bell attached to a lever pivoted outside the bell. One end of the lever is operated by the hand; the other is expanded into a circular disk or plate, and fits closely within the rim of the gong without touching the same. The striking mechanism is located within the gong, less than half the operating roller being the only portion of the striking mechanism which projects outside the gong; and it is true, as counsel say, that the bell as a whole is compact, and the operating parts are well protected from injury and from dust and moisture. While the exhibit shows a long lever arm which detracts from the compactness, it is obvious that this might be shortened, and the bell be operated by a cord, without substantial change. Were this arm shortened, it would still be necessary to pivot the entire bell outside the rim of the gong, and to move the bell bodily to and from the tire, in order to operate the striking mechanism by contact of the friction roll with the tire. The bell thus falls into the class of bells referred to in the opinion of the Circuit Court of Appeals of this circuit in *Nutter v. Brown*, 98 Fed. 892, 893, 39 C. C. A. 332:

"The prior art in this class of bells, as the complainants maintain, put the movable point so as to oscillate the whole of the bell; the complainants changed it so that only the striking mechanism oscillated."

It is said upon the defendants' brief:

"The question now to be decided by this court is whether or not it constitutes invention to transfer this pivotal point from a position without the rim of the gong to a position within the same and at or near the center, and whether or not the claims of the Ericson patent can be construed to cover this arrangement."

What Ericson did, however, obviously was more than to transfer a pivotal point from a position without the rim of the gong to a position within the same; for, assuming that Ericson had before him the Hill & Tolman bell, an advance that he made was to dispense with Hill & Tolman's lever, and to convert the disk-shaped end of Hill & Tolman's lever into a rotary lever, which did not bear the weight of the bell and move the bell bodily, but merely rotated or oscillated the striking mechanism within the bell. He thus relieved the lever of the weight of the bell, and, by pivoting his lever centrally with the bell, secured the desired effect in an ingenious and novel way.

In the previous opinion reference was made to the fact that in the defendants' device the gong partakes of the rotary movement of the lever, and it was held that this was immaterial. I still adhere to this view. The Ericson bell does not move out of its own location. It is held stationary, in a fixed position, and would still be fixed and stationary, within the fair meaning of these terms, though the gong were made to perform a revolution or a partial revolution within its fixed location. The Hill & Tolman bell has a bodily movement through the air, like that of a pendulum. One of the defendants' exhibits has a gong which partakes of the rotary movement of the lever, which we have held to be substantially the lever of Ericson. It revolves on its own location; it does not, like the Hill & Tolman bell, move bodily. It makes no difference to the operation of the Ericson bell whether the gong moves with the lever or whether it does not. The important thing is the lever movement, and this the defendants' bell has, despite the immaterial movement of the gong with the lever. Another exhibit of the defendants shows different pivots for the gong and for the lever, and there results a slight bodily movement in addition to the rotary movement of the bell; but this is a trifling variation, which effects no substantial change from Ericson. The movement of the lever in this exhibit is not such a movement as is suggested by anything else in the prior art, and is such a movement as is suggested by Ericson. These matters need not be considered further. They are not substantial, either mechanically or verbally.

In claim 1 of the Ericson patent occur the words, "an oscillatory plate or disk mounted to turn in the rear of the gong." There is no part in the Hill & Tolman bell which is fairly within this language, which well describes Ericson's lever; and, even if this language were not sufficient to describe Ericson's novel lever, yet, when construed in connection with the specification, it clearly distinguishes his device from Hill & Tolman's. Furthermore, the Ericson patent contains a very clear description of the thing which Ericson made, and the thing which he made is a very different thing from what Hill & Tolman made.

Claim 2 is of greater breadth, and the specific location of the plate or disk is not set forth in terms; but even this claim, construed in

connection with the specification and drawings, is not invalid for excessive breadth. The words, "a gong carried by the frame of a bicycle or other velocipede," are not fairly applicable to a gong carried upon one end of a lever attached to the frame of a bicycle, as in Hill & Tolman. These words refer to the lack of bodily movement of the gong of Ericson's bell, and to its confinement to its own location, and distinguish the bell from that of Hill & Tolman.

In claim 3 occur the words, "an oscillatory plate or disk fitted and adapted to turn freely in the inner side of the gong." These words are inapplicable to the lever of Hill & Tolman, and are applicable to the defendants' device. If the Ericson bell were changed by placing the attachment pin for the cord at the edge of the plate, and by putting the disk far enough from the rim of the gong to enable the pin to turn freely, these words would still be applicable, and they are applicable to the defendants' structure. Such a change is an immaterial variation.

In claim 4 are the words, "a plate or disk centrally pivoted on the outer end of the bracket, and fitted and adapted to turn freely in the inner side of the gong." Centrally pivoted does not mean, necessarily, pivoted in the exact center, upon a literal reading. The word "central" is defined as "placed at or near the center."

The German patent to Kuhrt & Schilling, No. 43,908, is again referred to. It is said that the Hill & Tolman bell was introduced to remove the contention that Ericson is entitled to credit for the improvement of placing the striking mechanism within the gong. But, even if it be assumed that Ericson had before him both the German bell and the Hill & Tolman bell, a mere aggregation of their respective features would not have produced his bell. Ericson's bell, though it possesses features shown in the Hill & Tolman bell, and features resembling in a broad mechanical sense those of the German bell, is nevertheless a new combination possessing the advantages of both, and operating by means not shown in either. It is a device more compact and more practical than either. Upon a somewhat extended acquaintance with this bell from this and previous hearings, I am inclined to appreciate the cleverness and novelty of Ericson's arrangement, rather than to regard him as one who merely borrowed from the prior art.

I have considered carefully the language of the Circuit Court of Appeals in *Nutter v. Brown*, 98 Fed. 892, 39 C. C. A. 332, referring to the necessity of proof to show that a change of a movable point is more than a mere detail of form, convenience, or fancy. To relieve the lever of the weight of the bell, to place the lever substantially within the gong, to put the weight of the gong on the support which carries the lever, to confine the bell to a fixed location, where it is well balanced, are substantial features which have been appropriated by the defendants, as appears by reference to their patent No. 622,159, to Mossberg & Brink.

Certain suggestions are made upon the complainants' brief as to the orders to be entered in this case and as to costs. These matters may be reserved, to be considered on motion for the entry of a decree. The defendants will take nothing by their supplemental bill.

A draft decree may be presented accordingly.

WINDLE v. PARKS & WOOLSON MACH. CO.

(Circuit Court, D. Vermont. March 3, 1904.)

1. PATENTS—CLOTH-MEASURING MACHINES—VALIDITY—ANTICIPATION.

Patent No. 507,300, for an improvement in cloth-measuring machines, consisting of a device for varying the length of the circumference of the measuring cylinders in order to allow for the elasticity of cloth, held valid, and not anticipated by prior patents and structures showing divided cylinder rims.

2. SAME—INFRINGEMENT.

Patent No. 507,300, for an improvement in cloth-measuring machines, to increase the circumference of the cylinders, to allow for difference in the elasticity of the cloth, and containing split rings, combined with an expanding device, and a rotating shaft, having a series of spiders thereon, was infringed by another machine using a similar split ring between the rims of the ends of the cylinders and their measuring circumference for the same purpose; the only difference being that the mode of separating the parts of the split rings was by means of screws, instead of by cams, as shown in the patent, and the use of a spring to control the expansion.

In Equity.

Nathan Heard, for plaintiff.

George N. Goddard, for defendant.

WHEELER, District Judge. This suit rests upon patent No. 507,300, dated October 24, 1893, and granted to the plaintiff, for improvements in cloth-measuring machines that use the surfaces of cylinders as standards. The differences in the firmness and elasticity of cloth require varying of the length of the circumference of the measuring cylinders in such machines as standards to secure practical accuracy. This had been sought by attempting to open and close the rims of the carrying ends of the cylinders to expand or contract their measuring circumferences in proportion to the stretch of the cloth. The necessary rigidity of the arms and rims appears to have prevented proper expansion and contraction of the circumference by this means. The plaintiff appears to have invented a split ring between the rigid rims and the measuring circumferences, with means to expand and contract that, and thereby lengthen or shorten the circumferences according to the cloth, independently of the length of the rims. That invention is the subject of this patent. The claims are:

"(1) In a cloth-measuring machine, a rotating shaft, and a cylinder having the rings of its spiders or heads split, combined with an expanding device for said rings or heads, whereby the effective length of the circumference of the cylinder may be varied to compensate for the elasticity of the cloth being measured, substantially as described.

"(2) A rotating shaft, having a series of spiders thereon, each having a ring split from one to its other edge to thus form ends, combined with an expanding device, a portion of which is located between the opposite ends of each ring, and devices to move said expanding device and confine it in its adjusted position, to operate substantially as described."

Prior patents and structures showing divided rims for accomplishing this purpose have been set up and proved as anticipations or limitations of this invention as patented, but they were not successfully operative. The difficulty was left that this invention of the variable split ring, as to length, operating between the rim and circumference, obviated. The patent appears to be valid for this improvement.

The defendant uses such a split ring in such a machine between the rims of the ends of the cylinders and their measuring circumferences for the same purpose of varying the length of the standard of measure in proportion to the quality of the cloth. The mode of separating the parts of the split ring is by screws, instead of by the cams shown in the patent as means for that purpose, but these particular means are not the subject of the patent. And the defendant has springs between the rim and split ring for controlling the expansion and contraction, but they do not appear to affect the operation of the split ring, as such, in its place. So the defendant appears by this use to infringe the patent.

Decree for plaintiff.

INTERSTATE COMMERCE COMMISSION V. CHESAPEAKE & OHIO RY. CO. et al.

(Circuit Court, W. D. Virginia. February 19, 1904.)

1. CARRIERS—INTERSTATE COMMERCE ACT.

Where a carrier owes an ascertained sum of money, which is a legally enforceable debt, it is not a violation of the interstate commerce act for it to pay such debt by carriage done for the creditor at its legally established rates.

2. SAME—UNJUST DISCRIMINATION—SALE AND CARRIAGE OF COMMODITY AT A LOSS.

It is not a violation of section 2 of the interstate commerce act for an interstate carrier to buy a commodity, and then sell the same, to be transported over its own line, at a price less than the aggregate of the cost, expense items, and its own published freight rates, unless such transaction was a mere device to cover an intentional giving of a less rate for carriage to some than to others; there being no legal ground for assuming that the loss was sustained by it as a carrier, rather than as a dealer.

3. SAME—UNDUE PREFERENCE OR ADVANTAGE.

Defendant railroad company, an interstate carrier, contracted to furnish to another railroad company not to exceed 2,000,000 tons of coal from its line at a fixed price; the same to be delivered to the purchaser at designated ports on the Atlantic, as required by it, each month, during a term of five years. To fulfill the contract, defendant was to buy the coal from mines along its line, transport it to the seaboard over its own line, forward by water, and discharge into the bins of the purchaser. In performing the contract from the beginning, the cost of the coal to defendant, added to the cost of transportation and discharge beyond its own line, and the freight over its own line at the published rates, exceeded the price received by a substantial sum, averaging 23 cents per ton. It was shown that, during the continuance of the contract, other coal was shipped from the same mines over defendant's road, and forwarded by water to dealers or consumers at the same ports where defendant made deliveries under its contract. *Held*, that the performance of the contract operated to give the purchaser an undue preference or advantage, or to subject some one or more of the parties concerned in the other sales and shipments to undue prejudice or disadvantage, in violation of section 3 of the interstate commerce act, and the contract was therefore illegal and unenforceable.

4. SAME.

Such contract being illegal, a claim by the purchaser for damages for its breach, by the failure of defendant to furnish the quantity of coal called for thereunder, was also illegal and unenforceable; and a further sale and shipment of coal by defendant in settlement of such claim at the contract price, which was at the time much less than the aggregate of the

cost items and defendant's published freight rates, subjected others concerned with the shipment of coal between the same points to undue prejudice or disadvantage, in violation of section 3 of the interstate commerce act, and the further performance of an agreement for such sale and shipment will be enjoined.

In Equity. Suit for injunction.

Wm. A. Glasgow, Jr., and Thos. L. Moore, Dist. Atty., for complainant.

Harrison & Long, for C. & O. Ry. Co.

Jno. W. Griggs and Daniel & Harper, for N. Y., N. H. & H. R. Co.

McDOWELL, District Judge. This case arises from a bill filed by the Interstate Commerce Commission, praying an injunction. In brief, the bill alleges that the Chesapeake & Ohio Railway Company—to be hereinafter styled the C. & O.—is carrying and intends to continue to carry coal at less than its published tariff rates for the New York, New Haven & Hartford Railroad Company, and is committing an illegal discrimination in favor of that company. Both defendants have answered, denying any violation of the interstate commerce act (Act Feb. 4, 1887, c. 104, §§ 2, 6, 24 Stat. 379, 380 [U. S. Comp. St. 1901, pp. 3155, 3156]).

On December 3, 1896, the following agreement was made. The body of the paper is partly printed and partly typewritten, and in the following copy the typewritten portions are in italics:

"Form E. 27.

"Contract made between the *Chesapeake and Ohio Ry. Co.* of and The New York, New Haven and Hartford Railroad Company.

"Said *Chesapeake & Ohio Railway Co.* for the consideration herein-after mentioned hereby agrees to furnish to said Railroad Company *not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1st, 1902. without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.*

"And said *Chesapeake & Ohio Railway Company* further agrees that all said *Bituminous Coal* shall be of the best quality first-class in every respect, and satisfactory to said Railroad Company and said *Railway Company* has the right to terminate this contract at any time if said *bituminous coal* be of poor quality, or if its delivery be unnecessarily delayed

"And said *Chesapeake & Ohio Railway Company* further agrees to deliver all said *bituminous coal* to said Railroad Company in its bins at such ports upon its line as required by the monthly requisitions of its Purchasing Agent.

"In consideration of the faithful performance by the said *Chesapeake & Ohio Ry. Co.* of all its agreements herein contained, said Railroad Company agrees to pay for said *bituminous coal* at the rate of two and seventy-five one-hundredths dollars per gross ton New Haven basis. Settlement to be made Monthly

"Said *Railway Co.* has the right to cancel any and all portions of said quantity of *bituminous coal* remaining undelivered on July 1st, 1902.

"Witness the names of the parties hereto this the third day of Dec. 1896.

"[Signed]

Chesapeake & Ohio Ry. Co.

"By M. E. Ingalls, Pres't.

"[Signed]

The New York, New Haven & Hartford Railroad Company,

"By C. S. Mellen,

"Second Vice President.

"For value received, I hereby guarantee that the *Chesapeake & Ohio Ry. Co.* shall not fail to deliver coal on account of strikes.

"J. Pierpont Morgan."

Under this contract the C. & O. delivered between July, 1897, and July, 1902, much the greater part of the 2,000,000 tons, but at the expiration of the time fixed in the contract there were still some 59,966 tons not delivered. Owing to a strike of the coal miners of both the New River and Kanawha fields then in force, the C. & O. was unable to supply the shortage, and the New Haven Company purchased the requisite amount where it could, and later presented a bill to the C. & O. of something over \$103,000 for the excess of the cost of the coal thus purchased over the price agreed upon in the contract above set out.

In April, 1903, a verbal agreement was made between the two companies to the effect that the C. & O., in lieu of paying this bill of damages, would compromise the claim by delivering the 59,966 tons of coal at the price named in the contract of 1896. At the time of this last agreement the cost of the coal at the mines and the cost of vessel freight were much higher than in 1896. The following table (No. 1) shows the time of shipment, number of tons delivered under this verbal agreement, the cost of the coal at the mines, the water freights, discharging costs, insurance, and the price received for the coal (which is somewhat more than \$2.75 per ton, as deliveries were made at ports other than New Haven). During this period the published tariff rate of the C. & O. on such coal was \$1.45 per ton from the Kanawha field, in West Virginia, where this coal was obtained, to Newport News, Va. Table No. 2 shows the loss to the C. & O. on these deliveries of 1903.

Table No. 1.

Date.	Tons Delivered.	Cost at Mines.	Water Freight.	Discharging.	Insurance.	Price Rec'd.	C. & O. Freight at \$1.45
1903 May	17627 tons & 2160 lbs.	\$22,563.79	\$16,429.60	\$4,107.66	\$176.23	\$ 49,455.04	\$25,560.45
" June	16141 " & 1870 "	20,861.48	14,042.01	3,722.17	181.43	45,224.63	23,403.66
" July	4309 " & — "	5,515.52	3,878.10	1,077.25	74.35	12,108.29	6,248.05
Totals,	38078 " & 1790 "	\$48,740.79	\$34,349.71	\$8,907.08	\$412.06	\$106,787.96	\$55,214.16

Table No. 2.

Date.	Total Costs Exclusive of C. & O. Freight.	Total Rec'd.	Balance.	Loss to C. & O.
1903 May	\$43,277.33	\$ 49,455.04	\$ 6,177.71	\$19,382.74
" June	38,587.09	45,224.63	6,637.54	16,768.12
" July	10,545.22	12,108.29	1,563.07	4,684.98
Totals,	\$92,409.64	\$106,787.96	\$14,378.32	\$40,835.84

Further deliveries were stopped by the service of a temporary injunction issued on the bill in this case.

The published freight rate of the C. & O. on coal per ton from the New River (West Virginia) field, from which field came all the coal delivered prior to 1903, to Newport News, Va., destined for points beyond the Capes of Virginia, were from March 8, 1899, to January,

1903, as shown by the following table. There is no disagreement as to these rates.

March 8, 1899	\$.90
May 13, 189980
Jan. 17, 190085
Feb. 1, 1900	1.00
April 2, 1900	1.15
April 1, 1901, to Jan. 1903	1.25

There is a disagreement as to the rates in force from July 1, 1897, to March 8, 1899. The complainant contends that the rates applicable to the coal delivered during this period are the local rates—\$2 per ton from July, 1897, to January, 1899, and \$1.55 per ton during January and February, 1899. The C. & O. contends that it had duly established and in force from July 1, 1897, until January 2, 1899, a through rate of \$2.25 per ton; of \$2 per ton on January 2, 1899; and of \$1.75 per ton from January 3, 1899, until March 8, 1899. There is evidence that at least one of the through tariff sheets (C. & O. 5,177) is not on the files of the Interstate Commerce Commission, but there is also testimony that this sheet was duly mailed to the then auditor of the commission. Another objection to this sheet is that it applies, as stated thereon, only to coal destined for New York City. While there is room for doubt as to the proper construction of these through tariffs, it seems to me unnecessary to settle these questions. Conceding, for argument's sake, that the contention of the C. & O. is sound, still the part of the through rate applicable to the C. & O. for carriage from the coal field to Newport News on the coal in question was the difference between the through rate and the (varying) aggregate of the costs of vessel freight, marine insurance (paid by the C. & O.), and the cost of discharging.

To illustrate: In July, 1897, the average cost per ton for vessel freight was	65.1c
Cost of discharging was	22.6
Insurance was	00.8

Total 88.5c

As the through rate was \$2.25 per ton, it follows that the C. & O. freight rate on such coal for that month was \$2.25 minus 88.5 cents, or \$1.365, per ton.

Now, the cost of the coal per ton was	70c
And the average price per ton received from the New Haven Company ..	\$2.845

The cost items, when added, are:

"Water costs" per ton	\$.885
C. & O. freight "	1.365
Cost of coal at mines700

Total per ton	\$2.950
The selling price being	2.845

The average loss per ton was \$.105

As 28,890 tons and 1,140 pounds of coal were shipped during that month, the actual loss was \$3,033.50.

On this basis, upon making the calculation, it appears that there was always a loss to the C. & O. until January, 1899. For January

and February, and from April to and including October, 1899, there was, on the basis most favorable to the defense, a profit. That is, the price received for the coal was in excess of all cost items, including the proper C. & O. freight charge. Since October, 1899, there has always been a loss. Stopping the account at January 1, 1903, the losses exceed the gains by \$301,959.13.

In addition to the foregoing loss, there is another large loss to be considered. In the answer of the C. & O. it is said that by reason of nondeliveries in 1900 and 1901, at which period all deliveries made were made at a loss to the C. & O., the latter became indebted for damages in the sum of \$160,000. This damage claim was compromised by the payment to the New Haven Company of \$130,000.

It is now necessary to consider and determine two disputed points as to the meaning of the contract above set out. It is remarkable that in this brief contract, involving over five and a half millions of dollars, there are at least two serious mistakes, if the contract be construed as contended for by the defendants. Twice the words "Railway Company" are used where, as is insisted, the words "Railroad Company" were intended. As to the first instance, I am inclined to think that the paper should be construed as contended for by the defendants. The clause in question reads: "and said Railway Company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed." It does not appear that the legal advisers of either company inspected this paper when it was executed, and this error may have escaped the attention of the laymen who signed it. To read the paper in this respect as written, and as contended for by counsel for the commission, would give it an extraordinary effect. It would give the C. & O. the right to terminate the contract if the coal to be procured by it should be of "poor quality," or if deliveries to be made by the C. & O. Railway Company are "unnecessarily delayed." I cannot believe that the parties to this paper had in mind deliveries by coal operators to the C. & O. They intended, I think, to refer to deliveries to the New Haven Company at its bins at the different ports. It is true that the contract gave the New Haven Company an option as to the amount of coal, not exceeding the stated limit, it might order. But I think this clause was intended to cover the contingency of an order being made by the New Haven Company, and the coal on delivery being of poor quality, or the deliveries being unduly delayed.

In the later disputed clause, the contract, as written, gives the C. & O. the right to cancel all portions of the quantity remaining undelivered on July 1, 1902. Mr. D. H. Matson says in his affidavit that a clause reading, "Any portion of this tonnage not shipped by ———, on which date this contract will expire, shall be cancelled," or a clause permitting the seller to cancel all coal not delivered within the period provided for upon certain conditions, has been, and is, the usual course of business among dealers in coal. The proper construction of this cancellation clause is a matter of some difficulty. The parties to the contract, prior to the institution of this suit, construed it as giving, not the C. & O., but the New Haven Company, the right to cancel.

The contract as a whole is, I think, an option on the part of the New Haven Company. But I do not think the intent was to make the cancellation clause read so as to give that company the right to cancel deliveries not made prior to July 1, 1902. There was no need for such a clause. The paper only obligated the New Haven Company to pay for such coal as it called for, and as was delivered prior to that date. On the other hand, such being the custom in drawing such contracts, I think the intent was that this clause, standing alone, should be read as it is written. However, this clause must be read in connection with the guaranty. The construction of the two, read together, seems to me to be that the C. & O. need not deliver any tonnage undelivered prior to July 1, 1902, unless the failure to deliver arose from strikes. As strikes caused the nondelivery of the entire tonnage prior to July 1, 1902, I think it proper to construe the contract as the parties construed it, and hold that the cancellation clause did not of itself absolve the C. & O. from the at least apparent obligation to deliver the balance of the coal.

The next question presented for solution is whether or not the C. & O., in the transactions prior to April, 1903, was the vendor of the coal. On this point it is sufficient to say that the evidence leaves no doubt in my mind that the C. & O. was in fact the vendor of the coal. The government's contention to the contrary is wholly unsustained. Therefore we must treat it as a carrier which purchased coal at mines on its road, and delivered it to a purchaser after carrying the coal over its own line, and having it carried and discharged by vessels employed by it.

Inasmuch as no action by the court is asked because of the transactions prior to 1903, the legality of the contract of 1896 is of interest now because on its legality depends the validity of the demand made in April, 1903, by the New Haven Company that the C. & O. pay the bill of damages, of about \$103,000. In the answers of both defendants the justice of this demand is asserted. This bill is alleged to be (and I find no evidence to the contrary) the actual difference between the cost of the coal purchased by the New Haven Company from others, and what would have been the cost to it, had the C. & O. fulfilled the contract of 1896. This demand, therefore, cannot properly be considered an unadjusted or vague and unliquidated claim. The inference to be drawn from *Goodridge v. Union Pacific (C. C.)* 37 Fed. 182, and *Union Pacific v. Goodridge*, 149 U. S. 690, 13 Sup. Ct. 970, 37 L. Ed. 986, is that an adjusted claim, if otherwise valid and enforceable, may be paid by a carrier by hauling for such creditor at a reduced rate; the difference between the schedule rate and the agreed rate being applied as a credit on the claim. While these opinions are obiter as to the question which we are now considering, as it did not arise in the above-mentioned case, still it seems to me that this conclusion is sound. Where a carrier owes a legal, enforceable, and ascertained sum of money, I cannot perceive that the commerce act is violated if the debt be paid by carriage done by the carrier for its creditor at the carrier's legal freight rate.

In view of the conclusion finally reached herein, no discussion is necessary of the contention that the contract of 1896 is void because

ultra vires, or because made in contravention of a certain West Virginia statute forbidding railroad companies to deal in coal. We may concede to the defense that neither of these contentions can be sustained in this case.

We are now brought to consider the validity of the contract of 1896, as affected by the interstate commerce act. In making this contract the C. & O. intended to, and did, in so far as it made deliveries prior to 1903, become the purchaser of the coal. If the commerce act was not violated by the transactions prior to April, 1903, then on that date the C. & O. was, so far as this court can say, legally obligated to pay to the New Haven Company the \$103,000 claimed as damages for failure to make deliveries.

I understand from counsel that the question now presented has never been adjudicated by any federal or state court of this country, and, owing to the many demands on my time, I have not undertaken to make a search of the books. I assume that, were there any adjudications, counsel would have found them. There are two rulings of the Interstate Commerce Commission relied on by the defendants (*Haddock v. Delaware, etc., Co.*, 4 I. C. C. Repts. 296, and *Coxe Bros. v. Lehigh R. Co.*, Id. 535), and another (*Grain Rate Case*, 7 I. C. C. Repts. 33) relied on by the complainant, which I think are sufficiently unlike the case at bar to deprive them of force. But, if not, these rulings are merely persuasive, and their existence does not relieve me of the duty of reaching my own conclusions.

There is no federal statute, so far as I know, which in express terms forbids interstate carriers to become dealers in articles of transport. It is, I think properly, admitted by counsel for C. & O. that in case a carrier becomes a dealer for the purpose of giving its purchaser or any favored person a rebate, such transaction would be obnoxious to the second section of the act. On this point there is no difference of opinion. And in the case at bar I do not find anything which satisfies me that the C. & O., in making the contract of 1896, had any special design to give a rebate to the New Haven Company or to any particular coal operators. In other words, I do not find here that the contract of 1896 was intended as a ruse or device to evade the commerce act. The contract was made at a time of extreme financial depression. It appears to have been an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line, made without thought of violating the commerce act. The second section of the act is directed only at charging to or receiving from some (directly or indirectly) less than is charged to or received from others for services rendered in transporting passengers or property. To arrive at the true intent of a statute, the reasons inducing its enactment, and especially the evils sought to be remedied, are to be considered. But still an intent cannot be found in a statute unless the statute contains apt and sufficient words to express or fairly imply such intent. We are now, therefore (confining ourselves to the second clause for the present), brought to consider this question: Can an interstate carrier buy and then sell articles, to be carried over its own line, at a price less than the aggregate of the cost and expense items and its own published freight rate? Always excepting cases where such dealings are mere devices to cover

an intentional giving of a less rate for carriage to some than to others, it seems to me that this question must be answered in the affirmative, in so far as the second section of the act applies. If, in thus dealing in and carrying such article, the carrier credits its freight account with the published rate, we can only say that it is carrying for its vendee at a too low rate, by saying that a carrier cannot suffer, if it wishes or must, a loss as a dealer. Whether it can, or not, will be considered a little later. If the carrier, under such circumstances, does not on its books credit its freight account with its published rate, and does not charge the loss to an account kept with the article dealt in, or to income, there would be a seeming violation of the second and sixth sections of the act. But this would be at the utmost a technical violation, if it has a right to suffer a loss as a dealer, and it seems to me that it could with difficulty be considered a violation in any sense. The law is not concerned with the carrier's methods of bookkeeping. Where the dealing is not a device to evade the law, and if a carrier can legally suffer a loss as a dealer, it seems to me a matter of no moment that it go through the form of crediting its full freight earnings on the transportation account, and charging the loss on the transaction to an account kept with the article dealt in, or to some other account.

Now, to recur to the proposition that a carrier, acting in good faith, can suffer losses as a dealer without violating the second section of the act: Let us suppose that the C. & O. were to make a contract to deliver New River coal to a purchaser in New England at a price which at the time covered the cost of the coal, its own published freight charges, and all water costs. We will also assume, as we are seeking an illustration where the contract is made in perfect good faith, that neither party to the contract has any reason to suppose that the cost of the coal, or the water costs, will, during the life of the contract, advance. With the contract price equal to all cost items and the carrier's full freight rate, I cannot perceive any ground for assailing the legality of the contract, or of acts done in performing it. When the cost items increase, there is a loss to be suffered by the carrier vendor. To say that this loss is necessarily a loss on carriage, and hence a rebate on freight rates to the purchaser, seems to me to beg the question. A statute which goes no further than to forbid carrying for one at less than the price charged others is not sufficient warrant for holding that a loss suffered by a carrier vendor has to be considered as a loss on carriage. If there were a federal statute forbidding a carrier to become a dealer, or if there were a statute forbidding a carrier dealer to sell articles of transport at less than the aggregate of all cost items and its own published freight rate, or if there were a statute providing that in such cases all losses must be treated as losses on carriage, the way would be clear. But, with the law as it is, in so far as the second section of the act goes, I fail to find authority for saying that loss under such a contract must necessarily be treated as a loss on carriage. Failing to find so far any law forbidding a carrier dealer to suffer a loss as dealer, we are met always with the unanswerable proposition that the loss under such a contract can just as properly be treated as a loss suffered as dealer as it can as a loss on carriage.

It is true that at the very inception of the contract of 1896 the cost

items, and the lowest rate that seems to me possible to be considered as the legal freight rate of the C. & O., were greater than the contract price. But unless this showed the contract to be a device to evade the second section, this fact is, to my mind, of no importance. If, for instance, a carrier has purchased a large quantity of some article, intending in the future to sell and carry it, and the market price declines, I do not perceive anything in the second section that would prevent the vendor carrier in such case from suffering a loss on the article. It is true that, where at the very inception of the contract there is a loss to the vendor carrier, it is somewhat difficult to ascribe an intent to lose on the article dealt in, rather than an intent to simply carry at less than the rates given to the public. But in the case at bar I am unable to find evidence of an intent to carry at less than the published rates of the C. & O. There is no evidence that, at the time he made the contract of 1896, Mr. Ingalls knew the prices he must pay the coal operators or the water carriers. Both the contract with the coal producers and that with the water carrier were made after the contract with the New Haven Company. When the contract of 1896 was made, Mr. Ingalls may have expected to purchase the coal at so low a price, or to procure water carriage and discharging at so low a price, that the aggregate of cost items and the C. & O. freight rate would have been at least equaled by the contract price to be paid by the New Haven Company. And if such be the fact, we have a case of unexpected loss to deal with. But, even assuming that Mr. Ingalls knew the price he must pay for the coal and the water costs, and that he knew that the contract price was not sufficient to pay these costs and the C. & O. published freight rate, still it does not seem to me to necessarily follow that he intended to carry the coal at less than the published rates. To say that it does follow is to say that a vendor carrier must treat its losses on a contract of sale and carriage as losses as carrier, or as reductions of its freight rate, and cannot treat them as losses suffered as a dealer. It is true that the effect to the carrier, to its vendee, and to the public is exactly the same, whether the transaction be considered as a loss on carriage, and hence a rebate on freight rates, or as a loss suffered on the article dealt in. But this fact does not, as it seems to me, give us a right to say that such losses must be treated as losses or rebates on carriage. In other words, if a carrier may become a dealer, it may suffer losses as a dealer. And if so, except for its bearing on the bona fides of the transaction, these losses may as well be expected and contemplated losses, suffered from the inception of the transaction, as losses arising from unforeseen contingencies. I can readily believe that it was good business policy for a carrier, situated as was the C. & O. in 1896, to contract knowingly to suffer a considerable loss on even a very large contract, in order to keep a great number of mines on its line in operation. I can find no evidence in the record which satisfies me that in making the contract of 1896 the C. & O. intended a ruse or device to give a rebate on freight rates to the New Haven Company. The second section is limited in its application. It cannot be declared violated unless the transaction was a ruse or device to carry at less than legal rates, or unless there was, directly or indirectly, a carriage at a too low rate. As before re-

marked, to say that the losses suffered by the C. & O. must be treated as a carriage at a too low rate is to assert that the honest losses of a vendor carrier must be treated as reductions in freight rates, and cannot be treated as dealer's losses. To so hold is to lose sight of the carrier's relation to the transaction as vendor.

It is further said that in the case at bar the evidence shows that the C. & O. agent, on receiving payment from the New Haven Company, first paid the operators and the water carriers in full, and then turned into the C. & O. treasury, on account of freight earnings, the insufficient remnant. It is therefore contended that in fact there was in this case an actual rebate on carriage. But it does not seem to me that the result is varied by this fact. Speaking now only of a case in which there has been no intent to violate the second section of the act by some device, and of a case in which a carrier vendor has acted in good faith, it seems to me that the facts above stated make out only a seeming case of violation of the second section. The reason for this conclusion is that the law is concerned only with practical results, and is not concerned with the order in which a vendor carrier pays its honest losses, or with its methods of bookkeeping. If the C. & O. agent had first, out of the receipts from the New Haven Company, turned into the C. & O. treasury a sum sufficient to pay the full freight rates, and had then drawn on the C. & O. treasury for funds to make up the sums necessary to pay in full the demands of the coal operators and the water carriers, the practical result, to the vendor carrier, to its vendee, and to the public, of such procedure, would have been precisely the same as that of the method said to have been actually adopted. To say that the method of handling the receipts constitutes a violation of the second section is to say that the law is concerned with mere matters of form, or with the order in which a vendor carrier pays its losses, although the practical result is the same as that of another order of payment, which is not a violation of the second section, if the vendor carrier is not forbidden by the law to suffer honest losses as a dealer. Being unable, therefore, to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything which forbids it as a dealer to suffer honest losses, I am unable to say that the transactions in question were in violation of the second section of the act.

No discussion of the sixth section of the act is necessary. If the transactions prior to 1903 did not violate the second section, they did not violate the sixth section.

We come now to a consideration of the third section of the act. This section forbids any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. It is quite clear that this language is so broad that, by merely becoming a vendor of the articles carried, the carrier does not escape

the inhibitions of the third section. If any undue advantage is given any one, or any undue prejudice is caused any one, by the transactions of a carrier involving carriage, this statute forbids such transactions. This section is not confined to advantage or prejudice caused by carriage at a rate less than the published rate.

We are now, therefore, brought to consider if the transactions in question, prior to 1903, either gave some one an undue advantage, or caused some one an undue prejudice, in any respect whatsoever. From the cross-examination of Mr. Hotchkiss, it appears that coal "destined beyond the Capes" means coal going to New York or to New England. In the sixth clause of the agreed facts is an admission which seems to be capable of no fair construction, other than that some coal from the West Virginia mines went in cargo lots during the period in question to New York or New England consumers other than the New Haven Company. It is possible that such consumers in fact paid no more for the coal than the New Haven Company was paying; but, if so, either some coal operator or some coal dealer or some water carrier suffered a comparative loss. For on all the coal going to other consumers the full published tariff rate of the C. & O. was charged and collected. If the consumers of the coal, other than that going to the New Haven Company, paid as much to the coal producers as the C. & O. paid, and paid as much to the water carriers as the C. & O. paid, and paid full freight rates to the C. & O., it is evident that such consumers had to pay more for their coal than the New Haven Company was paying. If, on the other hand, such consumers paid no more for their coal than the New Haven Company, then either some coal producer received less than did the producers of the coal going to the New Haven Company, or some water carrier received less, or some coal dealer suffered the loss. I cannot, from the evidence, say just who suffered this comparative prejudice, but it is sufficient if any one did. The third section is very comprehensive and broad. A prejudice to any one or to any particular description of traffic in any respect is forbidden. It is also to be noted that this section is in the disjunctive. It is not necessary to the application of the statute that there be both an advantage to the carrier's vendee and a prejudice to some one else. If either result is caused by the transaction in question, the statute applies. It may be said that, so far as the evidence shows, this other coal may have been sold by the C. & O., and at the same low price as that received from the New Haven Company. But if this be true, the fact was peculiarly within the knowledge of the C. & O., and should have been proved by it. It may further be said that the prejudice here may have been suffered only by some New York or New England consumers, and that there is no evidence that such consumers were competitors of the New Haven Company. But I find no such limitation in the third section. Prejudice to any one is forbidden. Moreover, the question of the intent of the parties is not involved. It is generally true, especially as to common-law offenses, that there must be both the act and the criminal intent in order to constitute a crime. But where a statute forbids an act to be done, the offense is committed by doing the act, regardless of the intent.

So, also, want of knowledge by the purchaser that the carrier's contract is or has become illegal is immaterial. The letter of the law and the policy of the law, for the public good, demand that such a contract shall not be performed. I have never heard that the courts can refuse to enforce a law because a party to a contract made in violation of law is ignorant that the law is being violated. It is also to be observed that this section applies as much to an unexpected advantage or prejudice not contemplated by either party at the inception of the contract as it does to an advantage given or prejudice caused with clear intent to violate the statute. Of course, some very slight advantage or prejudice is not forbidden. It must be "undue" or "unreasonable." I am fully convinced that if a carrier vendor makes a contract such as we have here under consideration, at a time when the contract price will pay, or will practically pay, all cost items and the published freight rate of the carrier, such contract does not become illegal, if, for reasons beyond the carrier's control, the cost items rise somewhat—if not too much—above the prices prevailing when the contract was made. But the very gist of the case lies in the amount of this increase in the cost items. The standard by which to determine when an advantage to one or a prejudice to some other is undue or unreasonable is not difficult to determine. Whenever it is sufficient in amount to be substantial and of importance to either the one receiving the advantage, or to the one suffering the prejudice, it must be held to be undue or unreasonable. In the case at bar, we should properly consider that the difference between the price received by the C. & O. and the aggregate of cost items and its published freight rates is to be treated as a loss suffered as dealer, but by one required to collect its full freight rates. Upon making the calculation, we find that the loss was \$301,959.13 on the actual deliveries made prior to 1903, and that there was a further loss of at least \$130,000 because of failure to make deliveries during the period in question. The total loss being \$431,959.13, there was an average loss of over 23 cents per ton on the actual deliveries. I cannot escape the conclusion that this advantage to the New Haven Company, or prejudice to some or all of those concerned with the other coal that went to New York or New England from the West Virginia mines, is sufficient in amount to be substantial and of importance.

While a carrier may become a dealer in articles of transport, and can sell, and consequently can contract to sell, such articles at a price which pays, or practically pays, the cost items and its own published freight charges, yet whenever the cost items so substantially rise that the loss to the carrier as a dealer, and the subsequent advantage to the purchaser consignee, or the disadvantage to some one else, becomes unreasonable or undue, such sales become, or such contract becomes, illegal. When such a state of fact comes to exist, the carrier must plead the illegality of the transaction, and cease to perform. It is not an answer to the foregoing to say that the losses of a carrier dealer may be treated as losses on its account as a dealer. If there is a loss, no matter to which of the carrier's accounts it is charged, there is, under evidence such as we have here, either an advantage to the purchaser, or a disadvantage to some one else, equal to this loss. If we

give an ordinary and reasonable meaning to the language of the third section of the act, every conceivable case of preference or advantage given by a carrier to one person, or of prejudice caused to be suffered by some one else, is forbidden.

The conclusion I have reached gives a carrier a right to cease to perform contracts made in good faith whenever the cost of the article or the other cost items go to such a point that the contract price does not equal, or practically equal, the cost items and the carrier's published freight rates. This may occasionally result in great hardship to the carrier's vendee. But the books abound in closely analogous cases, where shippers who obtained by honest mistake on the part of railroad agents an agreement for carriage at less than schedule rates have been held without remedy when the carrier refused to abide by the contract and insisted on the full tariff rate. *Chicago R. Co. v. Hubbell* (Kan.) 38 Pac. 266; *Bundick v. Savannah R. Co.* (Ga.) 21 S. E. 995; *Missouri R. Co. v. Bowles* (Ind. T.) 40 S. W. 899; *Houston R. Co. v. Dumas* (Tex. Civ. App.) 43 S. W. 609; *San Antonio R. Co. v. Clements* (Tex. Civ. App.) 49 S. W. 913; *Missouri R. Co. v. Stoner* (Tex. Civ. App.) 23 S. W. 1020; *Gulf R. Co. v. Hefley*, 158 U. S. 99, 15 Sup. Ct. 802, 39 L. Ed. 910; *Southern R. Co. v. Harrison* (Ala.) 24 So. 553, 43 L. R. A. 385, 72 Am. St. Rep. 936; *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144; *Bullard v. N. P. R. Co.* (Mont.) 25 Pac. 120, 11 L. R. A. 246. The interests of the many in having carriers required to observe the provisions of the interstate commerce act far outweigh the interests of the few who make contracts with carriers which cannot be performed except by violating the act.

Having reached the conclusion that there was here an undue preference or an undue prejudice, it follows that the demand made by the New Haven Company in April, 1903, for \$103,000 damages for breach of the contract of 1896, was a demand for damages for a failure to perform an illegal contract. The law does not allow damages for a failure or refusal to do an act which the law forbids to be done. The demand of the New Haven Road was therefore an illegal and unenforceable demand.

I do not discuss some very interesting questions that might arise under the construction I have given the third section of the commerce act. Could a vendor carrier voluntarily legalize, or be compelled to legalize, performance of a contract of sale and carriage which has become illegal by reason of an advance in cost items, by reducing, or being required to reduce, its published freight rates? As the C. & O. has not offered to do this, and as the New Haven Company has not asked cross-relief, this question is not presented in the case. Again, could a carrier vendor render illegal the performance of a contract, which otherwise it could legally perform, by increasing its published freight rate on the article contracted to be carried and sold by it? This question, also, is not here involved. While reasons occur to me leading to the belief that performance of such contract could neither be legalized nor rendered illegal by the methods suggested, a discussion of these questions would be purely by the way, and would unnecessarily add to an opinion which is already of too great length.

In regard to the transactions of 1903 it is unnecessary, so far as we

are concerned merely with the commerce act, to determine whether the C. & O. was the vendor of the coal, or merely the carrier. If it was the vendor, its acts were illegal, for the reasons given above, as it appears that the published rate of \$1.45 was in 1903 collected on other Kanawha coal; and, if it is to be considered merely as a carrier, its acts were also illegal, for it was carrying the coal at less than its published tariff, and its excuse that in so doing it was merely paying a debt due its creditor the New Haven Company cannot avail. This demand is an illegal and unenforceable claim. Under such facts the case of *Union Pacific v. Goodridge*, supra, governs us. However, in view of a possible construction of the third clause of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 365]), it is necessary to determine whether the C. & O. was the vendor of the coal to be delivered under the verbal agreement of April, 1903, or was merely the carrier thereof. If the C. & O. was merely the carrier, and hence was carrying at less than its published rates, it is contended that the Elkins act requires that an omnibus injunction be issued, requiring that the C. & O. observe its published tariffs in respect to all carriage for all persons. If, on the other hand, a mere case of undue advantage or disadvantage, created otherwise than by a rebate on rates, is made out, it is admitted that a mere injunction against the continuance of the particular transaction proved is all that should be awarded. I have therefore carefully considered the record, to learn, if possible, the true nature of the verbal agreement of April, 1903. The answers of both the defendants, the testimony of Mr. Stevens before the commission, and the affidavit of Mr. Hall, show, I think, that the C. & O. was in fact the vendor of the coal to be delivered under the verbal agreement. The affidavit of J. R. Thomas might lead to some doubt on this point, except for the explanation of his statement found in the papers above referred to. The C. & O. employed certain agents in the transaction, but in fact and in legal contemplation it was the vendor of the coal. It was simply continuing the performance of the incomplete contract of 1896, delivering Kanawha coal at the former contract price. And the advantage to the New Haven Company, or the prejudice to some one or all the persons concerned with other Kanawha coal, was in 1903 very great, because the C. & O. was receiving for the coal delivered in 1903 more than a dollar per ton less than the aggregate of the cost items and its published freight rate; the loss being over \$40,000 on the 38,078 tons delivered in 1903. See Tables 1 and 2, ante. And it is of no avail to ask that we treat this loss as a payment of an indebtedness theretofore incurred. This indebtedness, not being a valid and enforceable claim, cannot be treated as if it were such.

From what has been said, it follows that it is not necessary to construe the Elkins act as applicable to a case of carriage at less than published rates. The case at bar is merely one of discrimination brought about by transactions that cannot, as I think, be properly treated as a violation of the second section of the commerce act, but which must be treated as a violation of the third section of that act. The order should therefore merely enjoin the further performance of the agreement between the defendants.

THOMPSON v. WINSLOW.

(District Court, D. Maine. February 29, 1904.)

No. 100.

1. SHIPPING—CONSTRUCTION OF CHARTER—DUTY AND RISK OF TOWAGE.

A bill of lading for a cargo of coal provided that it should be carried from Philadelphia to Portland, Me., and there delivered, "consignees paying freight for the same at the rate of 90c. and discharged, and to tow vessel in and out of Back Bay free." *Held*, that the contract did not bind the consignee to pay for the towage but to provide the same, and that, after the vessel arrived in port and notified the consignee, the duty and risk of the towage service rested upon him.

2. SAME.

The schooner arrived in the harbor of Portland on Saturday at about noon, and shortly thereafter the master, who was unacquainted with the port, went to the office of a towboat company and inquired the location of the consignee's wharf, and at his request the agent of the company notified the consignee of the schooner's arrival. The master did not make any effort to engage a tug. Later the same day the agent of the towboat company again telephoned the consignee, and was told that he wished the schooner in by Monday morning. Sunday the agent went out to the schooner with a tug, and made arrangements to take her in that afternoon. The master made no contract for the towage nor to assume the risk, and the consignee had received the bill of lading containing the contract several days before. *Held*, that the towboat company, in performing the service, was acting under employment of the consignee, and not of the vessel.

3. SAME—LIABILITY OF CHARTERER FOR NEGLIGENT TOWAGE—EMPLOYMENT OF TOWING COMPANY.

The consignee of a cargo, having assumed by his contract the duty of furnishing towage, cannot relieve himself from liability for the manner in which it is performed by the employment of a towing company, and is responsible to the vessel for any damage or injury caused by the negligent manner in which the service is performed by such company.

4. TOWAGE—DUTY OF KNOWLEDGE AND SKILL—LIABILITY FOR NEGLIGENT SERVICE.

The consignee of a cargo of coal to be delivered at Portland, Me., who had engaged to furnish towage in and out of the Back Bay, in which his wharf was situated, employed a local towboat company to perform the service. The schooner was heavily laden, and had a draft of 21 feet aft. The master had no knowledge of the harbor. The company undertook the towage with two tugs, but the depth of water in the channel was insufficient and the schooner stranded on a bar, and in attempting to pull her over the bar she was considerably injured. The captains of the tugs were competent and experienced men, but had no knowledge of the depth of water in the channel, and did not ascertain the same, although the schooner was a vessel of larger draft than the company had ever taken through it. *Held*, that the company was negligent in undertaking the service under such circumstances, and their negligence rendered the consignee liable for the injury to the vessel, her master not being chargeable with negligence in trusting to the supposed skill and knowledge of the masters of the tugs.

In Admiralty. Suit to recover balance of freight, and for damage to schooner by stranding while in tow.

Benjamin Thompson, for libellant.

W. K. & A. E. Neal and Seth L. Larrabee, for respondent.

HALE, District Judge. The libellant brings this libel in personam, in behalf of himself and the other owners of the schooner Marjory

Brown, against Edward B. Winslow, doing business as Winslow & Co., to recover for a balance of the freight on a cargo of coal which the schooner was carrying at the time of the injury, and also to recover for alleged damage to said schooner while in tow of the steam tugs of the Central Wharf Towboat Company, and being towed from Portland Lower Harbor, through the bridge of the Grand Trunk Railway Company, and through Tukey's Bridge, into Back Bay, in order to reach the wharf of the respondent, at which the cargo was to be discharged.

The Marjory Brown is a four-masted schooner of the burden of 1,061 tons, about 220 feet long over all, and with coal carrying capacity of about 1,900 tons. She was drawing, at the time of the injury, 19½ feet forward and 21 feet aft. The respondent is engaged in the business of the manufacture and sale of stoneware at the head of Back Bay, in Portland, and has annually many vessels consigned to him and delivering cargoes at his wharf. In order to reach this wharf, it is necessary for vessels to proceed through the draw of the Grand Trunk Railway Bridge and of Tukey's Bridge, and then up through Back Bay by a channel recently dredged by the United States. Tukey's Bridge is nearly parallel with, and about 1,500 feet westerly from, the Grand Trunk Railway Bridge. The draws of the two bridges are located to conform to the general course of the channel, which swings a little to the northwest after leaving the Grand Trunk Railway Bridge, and before reaching Tukey's Bridge. The United States government chart shows that there are two channels extending a considerable distance from Tukey's Bridge toward the Grand Trunk Railway Bridge. The testimony shows that one of these channels, called the "Southern Channel," has a depth of about 14½ or 15 feet at mean low water, and the other, the northern channel, has about 11 feet at mean low water. About August 13, 1903, the schooner Marjory Brown was chartered to load at Philadelphia a cargo of coal to be carried to Portland, Me. The evidence of the terms of the contract is contained in the bill of lading. Under that bill of lading the schooner received at Philadelphia a cargo of 1,874 tons of coal, and August 19, 1903, the master executed the bill of lading, with this provision: that the cargo was to be delivered "at the aforesaid port of Portland, Maine, dangers of the sea only excepted, unto Winslow & Company, or to his or their assigns; consignees paying freight for the same at the rate of 90c. and discharged, and to tow vessel in and out of Back Bay free." A copy of the bill of lading was sent to Winslow & Co., and was received by them prior to the arrival of the schooner with her cargo at the port of Portland. Before that time, the consignee had received instructions from the shipper as soon as the cargo had been loaded, and about the 20th of August he got the bill of lading. The schooner came into the harbor of Portland about noon, Saturday, the 29th of August, sailing in without the aid of a tug, and coming to anchor in the lower harbor. From this point it is necessary for all sailing vessels to take a tug in order to proceed into Back Bay to the discharging berth of the respondent. Shortly after arrival, about 1 o'clock in the afternoon, Capt. Thompson, the master of the vessel, the libellant in this suit, came on shore, went to the office of the Central Wharf Towboat Company, and made inquiries as to the location of the office of Winslow & Co., his consignee. He

learned that it was some distance away, and thereupon requested Mr. York, agent of the towboat company, to notify Winslow & Co. of the schooner's arrival. Mr. York thereupon called Winslow & Co. on the telephone, and informed them of the arrival of the schooner Marjory Brown; and the bookkeeper in the employ of Winslow & Co. indorsed upon the copy of the bill of lading, held by them, the words, "Reported Saturday, August 29, at 2 p. m." Captain Thompson did not engage any tug to tow his vessel into Back Bay, nor make any efforts in that direction. Later in the same afternoon, August 29th, Mr. York, the agent of the towboat company, again telephoned to Winslow & Co., and talked with the respondent's superintendent, Mr. Hersey, who informed him that they would want the Brown at their dock to begin work on Monday morning. On Sunday afternoon Mr. York and Capt. McDuffie, the master of one of the company's tugs, went off to the schooner in the steam tug Fannie G., and told the libelant that the consignees wanted the schooner at their berth to begin discharging on the following morning. They also told him that the towboat company did not want to assume any risk in towing the vessel through the Back Bay; that they thought the schooner would go over the shoal all right, but that if she stopped she would not be injured, as the bottom was level. They mentioned, further, that the schooner Alicia B. Crosby had stopped on the shoal, and had gotten off without damage. They also said that if the schooner did not go up that afternoon it would be some days before she could be towed up, as the tides were falling off. Capt. Thompson then asked Mr. York and Capt. McDuffie why they didn't tow the vessel up the day before—Saturday. He testifies that he told them further that he did not want to assume any responsibility about the towing of his vessel. The testimony does not show that the libelant agreed to relieve the towboat company from any responsibility in the management of the vessel, or that he agreed to assume the risk. His testimony further shows that he was a stranger in the port, and had no knowledge of the shoals over which the schooner was to be towed, nor of the depth of the water. Between 4 and 5 o'clock the same afternoon—Sunday—within an hour and a half of high water, the steam tugs Belknap and Fannie G., of the Central Wharf Towboat Company, proceeded to the libelant's vessel, and, as soon as her anchor was weighed, started to tow her toward the Grand Trunk Railway Bridge. After passing the draw of that bridge, the schooner swung somewhat to the southward; the Belknap then made fast on the port quarter of the schooner, and the Fannie G. was put in position under her bow; together these tugs pushed the vessel in a northwesterly direction, so as to get her on a course to enter the draw of Tukey's Bridge. The schooner then proceeded at the rate of some 2 or 3 knots an hour, headed in a line parallel with the draw pier of Tukey's Bridge, and about 300 feet from the bridge she took bottom. Capt. Thompson then suggested that she be towed astern, but Capt. McDuffie, who had charge of the towage, said that the only thing to do was to tow her ahead, and that she would soon be over the shoal spot. Accordingly, the tugs attempted to tow the schooner ahead, but, although they had the aid of the schooner's steam power, they were unable to move her. On the ebb of the tide that night, the schooner listed

to port and remained in that situation until the high water of Monday. On Monday afternoon, a little before high water, the steam tugs Belknap and Portland, of the Central Wharf Towboat Company, reached the schooner, and, not finding her afloat, they proceeded ahead on the hawser, in the effort to jump her over the place where she had grounded. In their efforts they broke a new eight-inch hawser several times, cut into the bits, and were compelled to put the hawser around the foremast, to the great peril of his foremast, as the captain thought. But they succeeded in moving the schooner only about 50 to 75 feet. At low water that night, and on the following day, the schooner's bow was in 20 feet of water, and her stern, drawing only $13\frac{1}{2}$ feet of water, was sticking up in the air; she listed to port nearly 40 degrees, and began to show signs of strain, and to leak. Another unsuccessful attempt was made to haul the schooner off, Tuesday night. On Wednesday, September 2d, a lighter was engaged by the superintendent of the respondent, and about 100 tons of cargo were discharged in the after hatch. At high water that afternoon, the towboats, after great effort, hauled the schooner off. In doing this they were aided by the schooner's steam capstan, and by a hawser running to the pier of the bridge. The schooner was then towed toward the consignee's dock, but stuck in the mud about 200 feet from it, the tugs leaving her and coming back the next day. After some more cargo had been lightered, the schooner was hauled into her discharging berth. The cargo was discharged by the consignee. After this the libellant demanded payment of his freight, the consignee declining to pay unless the master would allow the expenses of lightering. This Capt. Thompson refused to do. The schooner was afterwards towed out of Back Bay by one of the Central Wharf Towboat Company's tugs, on Wednesday, September 9th. She then proceeded to Bath, and was hauled out on the Marine Railway. On examination of the schooner's bottom it was found that her butts were all opened aft, and that the keel was "all mashed up" to a distance of about 125 feet; at a point about 10 feet aft of the fore rigging, and aft of the spanker rigging, the keel was crushed toward the bilge 12 or 14 inches, and for a space fore and aft of about 10 or 12 feet; between these two points, for a distance of between 60 and 70 feet fore and aft, the keel was completely turned up, half on one side and half on the other.

The first inquiry for the court to make is, what was the contract under which the schooner was performing her voyage and seeking to deliver her cargo? The bill of lading shows that the cargo was to be delivered "unto Winslow & Company, or to his or their assigns; consignees paying freight for the same at the rate of 90c. and discharged, and to tow vessel in and out of Back Bay free." What is the meaning of the above language? In the recent case of *The Somers N. Smith*, in this court (D. C.) 120 Fed. 570, the charter provided that the vessel was to be "loaded and discharged and free wharfage, and towed out of Long Cove free." The court proceeded on the assumption in the case that it was the duty of the charterer, under the terms of the charter above quoted, to furnish the towboat and perform the towage service, and that the towboat assumed the risk of injury occasioned

by its service. The language of the bill of lading in the case at bar is substantially the same as in that case.

In *Barrett v. The Oregon Railway Company* (D. C.) 22 Fed. 452, the charter was to carry a cargo from New York to Portland, Or., for a lump sum, the charterer "to pay" for the necessary lighterage between Astoria and Portland, the port of discharge. Under this language the court held that it was the duty of the charterer not "to furnish" or to provide the lighterage, but only "to pay" for it. The court said:

"If the defendant had agreed 'to pay' all pilotage incurred by the vessel on the voyage, it might as well be held 'to furnish' it also, as to furnish lighterage, under this charter party. Nor is it likely or reasonable that if the parties to this contract ever contemplated that the defendant was to provide or furnish the lighterage under any circumstances, as well as to pay for it, they would have omitted to say it. An agreement 'to furnish' lighterage may, under ordinary circumstances, be construed to include the necessary expense of so doing. But an agreement 'to pay' for lighterage, in terms, no more includes the physical act of furnishing or providing the same, than the less does the greater, or a part the whole. *Keen v. Audenried*, 5 Ben. 535 [Fed. Cas. No. 7,639], is a case on all fours with this. A schooner was chartered to carry coals from Baltimore to Pawtucket, Rhode Island, the charterer to pay freight at a certain rate per ton, 'with towage from Providence to Pawtucket.' There was a delay in procuring towage at Providence, and the master of the schooner sued the charterer for demurrage, alleging that he was bound to furnish the towage, and was therefore responsible for the delay. But Mr. Justice Blatchford, before whom the case was tried, construed the somewhat ambiguous phrase 'with towage,' as used in connection with the stipulation for the payment of freight, as binding the charterer 'to pay' the cost of the towage, but not 'to provide' it."

In *Smith v. Lee*, 66 Fed. 344, 13 C. C. A. 506, a cargo of coal was shipped from Philadelphia to a consignee having a coal wharf above bridge 8, in the port of Cambridgeport, Mass. By the bill of lading he was to pay freight at the rate of 75 cents per ton, and 3 cents per ton per bridge for 7 bridges and towing up and down from Bridge 7; and it was held in the Circuit Court of Appeals, Judge Webb drawing the opinion, that this did not require the consignee to take charge of a vessel and tow her up from Bridge 7, but merely bound him to pay expenses of such towage, leaving the same to be done under control and direction of the master, both as to time and manner of towing; and that any delay resulting from the tug's fault, and not from the dangerous or inaccessible situation of the wharf, was imputable to the master, and not to the consignee.

The cases cited clearly show a distinction to be made between the two kinds of contract. In the case last cited, the consignee was to "pay" the freight at a certain fixed rate per ton and discharge, and was to pay the bridge money for seven bridges and the towing above Bridge 7, whatever the cost of towage might be. In that case the master might have selected any towboat, paid the charges, and compelled the consignee to repay him the towage. In the case at bar, as in the case of *The Somers N. Smith*, the contract must be construed to mean that the consignee agrees in effect to "furnish" the tug and perform the service. The consignee might, under such contract, be assumed to furnish his own tug; in any event, he could not be compelled by a master to pay any towage service that was contracted for by the master without his knowledge or consent. In the case at bar the contract must be held to be that the consignees were to tow the vessel in and out of Back Bay

free. When the schooner, then, came to the port of Portland, and notified the consignee that she was there at anchorage, no technical report was required, but simply a notification that she was at the port, ready for the consignee to perform his contract with reference to towage. The schooner had fully performed that part of the voyage which it was her duty to perform, and after that the schooner was at the service of the respondent, the consignee, and it was his duty to tow her into the discharging berth. In other words, the case at bar does not furnish an instance of a contract merely to "pay for" the towage, but to "furnish" the towage. It follows, then, that all the details of the towage service were left to the consignee. Among these details were how and when the towage should be performed, and it follows that the risk attending such service must be wholly with the consignee, because the consignee had expressly contracted to perform the service; he could furnish the towage service, either himself personally by his own crew, and by his own tugs, or by the employment of any third party. The court must hold, then, that the risk of the towage service was upon the consignee.

The court must inquire next, how did the consignee meet this duty of performing the towage service, and under what, if any, liabilities is he placed? The testimony shows that Capt. Thompson, the master, arrived with his vessel and anchored in Portland Lower Harbor, but that he did not engage towage. We have already found that it was the duty of the consignee to furnish such towage, and the testimony shows clearly that the towage service was performed by the Central Wharf Towboat Company. Was such service performed by the towboat company in the employment of the consignee? Or, in other words, did the respondent employ the Central Wharf Towboat Company to perform the towage service? The consignee must have known that he had chartered a large vessel, carrying a large cargo of almost 2,000 tons. The consignee is fully charged with knowledge that the place through which the vessel must be towed to reach his wharf was a hazardous place for a vessel of the large tonnage of the *Marjory Brown*. It was the duty of the charterer to see that the vessel with her large cargo was towed through this hazardous place to his discharging berth. It is not in evidence that the consignee owns any tugs; clearly, then, he is compelled to hire somebody to do the towage service. The evidence shows that, to perform this kind of hazardous service, the Central Wharf Towboat Company was the only company which had boats reasonably available which were able to render this towage service. Capt. Thompson, the master of the schooner, testifies that, although the steam tug *Belknap* of the Central Wharf Towboat Company followed him in, he did not engage towage of the tug, and no conversation was had with the captain of the tug about towage; that he had no conversation at the towboat office about towing around; that he never had any talk, after reaching Portland, about towing his vessel into Back Bay; but that on Sunday, the day after their arrival, Mr. York, the agent of the towboat company, and Capt. McDuffie went to the schooner, had an interview with libellant, and told him that they had orders to take the vessel up. Mr. York says, also, that he received notice of the schooner's arrival; and that he is under the impression that he received it from the captain of one of the boats; that

he then notified Winslow & Co. of the schooner's arrival with coal for them; and that he asked when they wanted her at her berth, and they told him that they wanted her around so as to commence work on her Monday morning. The court must come to the conclusion, on this question of fact, that the Central Wharf Towboat Company was employed by the respondent to do the towage service in this case, and that, acting under that employment, it proceeded to do that service.

The court must next inquire, were the consignees, at law, liable for the acts and defaults of the towboat company in the performance of its towage duty? In *Gannon v. Consolidated Ice Company*, 91 Fed. 539, 33 C. C. A. 662, the following facts appear: Gannon, the libellant, let to the respondent a canal boat, for a per diem compensation, to be used in the transportation of ice. The ice company then contracted with one Sheehey to tow the boat from Troy to Crescent, on the Erie Canal, at the rate of \$7 per trip. Sheehey was regularly engaged in the towing business, and employed his own men, and used his own horses in conducting that business. While he was towing the boat, it was, by the negligence of his servants, run against a pier and injured. The respondent company disclaimed responsibility for the damage, setting up that Sheehey was an "independent contractor," and that his servants were not its servants, and that it, therefore, was not liable for their acts. In a libel in personam, the Court of Appeals in the Second Circuit held:

"That the respondent company could not absolve itself from its duty to take care of the boat by delegating that duty to another; that the liability of the respondent company does not rest upon the ground that the boat was injured by its servants, but upon the ground that it was injured by its subusers."

It further held that the defendant company was liable, not only for its own default or negligence, but for that of any person using property within its control. The court in that case cited and confirmed *Hastorf v. Moore* (D. C.) 92 Fed. 398, which was a libel in personam to recover damages from the respondent, as charterer, for an injury to a scow. The facts in the case were that the defendant's employes, who, under a charter, had control of the movements of a scow hired from the plaintiff for convenience in unloading, swung the stern inshore, where she grounded on some spiles and was injured. The court held the respondent liable, and that its liability was not relieved by the fact that the libellant had employed a boatman or scowman, who was present on board, but did not exercise any authority as to the movement of the scow, and had no knowledge of the presence of the spiles. The court (Judge Brown) said:

"By the charter or hire of the scow, she was under the direction and control of the respondent in discharging the stone; it was the respondent's duty to give her a safe berth, and any change of position for the purpose of unloading was within the control of the respondent, or of the person or persons with whom the respondent might leave the work of unloading. The plaintiff's man who was on board the scow could have had no object in hauling her back and inshore, and he had no previous knowledge of the ground. * * * The presence of the scowman, in my opinion, could make no difference in this responsibility, unless the removal were under his direction or with his acquiescence, with clear knowledge of the bottom. It was not his duty to examine the ground, nor was a removal by defendant's men, in the ordinary course of un-

loading, a change of place for which the scowman or the libelant was responsible."

Both the last two cases cited refer to *Bouker v. Smith* (D. C.) 40 Fed. 840, as a leading authority. This was a libel in personam to recover for two scows which were wrecked through the alleged negligence of the respondent while they were in his employ. The respondent was removing a life-saving station on Far Rockaway Beach by the use of the scows upon which the building was placed while being transported. The libelant's boats were hired for the purpose of performing the transportation. The respondent had previously engaged the small tugboat *Kapella* to take the scows, with the building, in tow by a hawser. The court (Judge Brown) said:

"The respondent was not an insurer nor a guarantor of the safety of the scows in letting them out for this service; the libelant took the risk of all sea perils, and all other dangers naturally incident to that service, except in so far as they might be brought about by the negligence and want of proper care and skill of the respondent or his agent, having reference to the nature of the enterprise. For such negligence or want of due care, the respondent would be answerable. * * * The burden of proof is upon the defendant to excuse it by showing that it did not arise through any lack of care, skill, or diligence in navigation."

Further, the court says:

"These complications and liabilities were well known and understood beforehand, and it was the respondent's duty to provide, first, the precautions against them, so far as practicable; and, second, a reasonable means of escape if the grounding should occur. These dangers were not part of the libelant's risk. If the liability to ground in that inlet from such causes was real, it was negligence to start out at a time when such grounding was certain, or liable to prove fatal, through the approaching storm. The respondent should have waited for weather that would give opportunity to extricate the tow from such probable mishaps. The tug was in the employ of the respondent, hired by the day; there was no independent contract between the tug and the defendant, such as to free the latter from the legal responsibility of a principal for the acts of the tug as respects the scows which he had hired. The respondent is therefore answerable to the libelants for the loss of the scows, either for starting at an improper time, in view of the difficulties, liabilities, and mishaps naturally attending such an enterprise, or for want of proper care and skill in the navigation of the tug to avoid grounding."

This case was affirmed by the Circuit Court of Appeals in the Second Circuit, 49 Fed. 954, 1 C. C. A. 481. Judge Wallace said:

"No one can escape from the burden of the obligation which rests primarily upon him by engaging for its performance with the contractor. Smith could not absolve himself from his duty as a bailee by employing Jaycox to perform any part of it. Although Jaycox was towing the scow with his tug by a contract with Smith, he was nevertheless performing Smith's implied contract, as were also all those who were employed for the time being by Jaycox."

Fox v. Damm (D. C.) 105 Fed. 254, showed the following facts: A charterer of a scow, which at his instance made a landing at an unusual place, received an injury from striking upon rocks near the shore, without fault of the master. And the court held that "the charterer must be held to have assumed the risk of the landing, and to be liable to the owner for the injury." The court further said, "The scow was taken to the place of landing by a tug that was employed by the

respondent, and was acting under his orders, and in that sense and to that extent the scow was in his charge."

In the *Beard Dredging Company v. Hughes* (D. C.) 113 Fed. 680, it was held, "Where a dredge, and three scows to be used in connection therewith, were chartered for three months, the charterer is liable for an injury to the chartered vessel through the negligence of a company which he hired to tow the same." The court said, "There can, I think, be little doubt as to the liability of the respondents for any injuries to the scows through negligent handling, whether caused by the respondents directly, or by a towing company employed by them, which is called an 'independent contractor.'" The case was affirmed by the Court of Appeals in 121 Fed. 808, 58 C. C. A. 192. The court placed its affirmance upon the fact that the tug was hired by the respondent to tow the scow, and that the respondent was liable for the acts of his employés. The court held that this was not to be distinguished from *Gannon v. Consolidated Ice Company*, 91 Fed. 539, 33 C. C. A. 662, cited *supra*.

In the light of the principles of admiralty law and of the teaching of the cases which we have cited, we are compelled to conclude that the respondent must be held responsible for the acts and defaults of the towboat company, and for any negligence on the part of that company, or its servants, in the performance of their duty. It might work great mischief to commerce and to the carrying trade if the court should hold that a consignee, who was under the duty of furnishing towage, could, by the employment of a towing company, relieve itself from liability for proper towage. If consignees could be so relieved, they could then employ incompetent tugs to render the service, and throw the hazards upon the vessel to be towed. This might result in great hardship. Owners of vessels are clearly entitled to protection in their contracts to carry cargo, with the agreement that the consignees shall furnish towage to and from their discharging berths. Charterers or consignees must be expected to know the hazards attending towage in their own localities and must also be expected to know the character of the towage service which they employ.

The court must next decide whether or not the towing company was negligent in the performance of the towage service. In *The Somers N. Smith*, recently decided, and cited *supra*, this court has quite fully considered the obligations of a tug in rendering towage service. In that case the court decided that a tug must be held to reasonable care in the conduct of her towage service, and that such reasonable care is measured by the dangers which she is encountering. We found, further, that, "if a locality is more than ordinarily dangerous, the tug is held to a proportionately higher degree of care and skill." It is unnecessary in the case at bar to cite the long line of authorities which we quoted in that case. There are certain decisions, however, which we have not discussed in *The Somers N. Smith Case*, which may be valuable for our guidance in this case. In *The Harry and Fred* (D. C.) 49 Fed. 681, the court, while dismissing the libel in that particular case, holds "that, in undertaking to tow a vessel over a bar for the first time, where the conditions of the towage are unknown to the tow, the captain of the tug is under the duty to examine the draft of the tow, and

not to take her in tow if the water is insufficient." In the *Robert H. Burnett*, 30 Fed. 214, it was held "that the tug is required to have a knowledge of the condition of the bottom and of the depth of the water in the river she is navigating." In *The Lady Pike*, 21 Wall. 1, 22 L. Ed. 499, it was held "that owners of steamers undertaking to tow vessels are responsible for accidents, the result of want of proper knowledge, on the part of their captains, of the difficulties of navigation." In the *Margaret*, 94 U. S. 494, 24 L. Ed. 146, Mr. Justice Swayne, in delivering the opinion of the Supreme Court, said:

"She [the tug] was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either, in such cases, is a gross fault, and the offender is liable to the extent of the full measure of the consequences. * * * The port of Racine was the home port of the tug; she was bound to know the channel, how to reach it, and whether, in the state of the wind and the weather, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. She gave no note of warning; if what occurred was inevitable, she should have forecasted it and refused to proceed."

On this subject, also, we find instruction in *The Merrimac*, Fed. Cas. No. 9,478; *Pettie v. Boston Towboat Company*, 49 Fed. 464, 1 C. C. A. 314; *Atlee v. Union Packet Company*, 21 Wall. 389, 22 L. Ed. 619; *The Burlington*, 137 U. S. 386, 11 Sup. Ct. 138, 34 L. Ed. 731; *The Kate Jones* (D. C.) 91 Fed. 796; *The S. W. Morris* (D. C.) 59 Fed. 616; *The Hepry Chapel* (D. C.) 10 Fed. 778. In the last case cited, Judge Nelson says:

"The rule of law is perfectly well settled that a tug undertaking to tow a vessel in navigable waters is bound to know the proper and accustomed waterways and channels, the depth of water, and the nature and formation of the bottom, whether in its natural state or as changed by permanent excavations."

As bearing upon the same subject, see, also, *The Effie J. Simmons* (D. C.) 6 Fed. 639; *The Nathan Hale* (D. C.) 91 Fed. 682; *The James H. Brewster* (D. C.) 34 Fed. 77; *The Gypsum Packet Company v. Horton* (D. C.) 68 Fed. 931. In *The Zouave*, Fed. Cas. No. 18,221, Judge Wilkins said:

"The tug is presumed, in the undertaking she makes, to know the channel and all its perils, and engages to take her tow line safely through; it comprehends knowledge, caution, skill, and attention."

In *McMillan v. Moran* (D. C.) 107 Fed. 149, a tug was held liable for bringing the masts of a vessel in contact with Brooklyn Bridge. Judge Brown said:

"I consider it only a reasonable duty of tug owners to keep their tugs supplied with local charts, and to take notice of the government reports and corrections for their information and benefit, and that in this case there was therefore negligence of the respondent in not apprising the tug captains of the corrections in the estimated height of the bridge above mean high water."

In the light of the principles of admiralty law, stated and enforced in the cases which we have quoted, the court must conclude that it is the duty of any one responsible for towage service to clearly know the channel in which the towage is to be performed, and all dangers attending such service. Did the captains of the towboats engaged in the service in the case at bar meet this duty? The Central Wharf

Towboat Company is shown by the testimony to be the only towboat company in Portland having tugs of sufficient capacity to tow a fully laden vessel of the size and character of the Marjory Brown into Back Bay. It does not appear from the testimony of the agent or of the manager of the company that they had any report in their office of the condition of the channel, or that personally they knew the nature of the bottom. Capt. Peterson, master of the Belknap, which was engaged in this service, testified that he had towed in and out of Back Bay 20 years, and that he first knew of this shoal some time last summer; that he then went in with the schooner J. S. Winslow drawing 20 feet 6 inches on a pretty high tide, and that he felt the Winslow touch; but that he never after that made any soundings, and never made any effort to ascertain the depth of water over the shoal. Capt. Marshall, in charge of the Fannie G., says he was not familiar with the channel around there. Capt. McDuffie, who had charge of the towage service in the case at bar, is one of the most experienced captains in the service of the towboat company. He is clearly a man of great capacity and ability in his calling, and in frankness and clearness of statement is one of the best witnesses we have ever seen upon the witness stand. But the testimony shows that even Capt. McDuffie was not competently informed as to the location of the dangers in the channel where the towage service was performed. When a large vessel is placed in the care and custody of captains of the experience of the men we have quoted, those vessels have the right to feel assured that such men know the dangers of the towage service which they are undertaking, and that they will not undertake such service unless they can feel reasonably assured that they can perform it successfully. It is not sufficient for such men to say that they do not desire to assume any liabilities. If, in the case at bar, there was doubt as to their being able to tow a very deep draft vessel through the dangerous place, it was their duty to so inform the consignee; and it was then the duty of the consignee to see that proper lighterage service was performed, and the vessel thus made capable of being safely towed. The case shows that this was the largest draft vessel that had ever been brought to this dangerous place by this towboat company. The law, as we have already said, makes it incumbent upon those undertaking to render towage service to know the draft of the vessel, and to know whether she can reasonably be expected to be towed through the dangerous place under consideration. Without commenting further upon the details of the testimony, the court finds that the evidence shows that the captains of the tugs of the towboat company did not sufficiently and competently know the bottom of the place where the towage service was to be performed; that they did not know the channel, nor the peculiar dangers attending the towage; and that they did not exercise reasonable care in the conduct of the towing, or in their undertaking to haul the tow from the obstruction upon which their lack of knowledge had placed her. Mr. Both, the assistant United States engineer, has testified as to the soundings in the place where the towage was performed, and has shown further that he had proper surveys of the place in the office of the United States engineer. Under the doctrine of *McMillan v. Moran*, supra, it was the duty of the towing company to have availed itself of knowledge so

easily within its reach. In the attempt to jump the vessel over the spot where she had grounded, there was clearly a lack of proper knowledge; there was a want of judgment on the part of the towboat captains; for this fault of judgment we cannot hold them to the high degree of culpability to which they must be held for their initial fault in not knowing precisely the dangers which they were encountering in undertaking the towage service. If they knew those dangers to a vessel of so heavy draft, it was their duty, as we have said, to inform the consignee, in order that such vessel might be properly lightered, and so brought over the dangerous spot in her lighter condition.

In *The Julia Bailey*, which we have cited in *The Somers N. Smith Case*, supra, Judge Webb, in an unpublished opinion, says:

"The slightest departure from the highest skill and care is almost certain to be attended with loss, and, although the mere fact of trouble raises no presumption of fault, it does call for the sharpest scrutiny of all attending circumstances."

The court must find that the fault in this case, which led to the injury, was the same as in the case of *The Somers N. Smith*, where we said:

"The court is of the opinion, from the preponderance of evidence, that the principal cause of the stranding of the schooner was that the master of the tug, although he had had many years' experience in towing vessels at this point, did not know the channel."

After reviewing in detail the testimony as to the stranding in the case at bar, we think the fault for such stranding is that of the towboat company undertaking to render the towage service, and employed for that purpose by the consignee.

There has been some testimony as to a contract of exemption made by the towboat company. Without entering into the details of testimony upon this point, we do not find sufficient evidence to prove such contract. It is therefore unnecessary for us to decide what, under the peculiar circumstances of the case at bar, would have been the legal effect of such contract of exemption, if it had been proven. We have, however, fully discussed this question in *The Somers N. Smith Case*, cited supra. We held in that case that a contract that a vessel was to be towed at the risk of her owners would not relieve the tug from liability for the consequences of her failure to exercise reasonable care and skill in the performance of the service.

Having found that the respondent is in fault, it is the duty of the court to inquire whether the case shows any fault upon the part of the libellant. We do not find that there was any such fault on his part. It is clear from the testimony that he was not informed of the situation; he had never been in Back Bay before; he knew nothing of the location of the place where the towage was to be performed; he did not direct that the vessel should be towed, or do anything further than follow the orders of the captains rendering the towage service. Capt. McDuffie, in his clear, frank way, says, "Captain Thompson gave no orders, but followed my orders." He was not informed of the depth of water, the nature of the bottom, or the location of the channel. He had a right to assume that the respondent and the tugboat people were fully informed of the perils to which a large vessel would be subject

in going into Back Bay, with all the dangers of that location, on a low run of tides. In *White v. Steam Tug Laverne* (D. C.) 2 Fed. 788, Judge Choate said:

"The master of a towed boat is not chargeable with contributory negligence in acquiescing in the exposure of such boat to an unnecessary peril by the tugboat pilot, unless the danger about to be incurred is very obvious."

In the case at bar, the towboat company is not made a party to the suit by the libellant, and has not been brought into the suit, under the admiralty rules, by the respondent, so that we cannot consider or pass upon any questions which may arise between the respondent and the company which rendered the towage service.

The conclusion must be that the libellant is entitled to hold the respondent accountable for the damages sustained and for balance of freight. Decree for libellant; Fritz H. Jordan appointed assessor.

GUSTAFSON v. CHICAGO, R. I. & P. RY. CO. et al.

(Circuit Court, W. D. Missouri, Western Division. February 8, 1904.)

No. 2,813.

1. REMOVAL OF CAUSES—FRAUDULENT JOINDER OF DEFENDANT TO PREVENT REMOVAL.

A plaintiff has the right to join a citizen of the same state with a citizen of another state as defendants, although his purpose is to thereby prevent a removal of the cause if the cause of action is in fact joint.

2. SAME—MANNER OF RAISING ISSUE.

Whether or not allegations of fact in a complaint intended to show a joint cause of action against two defendants are true may be put in issue by a petition for removal which alleges that the joinder was solely for the fraudulent purpose of preventing a removal, and may be inquired into and determined on a motion to remand; and if it is found that they were untrue, and that such fact was or could have been known to the pleader, the court is justified in drawing the conclusion, as a matter of law, that the purpose was to prevent the exercise of the right of removal by the nonresident defendant.

3. TORTS—JOINT RIGHT OF ACTION—SUFFICIENCY OF ALLEGATIONS.

In an action for a personal injury resulting from a collision between a moving train and a switching engine standing on the track, allegations in the petition that the railroad company failed to make proper rules for running its trains, or to put up proper station signals, and required the train to be run at a speed of 50 miles an hour, do not state any acts of negligence in which the engineer of the train co-operated so as to give a joint right of action against him and the company, nor is negligence imputable to him merely because he obeyed the order to run the train at such speed.

4. RAILROADS—NEGLIGENCE IN RUNNING TRAINS—SUFFICIENCY OF ALLEGATIONS.

Allegations of negligence against a defendant railroad company in the running of its trains over a particular line of track, in making stops at stations, and in not making time schedules are negatived by a further allegation in the same pleading that such track was owned by another company, which operated its own trains thereon, and that defendant ran its trains over such piece of track under an agreement with the owner; it being a matter of obvious and common knowledge that under such

¶ 1. See *Removal of Causes*, vol. 42, Cent. Dig. § 79.

circumstances the defendant did not exercise control over its trains in the matters specified.

5. REMOVAL OF CAUSES—JOINDER OF DEFENDANT TO PREVENT.

Where an attorney, when drawing a pleading, had knowledge of facts which showed that allegations of negligence made therein against a defendant were without foundation, or notice of other facts to put him on inquiry which would have led to such knowledge, both he and his client are chargeable therewith; and where such allegations were made for the purpose of showing a joint cause of action against two defendants, one a citizen of the state and the other of another state, it is a fair inference that the defendants were joined for the sole purpose of preventing a removal of the cause by the nonresident defendant.

6. TORTS—JOINT LIABILITY—WANTON ACTS OF SERVANT.

Where the complaint in an action for personal injury alleged that the engineer in charge of a railroad train "carelessly, recklessly, and negligently" disregarded and ran by signals given to warn and advise him of the presence on the track of a switch engine on which plaintiff was stationed, and carelessly, negligently, and recklessly ran by said signals at a dangerous rate of speed and against said switch engine, causing plaintiff's injury, such allegations are of the ultimate fact which constituted the proximate cause of the injury, and, while the railroad company might be liable therefor on the doctrine of respondeat superior, no cause of action against the engineer and the company as joint tortfeasors is shown as the plaintiff would be entitled to recover punitive damages against the engineer, but only compensatory damages against the railroad company.

On Motion to Remand to State Court.

Mosman & Ryan and Amos Townsend, for plaintiff.

Frank P. Seebree, for defendants.

PHILIPS, District Judge. This controversy arises on a motion to remand, combined with an answer in the nature of a plea in abatement. This suit was instituted in the state circuit court of Jackson county, Mo., and was removed therefrom to this court on the petition of the defendant the Chicago, Rock Island & Pacific Railway Company on the ground that the cause of action presents a separable controversy; the said railroad company being a nonresident citizen, while the plaintiff and the defendant Samuel Hanna are resident citizens of the state of Missouri. The petition for removal further alleged that the plaintiff had no reasonable ground upon which to base a cause of action for recovery against the defendant Hanna, and that, according to the petition, the defendant railway company was responsible alone for the cause of action. The petition then alleges that the said Hanna was joined as a defendant for the sole and fraudulent purpose of preventing the defendant from removing the action from the state court, and for the sole purpose of fraudulently defeating the jurisdiction of said United States court.

After the hearing of said motion and the issue on removal, the defendant railway company, by leave of court, was permitted to amend the fourth paragraph of the petition for removal, which amendment alleges, as did the original petition, that the cause of action against the defendants is separable, and omits the statement in the original petition that it discloses no ground of recovery against the defendant Hanna, and contains the same allegation, in effect, that said Hanna was joined as a codefendant for the fraudulent purpose of defeating the removal

of this action from the state court by the nonresident defendant, and to defeat the jurisdiction of this court.

This question of the right to amend the petition for removal in this court has recently been discussed and determined by Mr. Justice Brewer, of the Supreme Court, in *Kinney v. Columbia Savings & Loan Association*, 24 Sup. Ct. 30, 48 L. Ed. —. It is decisive as to the right to make the amendment in question.

Indeed, the amendment to the petition for removal in this case, in legal effect, is little different from the original petition. While the original petition for removal averred that the petition did not show any grounds of recovery as against Samuel Hanna, and did show one against the defendant company, that was not the statement of a fact, but was a mere legal conclusion, drawn by the remover from the allegations of the petition. If it was a false conclusion in point of law, its omission from the amended petition is quite immaterial. The original petition contained the essential averment that the cause of action as to the defendant railway company was separable from that against the defendant Hanna, and that Hanna, the local defendant, was joined as a codefendant for the fraudulent purpose of preventing the nonresident defendant from removing the case into this court. The issue, therefore, on the motion to remand, is as to whether or not the petition on its face shows, as matter of law, that the cause of action against the defendants is joint, while the issue on the allegation that Hanna, the local defendant, was joined as a codefendant for the sole purpose of preventing the defendant railway company from removing the cause into this court presents an issue of fact, to be determined by the court on the plea.

It is to be conceded to plaintiff's contention that if, as a matter of law, he has a joint cause of action against the defendants, he had a right to sue them jointly, no matter if he did entertain the desire and purpose to prevent the defendant railway company from removing the case. On the other hand, if the plaintiff in the petition has alleged any fact intended to show a joint cause of action against both defendants, which the plaintiff at the time knew, or had reason to believe, was not true, that fact, under the allegations of the petition for removal, can be inquired into and determined on issue raised on the plea to the petition for removal. *Union Terminal R. Co. v. Chicago, B. & Q. R. R. Co.* (C. C.) 119 Fed. 209.

I will not attempt a résumé of the now familiar decision known as the "Dixon Case," reported in 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, as nothing determined by me here conflicts with what was really in contest in that case. The critical and clear analysis given of the Dixon Case by Judge Amidon in *Helms v. Northern Pac. Ry. Co.* et. al. (C. C.) 120 Fed. 389, leaves little need of further exposition.

Since the publication of the decision in the Dixon Case the practice of attorneys in personal injury cases, in joining a local resident defendant, like an engineer, brakeman, or other employé, with the non-resident railroad company, to prevent the removal by the railroad company from the state to the United States court, is becoming so universal as to invite the courts to closest scrutiny to see whether, in fact and law, there actually exists a joint cause of action, or merely a sim-

ulated one. While the policy of the judiciary act of 1887-88 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) was rather to restrict than enlarge the jurisdiction of United States courts, it is just as applicable to-day as it ever was what Judge Lurton in *Arrowsmith v. Nashville & D. R. Co.* (C. C.) 57 Fed. 169, quotes from the language of Mr. Justice Miller, that:

"It would be a very dangerous doctrine—one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

If this growing practice be further extended, under a latitudinarian construction, beyond what was really decided in the *Dixon Case*, and those in consonance therewith, the practical result is to be a denial to nonresident corporations of the right of removal from the local to the federal courts. The persistent insistence of attorneys for such plaintiffs is that just in so much as, by mere allegation in the petition, a joint cause of action can be apparently stated, regardless of the motive of the pleader and the underlying facts, they may effectually cut off even a technical analysis of the petition, to see whether in point of law a joint cause of action is stated, and any resort to evidence in pais on the issue of removal and remand. But the right and the duty of the court are well recognized to examine the petition by its "four corners," to see if a joint cause of action is stated; for, no matter how designedly and repetitiously the pleader may assert that "the defendants" did so and so, such assertions will be treated as a mere *brutum fulmen*, if, taking the facts as a whole stated in the petition, they disclose, in contemplation of law, a separable cause of action against the defendants. As held by the Supreme Court of this state, the allegation of negligence on the part of the defendants in general terms is treated as mere surplusage—words without meaning—when preceded or followed by specific allegations of specific acts of negligence. *Fuchs v. City of St. Louis*, 167 Mo. 620, 640, 67 S. W. 610, 57 L. R. A. 136; *Chitty v. Railway*, 148 Mo. 64-75, 49 S. W. 868; *McCarty v. Hotel Co.*, 144 Mo. 397, 402, 46 S. W. 172.

And as already stated, even where the petition on its face alleges a joint cause of action, or some joint acts of the defendants, the nonresident defendant may challenge the truth of it in his petition for removal by alleging that it was inserted for the purpose of preventing the exercise of the right of removal by the nonresident defendant, and this issue of fact is to be determined by the United States court. And if any material fact alleged in the petition, for the purpose of showing a joint cause of action, be found to be untrue in fact, and such fact was known to the pleader, or could have been known to him by the exercise of that inquiry which the law exacts, the court is warranted in drawing the conclusion, as matter of law, that the purpose was to prevent the right of removal by the nonresident defendant. *Union Terminal Railway Co. v. Chicago, B. & Q. R. R. Co.* (C. C.) 119 Fed., loc. cit. 213.

An analysis of the plaintiff's petition presents a strange medley of facts self-contradictory and pregnant with legal impossibilities. It discloses in the first paragraph the fact that the defendant railway company, under agreement, was running its engine and train of cars over the railroad of the Hannibal & St. Joseph Railroad Company between Cameron Junction, in Clinton county, Mo., by way of Harlem station, to Kansas City, Mo.; that at said Harlem there are railroad switch yards, consisting of a large number of side tracks parallel with the main line track, used for switching cars and making up trains, where a large volume of business is done upon said side tracks, and that frequently the main track is used and occupied by switching crews; that at the time of the plaintiff's injury he was a locomotive engineer, in the employ of said Hannibal & St. Joseph Railroad Company, managing a switch engine, with a switching crew in the yard; that he had his engine, with a large number of freight cars attached, on the main track of said railway; and while so engaged "the defendants, carelessly, negligently, and recklessly, and with great force and violence, ran a passenger train into, upon, and against his said switch engine, thereby greatly wounding, bruising, and injuring plaintiff, and rendering him a cripple for life." Then, to show the culpability of the defendant railway company, it alleges that one of its trains on which the defendant Hanna was the engineer at the time of the alleged injury was not running on schedule time, but, through the carelessness and negligence of the defendant company, was allowed to become more than an hour late; that the defendant railway company, its officers, agents, and servants, had carelessly, recklessly, and negligently failed to establish proper and suitable station boundaries and yard limits at said Harlem station, and to set up any signs, posts, or other suitable and visible objects to indicate where the yard limits of such station were, to advise its servants operating its engines and trains when entering and coming within the said yards and station limits; that the defendant company had carelessly, recklessly, and negligently failed to issue and promulgate, for the guidance of its servants operating its engines and trains, rules and regulations regarding the speed of trains, and having the same fully under control at all times, while running within the limits of the station; that said defendant, its officers, agents, and servants, knew the custom of switching crews to occupy and use at times the main-line track with engines, etc., in doing said yard work, and that such switch engines and cars might reasonably be expected to be occupying said main-line track at any time; that the defendant railway company carelessly, negligently, and recklessly caused, ordered, directed, and permitted its agents and servants, then and there running said passenger train, to run the same at a dangerous rate of speed, to wit, at 50 miles an hour, to make up lost time.

It is to be observed, in the first place, that if it be conceded that it was the duty of the defendant railway company to establish a schedule time table for the running of trains over the road at the point in question, to establish proper station boundaries at the yard limits at Harlem, and to set up signs, posts, and visible objects to indicate the yard limits of said station, and that it failed of its duty in this respect, what possible connection had the defendant Hanna, an engineer, with

such matters? These duties and obligations devolved upon the master alone. So that if these acts of negligence contributed to the injury in question, as it must be assumed the pleader intends by inserting them in the petition, there was no co-operation therein by the defendant Hanna, and consequently no joint cause of action for these derelictions of duty is stated. And it would entitle the defendant railway company, who alone is responsible for such dereliction, to remove the whole controversy into this jurisdiction. *Ferguson v. C., M. & S. P. Ry. Co.* (C. C.) 63 Fed. 177, 179.

Likewise of the allegation made in the petition that the said "corporate defendant carelessly, negligently, and recklessly caused, ordered, directed, and permitted its agents and servants, then and there running and operating said engine and passenger train, to run the same at a very high and dangerous rate of speed, to wit, at 50 miles per hour, in order to make up the time they had so carelessly and negligently lost." If the defendant Hanna, the servant, in obedience to such command of the master, ran the train coming from Cameron Junction at a speed of 50 miles an hour, upon what principle of law can it be said that the servant could be held jointly with the master for merely executing the positive command of the master? In this day of "rapid transit" the law recognizes the right of railroad companies to run at a high rate of speed, and no negligence is imputable, even as against the company, per se, for running at such rate of speed, in the absence of some averment that the condition of the track and the situation was such as to render fast running imminently dangerous, and that this fact was known to the company. Without more, "the primary duty of the servant is obedience, and it is not to be expected that he will, upon mere imaginary danger, of which he may be conscious, assert his right to relinquish his employment." The law does not exact, under such circumstances, the duty of the servant to disregard directions of the master, thereby running the risk of the loss of his position. See *Flynn v. Kansas City, etc., Railroad Company*, 78 Mo. 195, 204, 205, 47 Am. Rep. 99. And, if he executed such command without any carelessness or negligence on his part, he would not be answerable to third parties, unless it were shown that the engineer knew, or had reason to believe, that such rate of speed was hazardous and likely to occasion injury to some third party. All the law would exact of him would be to quicken his apprehension and increase his vigilance in proportion to the obvious risk in so running his train. Nothing of the kind is alleged in this petition, and therefore no joint cause of action is thereby shown by the naked averment that the master ordered and directed the given rate of speed.

Superadded to this, the allegation of the petition itself, showing that the defendant company was running its cars over the railroad tracks owned by the Hannibal & St. Joseph Railroad Company, by agreement with the owner of the road, coupled with the evidence on the hearing of the issues joined on the motion to remand, clearly enough show that the defendant company had nothing to do with the making of time schedules or directing the running of its cars between Cameron Junction and Kansas City, and that it had nothing to do with the making of regulations establishing signals or governing in any way the entry of

cars to and through the switch yards at Harlem; that these matters were under the exclusive control and management of the Hannibal & St. Joseph Railroad Company. The court finds from the evidence on the hearing of said motion and issues that plaintiff's attorney who drew the petition in this case had notice of these facts, or was in possession of facts sufficient to put him on inquiry the proper pursuit of which would have disclosed to him such facts, at the time he drew the petition. He had for many years not long prior to this accident been the trial attorney of the said Hannibal & St. Joseph Railroad Company, which owned the track and switch yards in question. When pressed on the witness stand for a direct answer to the question whether he did not know that the defendant railway company was running its trains over a part of the road in question when he brought the suit, he became tactical, and objected to the questions put to him for irrelevancy and incompetency. His answers were qualified with the statement: "I do not know that I ever saw the contract or knew what their rights were. Not having seen the contract, I have no information." But finally he admitted that, from his experience as a lawyer of the road, "I knew they were under a common head; I supposed they were under a common management."

In law notice is actual when the party sought to be affected by it knows the particular fact in question, "or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information, and it embraces all degrees, direct and indirect, of evidence." *Rhodes et al. v. Outcalt et al.*, 48 Mo. 370. Judge Sanborn, in *Percy v. Cockrill*, 53 Fed. 875, 4 C. C. A. 73, 10 U. S. App. 574, expressed the rule as follows:

"Notice of facts and circumstances which would put a man of ordinary intelligence and prudence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. Where a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.'"

When the plaintiff's attorney alleged in his petition that the defendant company was running its cars over the track of the Hannibal & St. Joseph Railroad Company under an agreement with it, taken in connection with the testimony on the hearing, he was in possession of a most essential fact, and the least inquiry on his part of the officers of the Hannibal & St. Joseph Railroad Company, his old client, would have enabled him to see the agreement itself or learned its purport.

Besides, there are some things so obvious to the common experience and observation of men in certain relations that the law will not permit them to shut their eyes and say, "I do not know because I do not choose to look;" or, as Judge Story expressed it, "One cannot wink so hard as not to see." Every sensible man, and especially an attorney of long standing, of superior intelligence, like the plaintiff's principal attorney, for many years connected with the legal department of a railroad, must be presumed to know the physical fact that two separate railroad companies, operating their trains over the same line, must be

subjected to the control, management, and direction of one mind, prescribing the signals, regulating and directing the manner of running of trains over such line; that, in the very nature of the case, the independent operation by each company of its trains over the same track would be attended with such hazards, destruction to life and property, as to compel the subjection of such operations to the exclusive management of one mind and one authority. Neither is it too much for the court to assume that it comes within the knowledge and observation of all persons conversant with such a situation that when the cars of another railroad company are permitted by the owner of the road, who is operating its own trains contemporaneously, to run over its tracks, it must be in subordination to the control and direction of the owner company. It would be such an extraordinary, unusual, and unnatural condition that the owner of a railroad, daily and hourly operating its own trains thereon, licensing another road to run its cars over a part of such line, would surrender its supremacy and right to prescribe rules and regulations for this joint operation, and the control of its own switch yards, to such licensee, as to devolve upon the party who asserts that such licensee had such control to specially aver and prove the existence of such exceptional condition.

The knowledge of the attorney at the time he drew the petition is imputable to the client. *The Distilled Spirits*, 11 Wall. 356, 367, 20 L. Ed. 167; *Hart v. F. & M. Bank*, 33 Vt. 252; *Law Register*, May, 1872, p. 144.

When, therefore, the plaintiff predicated an action of negligence of the defendant company on the failure to prescribe proper rules and regulations for its trains over the track in question to make a regular schedule time, and for failure to maintain proper safeguards and signals in and about the switch yards at Harlem, he knew these were duties not devolving on the defendant railway company, as these were matters over which it had no control, and their insertion in the petition warranted the allegation in the petition for removal that it was done for the purpose of showing a joint cause of action, when coupled with the averments in the petition that the defendants carelessly, negligently, and recklessly did these things, in order to prevent the removal of the case by the nonresident defendant. It should logically follow that as the engineer, Hanna, was running his train between Cameron Junction and Kansas City under the regulations and directions of the Hannibal & St. Joseph Railroad Company as to when he should start and how he should run and where he should stop on the main track and into the switch yard at Harlem, the Rock Island Company could not be held for the manner of running its cars by the engineer at the time and place. As said by the Supreme Court of Iowa in *Miller v. Railroad Company*, 76 Iowa, 655, 39 N. W. 188, 14 Am. St. Rep. 258:

"It [the train] was not running under any time card or by the direction of any train dispatcher of the defendant. The fact that the engineer, fireman, brakeman, and conductor, who composed the train crew, were retained upon defendant's pay rolls, and received their wages from the defendant, does not tend to show that the defendant retained any control of the movements of the train."

So, in *Smith v. R. R. Co.*, 85 Mo. 418, 55 Am. Rep. 380, it was held that inasmuch as the defendant railroad company, over the line where

the accident occurred, was running under the schedules, direction, and management of another railroad company, it could not be held responsible therefor. The court said:

"The trainmen, though in the permanent employment of the defendant, were, while moving the train from St. Louis to Pacific, under the exclusive control and management of the Missouri Pacific, and the engineer and fireman were in the employment of the latter company; yet not an order could the defendant company have given as to the running of that train between St. Louis and Pacific. * * * It certainly would be an anomaly to hold one responsible for the acts of another, over whom he had no control. Such a principle obtains in no civil action between individuals, and no reason can be assigned why it should apply in suits against corporations."

In *Brady v. R. R. Co.*, 114 Fed. 107, 52 C. C. A. 48, 57 L. R. A. 712, Judge Sanborn said:

"In an action against an alleged master or principal for the act of his alleged servant or agent, under the maxim *respondet superior*, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer."

The defendant company was without the power to prescribe any schedule time for running its trains when and where the accident occurred. It was without the power to direct the engineer when to start and where to stop, how fast or how slow he should run, how or where he should enter the switch yards, or to make any regulations respecting safeguards or signals in and about the switch yards. There certainly can be no responsibility on its part for any act of the engineer which it was without the power to direct or control. And if it should be said that the act of the engineer in disregarding the signal given him by the Hannibal & St. Joseph Railroad Company, and recklessly running onto the plaintiff, was so outside of the directions given him by the Hannibal & St. Joseph management as to absolve it from liability for the injury inflicted, and therefore the responsibility ought to be cast upon the owner of the train, which it had placed the engineer in charge of, this accountability must rest entirely upon the rule of *respondet superior*, and not upon the ground that the owner is a joint tortfeasor.

If we proceed to the further fact, alleged in the petition, that the defendant Hanna "carelessly, recklessly, and negligently disregarded and ran by signals given to warn and advise him of the presence of the switch engine and of the plaintiff upon said main track; that the defendant Hanna knew of the presence of the plaintiff and his switch engine upon said main track, or by the exercise of the ordinary care in running his engine and train could and would have known thereof; and knowing that switch engines and cars were accustomed to use the main line track in doing the switch work at said yards, etc., carelessly, recklessly, and negligently ran said engine past and by said signals at said high and dangerous rate of speed, and upon, into, and against said switch engine and this plaintiff"—it results that this was the ultimate act and proximate cause of the injury, for which he would be answerable to the plaintiff in an action of trespass *vi et armis*. And while the defendant company would be liable to the party injured in an action on the case, it would be predicable alone upon the doctrine of

respondeat superior, founded on principles of public policy. There would be no cause of action against them as joint tort feorsors, for the reason that the defendant company not only did not actively participate in this willful and wanton act of the engineer, but the engineer was acting outside of his duty in performing his obligations toward the master.

Judge Bliss, in his work on Code Pleading, § 83, says:

"Persons are not jointly liable for a tort merely because they may have some connection with it, even if it may give a several cause of action against them. There must be a co-operation in fact; 'there must be some community in the wrongdoing among the parties who are to be united as codefendants; the injury must be in some sense their joint work.'"

And Pomeroy, in his work on Code Remedies, at section 307, speaking of the right of the actor to proceed against the defendants jointly for an injury resulting from negligence, want of skill, fraud, and the like, says:

"In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as codefendants; the injury must in some sense be their joint work. It is not enough that the injured party has on certain grounds a cause of action against one for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action. This principle is of universal application."

The cases holding that the injured party may sue jointly the master and the servant limit this right to the instance where the injury results merely from the negligence of the servant; that is, the failure to do something which the servant ought to have done, but negligently failed to do. Even they hold that such action does not lie against the master and servant jointly for a willful injury done by the servant while engaged about the master's business. This is so held in the leading case of *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, so frequently cited by the advocates of the right of joint action against the master and the servant. I undertake to say that no well-considered case in modern jurisprudence can be found where it is held that where the servant is not only guilty of an act of negligence, but of an act of positive misfeasance, outside of any imposed duty of the master which directly occasions the injury, he is suable jointly with the master, when the master's liability springs alone from the doctrine of respondeat superior, and not as an active participant in the trespass.

This, it seems to me, must be the law of this case, for the reason that the rule contended for would disregard and overturn a well-settled rule of the common law that there can be no apportionment of contribution among tort feorsors. If a recovery can be had in an action against a railroad company and its engineer jointly for the willful and reckless trespass of the engineer in running his train by in spite of a known signal given to him, and recklessly dashing into another train on the track, injuring its occupants, a judgment therein would conclude both defendants that it was a joint act of misfeasance

on their part. Both defendants being parties to the judgment, a general verdict on such a petition would conclude both defendants as to every fact included within the allegations of the petition. *Cromwell v. County of Sac*, 94 U. S. 352, 24 L. Ed. 195. This being so, what becomes of the doctrine that where the master is held to respond for the wrongful act of the servant, done without the master's participation or direction, the master may have recourse against the servant for full restitution? Judge Story, in his work on Agency (9th Ed.) pars. 308, 309, discussing the liability of the master, says:

"The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases when the tort is of such a nature as that he is entitled to compensation."

It is upon this ground that the Supreme Court of Maine, in *Campbell v. Sugar Company*, 62 Me. 553, 16 Am. Rep. 503, said:

"The proper adjustment and the final responsibility between them cannot well be effected if one has distinct grounds of action against them—against the agents for their own negligence, against the principals because the law makes them responsible for the negligence of their agents—is permitted to recover against both in one suit."

The only innovation made upon this rule in this state is found in section 2870, Rev. St. Mo. 1899, c. 17, entitled "Damages and Contributions in Actions of Tort," which provides that:

"Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract."

The effect of this statute is to give to the defendants who are sued jointly "in an action for the redress of a private wrong," where one of them satisfies the judgment, the right to go upon the codefendant merely for contribution; that is, to compel his codefendant to contribute his proper proportion of the sum paid by him. Even this statute assumes that there is a joint liability among the several defendants; but it does not touch the common-law rule that where the master has been held to respond in damages for the negligence of the servant, upon grounds of public policy, without any active participation on the master's part in the wrongful act of the servant, the master is entitled to full restitution for the whole amount he has been compelled to pay out. This criticism does not conflict with the ruling in the *Dixon Case*, for the reason that there the ground of joint recovery was for a mere negligent act of the servant. In such suit the action is one on the case, the petition on its face disclosing the fact that the sole ground of recovery against the master is because of the doctrine of respondeat superior. A joint judgment, therefore, might not preclude the master's right of action against the servant for full restitution, as the record probably would not show that the master was an active joint tortfeasor, as it would be in the case at bar.

There is still another view, arising on one of the allegations of this petition, which shows that the cause of action against the defendants

is not joint. As already quoted from the petition, it charges that when the defendant engineer approached the switch yards at Harlem, Mo., he carelessly, negligently, and recklessly disregarded and ran by signals given to warn and advise him of the presence of the switch engine and of the plaintiff upon said main track. If this be so, that was the *causa causans* of the injury, and was wantonly committed by the engineer despite the signal warnings given him to prevent the collision. It was a physical impossibility for the defendant company to have been present at that instant, directing or participating in this reckless act of the engineer. By the use of the accumulated epithets that this was done "carelessly, negligently, and recklessly," the term "recklessly" thus employed is tantamount to the allegation that it was "a wanton disregard of all consequences," and would warrant the jury in awarding punitive damages against the defendant Hanna. *Times Publishing Company v. Carlisle*, 94 Fed. 773, 36 C. C. A. 475. Such an allegation in the petition, without more, would warrant the court in instructing the jury that the plaintiff, if the allegation be sustained by the evidence, would be entitled to exemplary damages as against the defendant Hanna; and this fact, manifest on the face of the petition, presents a separable controversy as to the defendant company under the removal act. *Davenport v. Southern Ry. Co.* (C. C.) 124 Fed. 983.

It is expressly held in *Lake Shore, etc., Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, that:

"In actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief, or criminal indifference to civil obligations."

—But that such punitive damages cannot be awarded against the railroad company which did not participate in the offense. The court said:

"A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent."

This for the reason that the accountability of the master in such case arises by reason of the doctrine of *respondeat superior*.

The provisions of the Missouri statute in such action to entitle the plaintiff to punitive or exemplary damages, requiring that he must make separate prayers, stating the amount of compensatory damages and the amount of punitive damages claimed, has no application to the practice in the federal court. *Times Publishing Co. v. Carlisle*, *supra*. The plaintiff is entitled to such relief as the facts stated entitle him, regardless of the prayer of the petition.

This court is unwilling, in order to make contribution to these latter-day efforts, in cases like this, to avoid the removal of causes from the state to the United States Circuit Courts, to efface the many ancient landmarks of the common law involved herein, founded, as they are, in wisdom.

The application to have this case remanded is denied.

SHAFFER v. UNION BRICK CO. et al.

(Circuit Court, D. Kansas, Third Division. March 12, 1904.)

No. 326.

1. NEGLIGENCE OF SERVANT—LIABILITY OF MASTER.

To constitute a joint liability of master and servant for the negligence of the servant, there must be actual negligence, as contradistinguished from imputed negligence, of the master concurring with an act negligently committed by the servant.

(Syllabus by the Court.)

At Law.

This is a motion by plaintiff to remand the case to the state court, from whence it came for want of jurisdiction in this court.

The action was brought in the district court of Allen county by plaintiff to recover damages jointly from defendants for negligently causing the death of her husband, David C. Shaffer, while in the employ of the defendant brick company. The petition alleges deceased, when injured, was operating what is known as a "dry pan"; that it was his duty to oil the machinery operating such pan immediately before commencing work; while doing so, under the direction of defendant Ratliff, an employé of the defendant brick company, the machinery was suddenly started by Ratliff removing a clutch; that deceased was caught in the machinery, and received injuries resulting in his death; that the machinery was started by Ratliff, who at the time knew, or should have known, the deceased was in a dangerous position, and likely to receive injuries therefrom.

The specific acts of negligence alleged against defendant the Union Brick Company are:

"(a) In failing to provide the best and latest improved machinery of the kind necessary for the purpose for which the machinery hereinbefore described was used by it; that said machinery not being the latest improved and standard machinery for such use, and not having the latest and best methods for providing safety to employés in operating it.

"(b) It was further negligent in not providing a system of guard rails or covering over and around said cogwheels for the purpose of preventing any one in oiling said machinery or in operating it from falling upon or into said cogwheels while in motion.

"(c) It was further negligent in starting said machinery, or causing it to be started, by its said foreman and codefendant, J. T. Ratliff, acting for it and in its behalf and by its direction, while said deceased, David C. Shaffer, was close to or upon said cogwheel, in the act of oiling it, as hereinbefore stated.

"(d) It was further negligent in not providing a gong or means of making a loud noise for the purpose of warning any and all employés, and more especially deceased, of the intention of any one to start said machinery, so that such employés, and more especially deceased, might have been warned, avoiding death or injury from the starting of said machinery.

"(e) That it was further negligent in causing said machinery to be started by its said codefendant, J. T. Ratliff, at the time and place hereinbefore mentioned, without giving deceased warning of such intention, said defendant J. T. Ratliff so acting for and in behalf of his codefendant, the Union Brick Company, being at the time he started said machinery in a position to have easily seen deceased at the place where he was, and to have easily given him warning of his intention to start such machinery."

The act of negligence alleged against defendant J. T. Ratliff is:

"That said defendant J. T. Ratliff was negligent in carelessly and negligently starting said machinery in operation by the use of said clutch when he knew, or by the exercise of reasonable care and prudence might have

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 1238.

known, that deceased was in a place where the starting of said machinery would cause his death or cause him great bodily injury, and in so starting said machinery without giving warning to deceased of his intention to so start such machinery, as hereinbefore stated."

It is further alleged in the petition that the Union Brick Company is a foreign corporation, organized and incorporated under the laws of the state of Wyoming, and that defendant Ratliff was, at the date of the injury, foreman and assistant manager of the business of the brick company.

The case was seasonably removed into this court upon petition of the brick company. The petition for removal alleges the facts necessary to show jurisdiction in this court; avers the existence of a separable controversy between plaintiff and defendant brick company; also alleges Ratliff, a citizen and resident of this state, to have been fraudulently made a party defendant to the action for the sole and only purpose of defeating the right of the brick company to remove the cause into this court.

Ewing, Gard & Gard, for plaintiff.

Campbell & Goshorn and Moore & Berger, for defendant the Union Brick Company.

POLLOCK, District Judge (after stating the facts as above). The petition is framed on the theory that defendants are joint wrongdoers, and jointly liable in damages for the death of David C. Shaffer. If so, the case is not removable into this court. *Powers v. Chesapeake & Ohio Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Louisville, etc., Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899.

It is alleged in the petition for removal filed herein that Ratliff, a citizen and resident of the state of Kansas, was made party defendant for the sole and only purpose of defeating a removal of the case from the state court into this court, but such allegation cannot have effect in this case for two reasons: First, it is not supported by proof. In *Warax v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 72 Fed. 637, it is said:

"In order that such joinder should be regarded as fraudulent, it must appear, by allegation and proof, not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the petition upon which the right to join the defendants is claimed are so unfounded and incapable of proof as to justify the inference that they were not made in good faith, with the hope and intention of proving them, or else that they do not state a joint cause of action."

Again, it is well settled, if the plaintiff alleges a joint cause of action against the defendants in her petition filed in the state court, and one or more of such defendants are citizens of the state, a nonresident defendant may not remove the case into this court. In *Powers v. Chesapeake & Ohio Railway*, supra, it is said:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and alleges that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.'"

A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right of prosecuting his suit to a final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

In Louisville, etc., *Railroad Co. v. Wangelin*, supra, it is said to be equally well settled—

"That in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In other words, the authorities hold that, if plaintiff has in law a joint cause of action against both defendants, she may join them in one action, and no wrong or fraudulent motive will be imputed to her, though the result of her action be to prevent a removal by the non-resident defendant.

Hence the only question of merit arising upon this motion for determination is, does the plaintiff allege in her petition a joint cause of action against both defendants? If so, the motion to remand must be granted.

The almost universal practice in vogue of late years, and more especially since the decision of the *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121 (decided in October, 1900), of joining a local resident defendant, like an engineer, fireman, brakeman, or other employé, with the nonresident master, to prevent the removal by the master from the state to the federal court, demands a consideration and determination of this question upon principles alike applicable to all this class of cases. Doubtless there are cases of this character where the allegations of joint liability are so ridiculous or absurd upon their face that the court would be justified, from a simple inspection of the record, in holding that no joint liability does or could exist in the case. Again, no doubt there are cases in which it might be alleged in the petition for removal, and shown by proof, that a resident employé was fraudulently joined with a nonresident master for the sole purpose of preventing removal of the case by the master; but in comparison with the great body of litigation upon this question such cases are quite infrequent in occurrence, and depend more upon the ingenuity and skill of the pleader drafting the petition than the true circumstances of the particular case. It is manifestly both unsafe and unsound to allow the ultimate determination of the right of removal from the state to the federal courts to rest upon the ingenuity of counsel drafting the pleadings; for, as said by Mr. Justice Miller in *Board of County Com'rs v. Kansas Pac. Ry. Co.*, 4 Dill. 277, Fed. Cas. No. 502:

"It would be a very dangerous doctrine—one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. We must therefore

be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

As the right of the nonresident master, joined in an action to recover damages for negligence with the resident servant charged with committing the act of negligence, to remove the action from the state into the federal court must be tested by the petition of the plaintiff filed in the state court, the broad general proposition for consideration is, under what circumstances may such joinder be made? In what case does a joint liability on the part of the master and negligent servant exist in law? In principle and upon authority, as gathered from the law writers and adjudicated cases upon this proposition, is the master jointly liable with his negligent servant in all cases or in any case? If so, what is the reason for such joint liability or nonliability, in the absence of statutory enactment upon the subject?

I am persuaded from an examination of the authorities that its solution must depend upon the character of the act charged as negligent, and the fundamental distinction between the nature or ground, in law, of the liability of the master and that of the servant for an injury resulting to a third person in consequence of the negligent act of a servant done in the performance of the master's business. In order that there may be a joint liability of master and servant, there must be actual negligence as contradistinguished from imputed negligence of the master, concurring with an act negligently committed by the servant. In common parlance, it is said the negligence of the servant occurring in the discharge of his master's business, to the injury of another, is the negligence of the master. This statement, for practical purposes, is true, but it is inaccurate. For such negligence of the servant the master is legally liable, but such liability may rest either on grounds of public policy, or upon the ground that the master is liable for his own wrongdoing. The servant may or may not be liable, depending upon the nature of the act performed. For example, a servant may wholly fail to perform any of the duties imposed upon him by the master. Injury resulting to a third person from such failure, the master will be responsible to the injured third person. The servant will not be liable to such third person, but to the master only. In such case there is no joint liability, because the master alone is liable. Again, the servant may violate the express directions of his master, or may commit an act of negligence to the injury of a third person without the knowledge or direction of his master. In such case both the servant and the master will be liable to such injured third party—the servant, for negligence in the performance of his duty; the master, because on grounds of public policy the law imputes to him and holds him responsible for the negligence of his servant, and this although the negligent act of the servant may have been performed against his express direction and command. In such case the liability is several, not joint. Again, the negligent act of the servant complained of may be done in the presence of the master and under his direction, or in the absence of the master, in pursuance of his express direction or command. In such case both servant and master are liable to an injured third party, and both are negligent in fact, and liable because they are negligent. In such case the cause of action against both is for negli-

gence in fact, and such cause of action may be joint or several, at the election of the party injured.

While the authorities are not in harmony upon this proposition, yet the great weight of authority and the very reason of the matter leads inevitably to the conclusions stated, as a brief review of the authorities will show.

Pomeroy in his work on Code Remedies, § 307, says:

"The common-law doctrines concerning the liability of tortfeasors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure. It is unnecessary to repeat these ancient rules; that they are still in operation, with their full force and effect, is sufficiently shown by the following particular instances: In general, those who have united in the commission of a tort to the person or to property, whether the injury be done by force, or be the result of negligence or want of skill, or of fraud and deceit, are liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed. * * * In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action be possible, there must be some community in the wrongdoing among the parties who are to be united as codefendants; the injury must in some sense be their joint work. It is not enough that the injured party has on certain grounds a cause of action against one for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action. This principle is of universal application."

Bliss in his work on Code Pleading, § 83, says:

"Persons are not jointly liable for a tort merely because they have some connection with it, even if it be such as to give a cause of action against them. There must be some co-operation in fact. There must be some community in the wrongdoing among the parties who are united as codefendants. The injury must be in some sense their joint work."

In the case of *Mulchey v. Society*, 125 Mass. 487, it is said:

"But the jury should have been instructed, as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intentment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers, and therefore jointly liable."

In the case of *Campbell v. Sugar Co.*, 62 Me. 553, 16 Am. Rep. 503, it is said:

"But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but there are substantial reasons assigned in *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury. The proper adjustment of the final responsibility as between themselves cannot well be effected if one who has distinct grounds of action against them—against the agents for their own negligence, against the principals because the law makes them responsible for the negligence of their agents—is permitted to recover against both in one suit."

...In the case of *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, it is said:

...But whether the liability to the defendant in error, if any exist, attached to Freeman alone, or to Clark for the negligence of his servant or agent, or to Clark and Freeman as joint tort feasons, depended upon a legal question arising upon the relation between Clark and Freeman in respect to the transaction alleged as the occasion of the injury. If the excavation had been ipso facto unlawful, as an unnecessary encroachment on the street, Clark and Freeman would have been liable, if any liability existed, jointly as wrongdoers. But if there was nothing in the work that Clark had required by the contract to be done which was in itself unlawful, or which, properly done, could be the occasion of an injury to any one, and Freeman, wholly free from the control of Clark as to manner of doing the work, had by his own wrongful and negligent conduct been the cause of the injury, he alone would be liable. If, however, Freeman, acting under the control and direction of Clark, as his servant or agent, had negligently and wrongfully allowed the excavation to be in an unfenced or otherwise dangerous condition, whereby the injury was sustained, Clark would be liable, although not jointly, with Freeman. In this last instance supposed either Clark or Freeman might be sued separately; but inasmuch as Clark, although he could not excuse himself on the ground that the nuisance had been occasioned by the negligence of Freeman, would have a right of action against Freeman for the recovery of such damages as he might be compelled to pay by reason of his negligence, he (Clark) could not be joined in the same action with Freeman. This doctrine was expressly ruled in *Parsons v. Winchell*, 5 Cush. 592 [52 Am. Dec. 745], and appears to rest upon a reason which is entirely satisfactory."

In the case of *Warax v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.)* 72 Fed. 637, Judge Taft, after quoting from *Pollock on Torts* (4th Ed.) p. 70, says:

"It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant, and does not exist at all, unless it would also exist for the same act when committed, not as the servant, but as the principal. Liabilities created on two such wholly different grounds cannot and ought not to be joint."

In the case of *Helms v. Northern Pac. Ry. Co. (C. C.)* 120 Fed. 395, it is said:

"For the purpose of determining the liability of the master for the negligence of the servant, it is common to say that the negligence of the servant is the negligence of the master. This, however, is a convenient rather than an accurate statement. The master is in fact negligent only when he participates in the wrongful act of his employé. This he can only do in one of three ways: (1) By direct participation; (2) by previous direction; (3) by subsequent adoption. In the case at bar, as is usual in suits of this character, there is no contention that the corporation was in fact a party in either of these respects to the negligence complained of. To say that because the master is responsible for the negligence of his agent he is therefore himself negligent is to confuse things that are widely different."

As supporting the views herein expressed, see, also, *Hukill v. Maysville & B. S. R. Co. (C. C.)* 72 Fed. 745; *Beutel v. Railroad Co. (C. C.)* 26 Fed. 50; *Ferguson v. Railway Co. (C. C.)* 63 Fed. 177; *Hartshorn v. Railroad Co. (C. C.)* 77 Fed. 9; *Page v. Parker*, 40 N. H. 68; *Bailey v. Bussing*, 37 Conn. 349. As holding a contrary view, see *Charman*

v. Railroad Co. (C. C.) 105 Fed. 499; Riser v. Railroad Co. (C. C.) 116 Fed. 215; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 501. Nor is it thought the views herein expressed are in conflict with the decision made by the Supreme Court in Chesapeake & Ohio Ry. Co. v. Dixon, supra. That action was brought by Mrs. Dixon to recover damages for the wrongful death of her husband against the railway company, a foreign corporation, and the resident engineer and fireman in charge of the train, in a state court in Kentucky, under the provisions of a statute of that state which reads as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful, or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased." Ky. St. 1903, § 6.

The petition alleged negligence in the following language:

"At the time and place when and where plaintiff's intestate was injured, as aforesaid, the defendants R. H. Chalkey and Wm. Sidles were, and for a long time theretofore had been, servants of the corporate defendants, in charge and control of said train, and then and there were, and for a long time theretofore had continuously been, respectively, engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said servant and other of its servants, then and there in its employment, and said negligence was the joint negligence of all the defendants."

The railroad company filed its petition and bond for removal from the state to the federal court. The state court refused to order a removal of the case. Thereupon the railway company answered, and went to trial in the state court. A judgment entered in favor of plaintiff against all the defendants was affirmed in the court of appeals of that state, that court holding the petition stated a joint cause of action against all the defendants. The case was carried to the Supreme Court on the question of jurisdiction. In passing on the case the Chief Justice, delivering the opinion of the court, recognizes the principles hereinbefore stated, as follows:

"The contention of counsel is that this complaint charged neither direct nor concurrent nor concerted action on the part of all the defendants, but counted merely on the negligence of the employes. If the complaint should be so construed, the question would still remain whether the cause of action was not entire as the case stood, and the objection of the difference in the character of the liability matter of defense, which might force an election, or defeat the action as to one of the parties. The cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And, on the principle of the identification of the master with the servant, it would seem that there was no fact which the company could traverse which its codefendants, being its employes, could not. At all events, a judgment against all could not afterwards be attacked for the first time on this ground.

"But does the complaint bear the construction the company puts upon it? The pleader did not set forth, and according to the decision of the Court of Appeals this was not material, the specific acts of negligence complained of. It was stated that the negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants. Assuming this averment to be inconsistent with a charge of direct action by the company, it may nevertheless be held to amount to a charge of concurrent

action when coupled with the previous averment that Dixon was killed while crossing the track at a turnpike crossing by the negligence of the company and the other defendants in charge of the train. The negligence may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurrent negligence is charged the controversy is not separable. * * * Our conclusion is that it cannot properly be held that it appeared on the face of this pleading, as matter of law, that the cause of action was not entire, or that a separable controversy was presented."

Applying the principles deducible from the foregoing authorities to the case at bar, it becomes clear no joint liability of the defendant brick company and its employé Ratliff is alleged in the petition. The statute under which this action was brought reads:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission." Gen. St. Kan. 1901, § 4871.

It will be noted, from the specific acts of negligence quoted from the petition, the defendant brick company is not charged with participating in or directing the act of negligence alleged against the employé Ratliff. If liability for such act attaches to the brick company at all, it is on grounds of public policy, and not for actual wrongdoing by the company through its managing officers. On the one hand, the liability of the employé Ratliff is direct and proximate—is a liability for his negligence or wrongdoing. It neither arises from nor is in any way dependent upon his connection with the defendant company. He is not concerned in or affected by any other ground of negligence alleged in the petition against the defendant company. On the other hand, the liability of the brick company for the negligent act of its employé Ratliff is indirect, and contingent upon it being first shown he was acting for the company. It is not a liability for negligence of the company, but a liability created by the policy of the law.

Again, under the allegations of the petition, the proof necessary to establish the liability of the defendant brick company differs materially and essentially from that required to fix the liability of the employé Ratliff. It is possible to establish the liability of the employé Ratliff in this case without showing any connection between him and his co-defendant.

The ground of liability of the defendant brick company to plaintiff for the negligent act of its employé Ratliff, as alleged in the petition, being essentially and inherently different from the liability of the employé for his own wrongful act, and the proof necessary to establish the liability of the brick company to plaintiff being radically different from that required to establish the liability of its employé to plaintiff, it must be held no joint liability to plaintiff exists.

Therefore, under the allegations of plaintiff's petition, the motion to remand will be denied.

McDUFFIE et al. v. MONTGOMERY.

(Circuit Court, N. D. Illinois, N. D. February 8, 1904.)

No. 26,885.

1. WILLS—CONSTRUCTION.

Under a will by which the testator gave his residuary estate to his wife "absolutely," with a request that at her decease or before she give to his son \$30,000, "or any sum she may think best," provided he was of good habits, otherwise not, and a further request that at her decease she should divide her property among his brothers and sisters "as she may think best," no interest in the property of the testator vested in the brothers and sisters prior to the wife's decease, and the legal representatives of those who died before her death are not proper parties to a suit against her executor to establish and enforce a trust under the will of her husband.

2. JURISDICTION OF FEDERAL COURT—CITIZENSHIP OF ADMINISTRATOR.

A state statute providing that a nonresident cannot act as administrator does not make an administrator appointed therein a citizen of the state for the purpose of the jurisdiction of a federal court, which is determined by his actual citizenship.

3. WILLS—CONSTRUCTION—PRECATORY TRUST.

The will of a testator gave his residuary estate to his wife "absolutely," with a request that at her death, or before, if she should think best, she give to his son a certain sum or any sum she might think best. The will then provided: "I further request that she, my said wife, shall assist any of my brothers or sisters if they should be in need, and at her decease she should divide her property among them as she may think best." *Held*, that the will gave the wife an absolute estate in the property, and did not create a precatory trust in favor of the testator's brothers and sisters.

In Equity. On demurrer to bill.

Frank E. McDuffee and Isham, Lincoln & Beale, for complainants.
E. C. Ritsher and Louis E. Hart, for defendant.

KOHLSAAT, District Judge. From the bill filed herein, it appears that Henry E. Sawyer died in the state of Massachusetts on September 12, 1887, leaving a last will and testament, whereby he bequeathed and devised his real and personal estate, valued at about \$125,000, as follows, viz.:

"I give and bequeath to my two sisters, to-wit: Mrs. Jane Robie and Lydia Sawyer, each fifteen hundred dollars. I give and bequeath all the balance of my property consisting of bonds, bank stock, notes, demands, real estate and personal to my wife Amanda N. Sawyer absolutely; and request that at her decease or before, if she shall think proper she give to my son, Harry C. Sawyer, the sum of thirty thousand dollars, or any sum she may think best, provided he is of good habits and capable of using such monies to good advantage. But unless he is a person of good habits in every respect, he is not to have the control of any of such money.

"I further request that she, my said wife, shall assist any of my brothers or sisters if they should be in need, and at her decease she should divide her property among them as she may think best."

¶ 2. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298. See Courts, vol. 13, Cent. Dig. § 858.

The will was duly admitted to record in the probate court of the county of Middlesex, state of Massachusetts, on or about November 9, 1887, and Amanda N. Sawyer qualified as executrix thereof. In the course of her duties as such executrix she financially assisted her husband's sister Elizabeth H. McDuffie, one of the defendants, and her husband's nephew, Frank E. Sawyer. It does not appear what was done for testator's son, Harry C. Sawyer, nor what has become of him. He is not made a party to the suit. If living, he is, of course, an indispensable party. Afterwards, and about December 31, 1902, Amanda N. Sawyer died at Chicago, Ill., testate. Her will distributed her estate, amounting at that time to about \$190,000, between the relatives of herself and her said husband, giving the greater portion thereof to her own relatives. The defendant, Montgomery, was therein named, and afterwards qualified as executor and trustee.

The complainants insist that by the will of said Henry E. Sawyer, a trust was created in favor of his brothers and sisters, i. e., Elizabeth H. McDuffie, Jane J. Robie, Lydia A. Sawyer, Edward C. Sawyer, four of the complainants, and Joseph Sawyer, John H. Sawyer, Mary D. Burroughs, and Emily P. Blanchard, brothers and sisters, who have died since the death of said Henry E. Sawyer. These latter four are represented, among the complainants herein, by their several legal representatives. It is further claimed by the bill, in effect, that the interest of said brothers and sisters vested as of the date of the death of said Henry E. Sawyer, and the court is asked to decree that the defendant proceed to distribute the estate in his possession, to wit, the estate of said Henry E. Sawyer now remaining, and the increment thereof, in accordance with the terms of his will, and execute said trust in favor of his said brothers and sisters. The matter now comes before the court on demurrer, setting up the following special grounds: (1) That the legal representatives of deceased brothers and sisters are not proper parties to the suit, having no interest in the subject-matter; (2) that the allegations of the bill with regard to assistance rendered by Amanda Sawyer to her husband's relatives during her lifetime are impertinent; (3) that the allegations of the bill with reference to Henry E. Sawyer's sentiments toward his wife's family are also impertinent; (4) that no case for the relief sought is presented by the bill.

The point first made must turn upon a construction of the will of Henry E. Sawyer with reference to the time when the interests of the brothers and sisters vested. After giving the wife an estate, absolute in terms, the testator adds, "and request that at her decease, or before, if she shall think proper, she give to my son Harry C. Sawyer, the sum of thirty thousand dollars, or any sum she may think best." In the event his habits were not good, he was to have no part thereof. Fairly construed, this gave the wife the option to give Harry whatever she wished, even to the exhaustion of the whole estate, provided his conduct was good. Had she done so, complainants could have made no claim. Then, too, the wife is requested to assist the brothers and sisters "in need of help," and at her decease she should divide her property among them as she may think best. If this clause means anything, it means that she had discretion to divide the estate among

the brothers and sisters, or those who needed it, in such proportions as she thought best. This would involve the right to give to some of them nothing, or a nominal amount, and to others the bulk thereof, or she was at liberty to use it all up in her lifetime. Everything considered, it seems evident that, if title in the brothers and sisters vested at all, it must have vested as of the date of the wife's death. Therefore the legal representatives of those who had deceased prior to that date have no interest in the subject-matter, and are not proper parties to this suit. If the estate had vested in the brothers and sisters at the time of Henry E. Sawyer's death, then, as to the real estate involved in this suit, the heirs of those who have died would be necessary parties. If the estate did not vest until the wife's death, then only the surviving brothers and sisters would be concerned.

I think it clear the bill is defective as to parties. Under the view the court takes of this case, and hereinafter stated, the matter covered by the said special grounds of demurrer 2 and 3 are wholly immaterial and need not be passed on.

The point made by defendant, that Frank E. Sawyer, as administrator of Joseph Sawyer, appointed by the probate court of Cook county, Ill., must be held to be a resident of this state, because by the Illinois administration statute a nonresident cannot act as administrator, is not well taken. The residence or citizenship of an administrator is the fact which determines jurisdiction. *Rice v. Houston*, 13 Wall. 66, 20 L. Ed. 484; *New Orleans v. Gaines, etc.*, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102. The Illinois statute provides how an administrator who has left the state may be removed. The question cannot be raised in a collateral proceeding for purposes of jurisdiction.

The substantial questions of this case are those raised by the general demurrer set out as ground 4 of said demurrer. It is settled beyond need of citation, in this country, that the courts will, in cases like this, be governed by one never varying rule, i. e., to effectuate the intention of the testator. If this can be reasonably arrived at from the terms of the instrument, that must prevail. Extraneous facts cannot be injected for the purpose of placing a different construction thereon from that which is the plain meaning of the language used. *Schouler on Wills*, § 568 (2d Ed.); *Underhill on Wills*, § 913. What, then, is the plain, common-sense meaning, as effected by the decisions, of the language of the will now before the court, since, of course, the language used must be construed with reference to any well-established legal construction thereof, and it will be assumed that the testator used the phrase with knowledge of such construction, unless the contrary appears? The language used, viz., "I give and bequeath all the balance of my property consisting of bonds," etc., real estate and personal, "to my wife Amanda N. Sawyer absolutely," of itself creates an absolute estate in the widow. It is claimed by the bill that the subsequent language, requesting her, at her decease, to divide her property among "them as she may think best," creates a so-called "precatory trust," and that it has the same force as though it had been a command.

In order to maintain the contention of complainants herein, the facts must bring the case within the rule concerning precatory trusts. Tersely stated, that rule requires: (1) That the words used must be such that it shall appear from them that they were intended in an imperative sense. (2) The subject of the recommendation or wish must be certain. (3) The object thereof must be certain.

It is the contention of complainants that all of these elements exist in the clause of the will relied on. In support of their position, complainants cite, among other cases, the case of *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322, decided by Chief Justice Marshall in 1832. The facts were as follows, viz.: The testator gave to his wife all his personal estate "to and for her own use and benefit and disposal absolutely, the remainder of said estate after her decease, to be for the use of the said Jesse Goodwin," a son of testator. (In *Campbell v. Beaumont*, 91 N. Y. 468, 469, and *Fox's Appeal*, 99 Pa. 382, the doctrine of this case is questioned.) It will be noticed that the wording in this case is not a request or wish, but a plain and strong statement, that the remainder is to be for the use of the son. This claim is just as peremptory as that pertaining to the wife. It would seem that, if there ever was a case where the use of the word "absolutely" should not be given its strict sense, this is the case. The intention of the testator is apparent. The subject-matter involved consisted of shares, in regard to which the court says it is "a species of property not consumed by the use, and in regard to which a remainder may be limited after a life estate." The court also says: "The testator unquestionably intended to make a present provision for his wife and a future provision for his son. This intention can be defeated only by expunging or rendering totally inoperative the last clause of the will," thereby, as the court holds, ignoring the testator's intention. No one, it seems to me, can read this case without acquiescing in the conclusion of the court. Whatever hesitancy the courts have felt in regard to it grows out of the fact that the will does contain two apparently conflicting provisions; that is, it creates two absolute estates on its face. These the court had to reconcile, which it found no difficulty in doing.

The other Supreme Court case relied on by complainants is that of *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, decided in 1887 by Justice Matthews. The facts are these: Colton, a resident of California, died testate. By the will, testator gives and bequeathes to his wife all the estate, real and personal, of which he died seised or entitled to, and adds, "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." The estate amounted to \$1,000,000. The case came before the court on appeal from the decree of the Circuit Court sustaining a demurrer to and dismissing the bill. The point in dispute was whether a trust was created in favor of the mother and sister, or whether the widow took the estate absolutely, with liberty to disregard the request and recommendation, and make provision for them or not, as she chose. The court (page 313, 127 U. S., page 1170, 8 Sup. Ct., 32 L. Ed. 138) quotes with approval the following declaration of Vice Chancellor

Cranworth in *Williams v. Williams*, 1 Simons (N. S.) 358: "I doubt if there can exist any formula for bringing to a direct test the question whether words of request or hope or recommendation are or are not to be construed as obligatory;" and also the language of Gray, C. J., in *Hess v. Singler*, 114 Mass. 56, as follows: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. * * * It must appear that the words were intended by the testator to be imperative, and, when property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation or confidence"; and holds that the above language in the Colton will creates a trust in favor of the mother and sister. It is apparent that the court considered this case an extreme application of the principles invoked, since the opinion lays hold of every detail, such as the difference in expression between said clause and the following one, with reference to the children of testator and his wife; also the fact that testator died the day after making his will, which it is assumed he made in haste; also the fact that the mother was aged, feeble, and a widow, and that the sister was caring for her; also that the only income possessed by the mother and sister was the interest on his own note of \$15,000 loaned to him many years before by his father, and the further fact that his own estate was more than ample for his wife and children. Undoubtedly it was an extreme case, justified, as the court holds, by the circumstances. In order to bring a case within the requirements of a precatory trust, it is necessary that the language used should be imperative, and that the subject and object be certain (*Cruwge v. Colman*, 9 Ves. 323; *Bland v. Bland*, 2 Cor. 349; *Warner v. Bates*, 98 Mass. 274; *Knight v. Knight*, 3 Beav. 179; *Flint v. Hughes*, 6 Beav. 342; *Fox v. Fox*, 27 Beav. 301; *Mills v. Newbury*, 112 Ill. 123, 54 Am. Rep. 213), and the court held all of these conditions to exist in the Colton Case. The objects of the trust were the mother and sister, the subject-matter was "a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities and the amount and value of the fund from which it must come." In regard to the clause "I * * * request her [the wife] to make such gift and provision for them as in her judgment will be best," the court held that the discretion reposed thereby in her did not involve the right to choose whether a provision shall be made or not, but that it was to be the exercise of judgment by her, directed to the care and protection of the beneficiaries, by making such a provision as will best secure that end; and then lays down the rule that a court of equity had full power to act for her in case she refused to perform the trust. There was no uncertainty as to the existence of the fund from which it should be provided. It was a prior charge upon the whole property devised.

Many other cases are cited for complainant, but in each of them there are features which distinguish them from the case at bar.

In support of the claim of defendant that the title vested absolutely

in his testatrix, defendant cites the case of *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089, wherein the court passed upon a somewhat similar case. One Lewis Carusi, a bachelor, died testate, and seised of real estate. By his will he devised and bequeathed all his estate, personal and mixed, to his brother, his heirs, executors, administrators, and assigns forever, "with the hope and trust, however that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance and that at his death the same or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale shall descend to my three beloved nieces," etc., giving to one niece the sum of \$5,000, and the balance, share and share alike, to the other two, and adds, "I further hope, trust and desire that in the event either one of my said nieces * * * shall not survive my said brother Samuel, that the share she might be entitled to had she survived him, may be conferred and fall to the surviving niece or nieces." Afterwards testator executed a deed of trust to Samuel Carusi in fee, authorizing him to reduce the estate to money and invest the proceeds for the use of testator, and after testator's death to convey the estate then remaining to such parties as he might name in his will. There was some dispute as to delivery of this deed. Afterwards testator executed and delivered to Samuel Carusi a deed in fee simple of said lands, reserving a life use in himself. On the death of Samuel Carusi, one of the beneficiaries under the said clause of the will of Lewis Carusi brought suit against the beneficiaries under the will of Samuel Carusi for her portion of said estate. The Supreme Court thereupon construed said clause, and held that the complainant took no interest thereunder, because an absolute estate was by said will vested in Samuel Carusi. The court says the words used do not raise any trust in Samuel, and that, even had the will contained an express request that Samuel should convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will gives the absolute power of disposal. To the same effect are *Jackson v. Bull*, 10 Johns. 18; *Ide v. Ide*, 5 Mass. 500; *Melson v. Cooper*, 4 Leigh, 408.

In *Knight v. Knight*, 3 Beav. 148, the court says: "If it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject from the wish or request, * * * it has been held that no trust was created." Where the first taker has the absolute power of disposal, or ownership, or where a clear discretion and choice to act, or not, is given, equity will not construe a trust from the language employed. *Jackson v. Bull*, 10 Johns. 18; *Ide v. Ide*, 5 Mass. 500; *Bowen v. Dean*, 110 Mass. 438; *Bills v. Bills*, 80 Iowa, 269, 45 N. W. 748, 8 L. R. A. 696, 20 Am. St. Rep. 418; *Fullenwider v. Watson*, 113 Ind. 18, 14 N. E. 571; *Gibbins v. Shepard*, 125 Mass. 541; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274; *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225; *Coulson v. Alpaugh*, 163 Ill. 304, 45 N. E. 216.

In *Randall v. Randall*, 135 Ill. 398, 25 N. E. 780, 25 Am. St. Rep. 373, the court holds that "no trust can be implied merely from the words indicating the motive which induced the gift, and the rule is,

whenever the prior disposition of the property imparts absolute and uncontrolled ownership, and also where a clear discretion and choice to act, or not to act, is given, equity will not construe a trust from the language employed."

In *Mills v. Newbury*, 112 Ill. 123, 54 Am. Rep. 213, the court, construing the clause, "I devise and bequeath to her [the mother] all my property, both real and personal of every kind and nature, upon the express condition, however, that she devise by will, to be executed before receiving this bequest, so much thereof as shall remain undisposed of or unspent at the time of her decease, to such charitable institution for women in said City of Chicago, as she may elect," held that this did not constitute a residuary clause, and that no trust was created, for the reason that the subject was uncertain. To the same effect are: *Winne v. Hawkins*, 1 Bro. Ch. 179; *Beachcraft v. Broome*, 4 Term R. 441; *Attorney v. Hall*, Fitz. 314; *Flint v. Warren*, 15 Sim. 625; 1 *Jarmon on Wills*, 363; 2 *Redfield on Wills*, 391; *Coulson et al. v. Alpaugh*, 163 Ill. 293, 45 N. E. 216; *Hill on Trustees*, 119; *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089; *Story, Eq. Jur.* § 1070; 2 *Pom. Eq. Jur.* §§ 1014-1017.

The provision now sought to be enforced relates to "her property," and requests that the wife divide the same at her death as she may think best. Whether this clause refers to all his brothers and sisters, or only those who might be in need, is not definitely stated. Manifestly, the only way in which she could make division of any kind, outside of the rules of descent, would be by some instrument conveying the property subject to her life estate, or by will. Thus it is apparent that whatever title complainants now have must come through her. Mrs. Sawyer was not requested to act in her lifetime, but at her death. It is plain that no title could vest in complainants, or any of them, until she acted, for it is termed "her" property. The clause in question includes not only property devised from testator, but all the property she has at her decease. She was at liberty to divide the same as "she may think best." If this means anything, it means that she had the option to give to some more, and to others less, or nothing at all. It makes no provision for the death of any of the brothers and sisters during her life. There is to my mind an utter lack of the necessary conditions upon which to raise a precatory trust. The language used, in my judgment, created an absolute estate in the wife.

For these reasons, and for those previously stated, the demurrer will be sustained.

UNITED STATES V. YOUNG.

(District Court, M. D. Alabama. February 18, 1904.)

1. NATIONAL BANKS—OFFENSES BY OFFICERS OR AGENTS—MAKING FALSE ENTRIES.

The entry on the books of a national bank by the cashier as a "cash item" of a check which actually entered into a transaction of the bank will not support an indictment of the cashier, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], for making a "false entry," although it is further charged that he knew the check to be worthless and fraudulent,

and made the entry with intent to deceive, etc. The entry, being a truthful statement of the actual transaction, cannot be converted into a false entry by any other fraudulent or unlawful act of the cashier.

Criminal Prosecution under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497]. On demurrers to indictment.

The indictment originally contained 48 counts. The government, being required to elect by the court, nol prossed all but 12 of the counts. These remaining 12 counts charge the making of false entries, under section 5209 of the Revised Statutes [U. S. Comp. St. 1901, p. 3497]. They refer to different items and entries, made on the books of the bank in different capacities, sometimes as teller and sometimes as cashier. They sometimes charge the entries were made with intent to defraud the association, etc., and sometimes to deceive any agent who might be appointed to examine the affairs of the bank, etc. The fifteenth count is like all the others, but makes the strongest statement as to the falsity of the entries. A synopsis of its allegations is necessary to a proper understanding of the ruling upon demurrer as to the other counts. That count, by formal prefatory averments, shows the organization of the bank; where it did business, etc.; defendant's connection with it as cashier, etc.; and then avers that the defendant, as such cashier, "did make in a certain book belonging to and in use by the association in transacting its banking business," said book being particularly described, covering a period which is given, "an entry in words and figures as follows, to wit: Cash items, four thousand seven hundred sixty-five and $\frac{2}{100}$ dollars." It further avers "that the entry [describing it] in the described book then and there purported to show, and did in substance and effect indicate and declare, that said Edward B. Young, as such cashier, did then and there, at the time said entry was so as aforesaid made, have in his possession, as such cashier, as the property of said association, real, valid, and proper cash items, amounting in the aggregate to four thousand seven hundred sixty-five and $\frac{2}{100}$ dollars." It then proceeds: The entry "was then and there false, in this: that said entry represented that said Edward B. Young, as such cashier of said association, then and there had in his possession as such cashier divers cash items, which, when taken and counted together, made the aggregate sum of four thousand seven hundred sixty-five and $\frac{2}{100}$ dollars; and which said entry then and there purported to show, and did in substance and effect indicate and declare, that he, the said Edward B. Young, then and there had in his possession, as such cashier, divers real, valid, and proper cash items, amounting in the aggregate to four thousand seven hundred sixty-five and $\frac{2}{100}$ dollars; and said entry so as aforesaid made was false, in this: that one of said cash items [which is set out], being a check drawn on the Eufaula National Bank, to the order of warrants for twenty-one hundred dollars, and signed by Edward B. Young as city treasurer, was then and there, at the time of said entry, in truth and in fact worthless, valueless, and fraudulent, as he, the said Edward B. Young, at the time said entry was so made, well knew."

The demurrers raise several objections: First, that the counts do not show that the Comptroller of the Currency had appointed, or would appoint, an agent to examine the affairs of the bank; second, that the items alleged to be worthless, fraudulent, and valueless might be so, and yet be real, valid, and proper cash items; third, that the counts do not allege wherein the items said to be worthless, valueless, and fraudulent were worthless, etc.; and, fourth, that the counts do not charge or allege that the entries alleged to be false did not truly represent a transaction that actually occurred in the business of the bank.

W. S. Reese, U. S. Atty.

S. H. Dent, Sr., Lee H. Weil, and Phares Coleman, for defendant.

JONES, District Judge (after stating the facts as above). The gravamen of all the counts, stripped of legal phraseology, is that the cashier or teller, as the case may be, made false entries on the books of the aggregate of his "cash items," by including therein a particular

item, based upon paper which was "worthless, valueless and fraudulent," and known to be so at the time of the entry, etc., with intent to deceive, etc. Does such an entry constitute a false entry, within the meaning of section 5209 of the Revised Statutes? If the entry was not false within the meaning of the section, it is hardly necessary to say that the making of it, with intent to deceive or defraud, etc., would not constitute an offense under the section. The intent with which the entry was made is wholly inconsequential, in that view.

In the first part of section 5209 [U. S. Comp. St. 1901, p. 3497] Congress made embezzlement, abstraction, and willful misapplication of the money, funds, and credit of any national banking association, and other specific acts, by which the funds or credit of a national banking association could be unlawfully imperiled, criminal offenses against the United States; and then, at the end of the section, created the offense of making "any false entry" with intent to deceive, etc. At the same time, and in the act of which this section forms a part, Congress enacted very comprehensive regulations for the business of national banking associations. This act, carried forward in appropriate sections of the Revised Statutes, invests the Comptroller of the Currency with large visitorial power over them, empowers him, among other things, to appoint examiners to ascertain and report upon their condition, to appoint receivers of such associations, in certain contingencies, and also to call upon them for special reports, according to forms prescribed by the Comptroller, showing their condition, etc., and requires these reports to be published in the place where the bank does business—all this that the public, as well as the government, may be informed of the condition of the bank, and act accordingly in their dealings with it. Having thus enacted safeguards for the preservation of the funds and credit of the association, and declared criminal penalties for transgression of regulations in those respects, Congress did not have to go over, and cannot be held by any legitimate construction to have intended to go over, the same ground, when it created the offense of making "any false entry." The several misdemeanors which the section creates apply to separate and distinct offenses. Clearly, that part of the section which creates the offense of making "any false entry" was not designed to cover other criminal breaches of duty, for which the law had already provided in prior parts of the section; but had other objects in view.

One important purpose of this provision as to "any false entry" was undoubtedly to stimulate integrity on the part of the officials in the conduct of their business. This the provision secures, as far as law can effect such a result, by forbidding bank officers, under penalties, to misstate by "any false entry" what they do. Another dominant purpose was, by enforcing true entries, to spread upon the books of the bank accurate statements of things done by the bank officers, to the end that bank examiners might be the better enabled thereby to trace and determine accurately, day by day, the actual condition and conduct of the business of the bank. The duty with which we are here concerned is the duty not to enter a false statement of the aggregate amount of "cash items." The cashier's books are not intended to furnish, and are not kept to show, the history or the origin of paper

taken by the cashier, whether received in good or bad faith, or "worthless and fraudulent." Other parts of the section had provided penalties for breaches of duty in this respect by persons handling the bank's cash. The sole purpose of this provision is fully accomplished if the item included in the "cash items" is truthfully based on any actual transaction with the cashier, which increases or diminishes the cash in his hands. The demand of this provision is that when a check, though "worthless and fraudulent," whether knowingly received or not, is received by the cashier, that the amount paid out on account of it, the particular—the detail—on which the item in his cash account is based, shall be truly stated. Obedience to that command, truly making the entry, though the history of the check and the cashier's dealing with it may bring him under condemnation of other provisions, cannot make him a transgressor against this provision.

If we stop a moment to consider what the "item" is which must enter into the cash statement, it will be seen at once that the good or bad faith in which the paper is taken, or its value or worthlessness, cannot determine whether the entry of the "item" as to it, or its inclusion under the aggregate of "cash items," is true or false, in the sense of this provision of the statute. One of the meanings of item is, "an article; single entry; anything which can form part of a detail; the particulars of an account." The detail, or particular here—the "item"—is on what account the sum stated has been paid out. This check is the thing which forms part of the detail—the "item"—which shows what was done with the bank's money as to it. The inclusion in the cash of a perfectly good check drawn on the bank, if that check has not in fact entered into any transaction of the cashier upon which he parted with money of the bank, would constitute a "false entry," if included in the "cash items" with intent to deceive. On the other hand, knowingly entering or including in the "cash items" an item based on a "valueless and fraudulent" check, if it were in fact received in a transaction with the cashier at the time the entry is made, and he paid out the amount of money included in the "item" on account of it, and truly entered or included the item in his "cash item," could not constitute a false entry. It is immaterial here, therefore, whether or not the check was in fact "worthless and fraudulent."

The cashier, by including the item here in his "cash items," did not declare or represent that the check upon which the item was based was good or supported by honest consideration. The entry makes no representation whatever as to that. The legal effect of the entry is but a written representation to whom it may concern that the cashier, in an actual transaction, had received the check, and that the amount stated was the basis of one item, which went with others to make up the aggregate "cash items" which the entry declared the cashier had at the time. The several counts assail the truth of the entry solely on the ground that the amount of one of the items which entered into the aggregate "cash items" was based on a check or paper which was fraudulent and worthless, and known to be so at the time of the entry. The cashier in that event would be equally bound, as in the case of a good check bona fide received, in stating his transactions upon the books, to make a proper "cash item" as to such check, irrespective

of its being taken in good faith, or knowingly received in bad faith. The several counts do not deny that the truth had been stated in the entry, or that the check upon which the item was based had been received by the cashier in an actual transaction with the bank. The several counts, therefore, resolve themselves into an assertion that the recital truthfully made by the cashier of the fact that he has included in his "cash items" an item based on a check received by him in an actual transaction with the bank, is converted into a false entry because he knew at the time the entry was made that the check was "worthless and fraudulent," etc. The fraud which entered into the consideration or taking of the check by the bank cannot obliterate or recall the fact that such a check was actually taken by the bank in a transaction with the cashier, who truly recited the fact upon the books. It cannot be a false entry to enter upon the books of the bank a correct recital as to the taking of the check and its inclusion as an item in the aggregate "cash items" of the bank. The truth of what the cashier actually did with the bank's cash as to this check, and statement he made about the cash in the entry on the books of the bank, is not altered in any way by the fact that he knew the check was "worthless and fraudulent." The entry, as we have seen, involved no assertion as to the value or bona fides of the check. It stated the exact truth of the transaction as it is entered on the cash account. It cannot be a false entry to make a recital on the books of the bank which speaks the truth. *Coffin v. U. S.*, 156 U. S. 446, 15 Sup. Ct. 394, 39 L. Ed. 481; *Id.*, 162 U. S. 682, 16 Sup. Ct. 943, 40 L. Ed. 1109; *Graves v. U. S.*, 165 U. S. 324, 17 Sup. Ct. 393, 41 L. Ed. 732. The averments here are quite different from those in the indictment in *United States v. Britton*, 107 U. S. 657, 2 Sup. Ct. 512, 27 L. Ed. 520. There it was specifically alleged that the item entered, representing cash, etc., "was not then and there received by said association upon any account, from any source," as he well knew.

What constitutes the basis of "proper cash items" on the books of the cashier or teller is not defined by law. It depends on the particular bank's mode of paying out its cash and keeping the account with its cashier. The indictment is silent as to the custom of the Eufaula National Bank in this respect. Many large banks do not treat checks drawn on it and paid by the cashier as any part of the "proper cash items" of the cashier, as the checks are delivered by the cashier or teller to some other officer, who credits him and charges them to other accounts. Such banks include in the "proper cash items" of the cashier only money or papers due from other persons or banks, which are immediately available to bring in cash, and remain uncollected in the hands of the cashier or teller. In the absence of any custom of banking of which the court can take judicial notice, or statements in the indictment showing that the words "cash items" were used in the technical instead of their ordinary sense, the words of the indictment do not by any means exclude, as the basis of "proper cash items," a paid check drawn on the bank by a depositor in funds, if the cashier has parted with the bank's money for it. "Proper cash items" in a cashier's accounts ordinarily include not only money on hand, but everything for which he has paid out the association's cash during a

particular day or business period. They are vouchers, particulars, "cash items," which show what he has done with the money. Generally, in large banks, drafts, bills, notes, or other evidence of value, purchased or discounted by the bank, for which the teller or cashier pays out the association's cash, are not turned over to him. A cash slip or memorandum is made by some other officer or agent of the bank, which is the cashier's voucher or authority to pay out the amount of money named in it. In such case this memorandum slip or order, and not the paper which it represents, constitutes the "proper cash item" in the cashier's accounts which should be entered on the books. If, however, the teller or cashier himself, out of the money in his hands on any particular day, loans money on a paper, or buys it, such paper would constitute a "proper cash item," entering into the day's business of the cashier, and would so continue until by passing to some other officer or department, and giving credit for it to the cashier in his cash account, it ceases to be a "proper cash item" on the cashier's or teller's books.

To prevent confusion, it is proper to add that the "proper cash items" above referred to must not be confounded with "checks and other cash items" which the association is required to state under the head of "Resources" in the forms prescribed by the Comptroller of the Currency for reports of the "condition" of the bank. The purpose of these reports is to enable him to ascertain whether the bank is solvent by comparing its "resources" with its "liabilities." A check drawn on the cashier's bank by a depositor who has funds to meet it, and paid by the cashier out of its cash, is far from being an asset or resource. It is only evidence of a debt paid. For that very reason, however, as it diminishes the cash, such a check would be a proper item of the cashier's accounts with the bank, while it would be misleading and out of place in a statement of "resources" in a report made to the Comptroller. The intentional inclusion in such a report, under the head of "checks and other cash items," of a check drawn against deposits in a bank and paid by it, or of one drawn on another bank and cashed by the cashier, who knew the check was "worthless and fraudulent," without accompanying it by a true statement as to its value, would subject the officer signing the report to indictment, under another provision of the statute, for making a false report. That, however, is quite a different offense from making a false entry on the books of the bank, which is here charged.

It is unnecessary to discuss other objections raised to the indictment, since that already discussed is fatal to it. The demurrers are sustained.

SOCIAL REGISTER ASS'N v. MURPHY.

(Circuit Court, D. Rhode Island. January 28, 1904.)

No. 2,617

1. COPYRIGHT—INFRINGEMENT—LISTS OF SOCIETY PEOPLE.

Complainant publishes a series of copyrighted books entitled "Social Register," each of which covers a different city, and contains a local directory of certain persons selected with reference to social standing. The names are arranged in groups showing the members of households, and

the maiden names of married women are also given. It also publishes annually books entitled "Social Register, Summer," giving the summer addresses of persons in different cities, and some years previously it published a "Social Register, Newport." Defendant published a book purporting to contain the summer and winter addresses of cottagers at Newport and other summer resorts, in the preparation of which he made use to some extent of the books of complainant, but it did not appear that he used the selections of prominent persons made therein. *Held*, that whether or not such use constituted an infringement of copyright depended upon whether matter obtained by complainant from original sources of information, and which was the product of its labor and expenditure, was appropriated; that under such rule it is doubtful if the copying or verifying of a small number of winter addresses of persons or families from complainant's books would be an infringement, but that as to the special features, such as giving the members of households, or the maiden names of married women, complainant was protected by its copyrights, and was entitled to an injunction, it appearing that in some instances such matters had been appropriated by defendant.

2. TRADE-MARK—INFRINGEMENT—TITLE OF BOOK.

While the words "Social Register," adopted as the title of a series of books containing lists of persons selected by the compiler, may, in association, constitute a trade-mark, neither word alone can be so appropriated, and the fact that complainant published such a book under the title "Social Register, Newport," does not entitle it to enjoin the use by defendant of the title "Newport Social Index" for a similar publication, there being no proof that any deception was intended or resulted, such as to constitute unfair competition.

3. COPYRIGHT—SUIT FOR INFRINGEMENT—SCOPE OF INJUNCTION.

An injunction against an infringing publication will be extended to all portions in which infringing and noninfringing matter has been so blended that its separation is impracticable, but not to such distinct parts as do not infringe, and defendant may properly be given leave to apply for its modification when he shall have expunged all infringing matter.

In Equity. Suit for injunction to restrain infringement of copyright and unfair competition. On final hearing.

Gifford & Bull, for complainant.

Frank Healy, for defendant.

BROWN, District Judge. It is charged that the defendant's book "Newport Social Index, Summer 1902," is an infringement of copyrights owned by the complainant, and also that its sale constitutes unfair competition in trade.

The complainant publishes a series of copyrighted books, each of which has in its title the words "Social Register," accompanied by the name of the city and the year of publication; as, for example, "Social Register, New York, 1902," "Social Register, Washington, 1902," etc. A social register is published annually in each of eight cities—New York, Washington, Philadelphia, Chicago, Boston, Baltimore, Buffalo, and St. Louis. Each of these books is a special local directory containing "a list of names of certain persons selected with respect to their social standing." The names are arranged in groups showing the members of households, with the names of parents first, daughters next, and sons next, in the order of their ages; also the names of minors and relatives. While, in the general arrangement of

†3. See Copyrights, vol. 11, Cent. Dig. § 80.

the book, an alphabetical order is used for the principal members of a household, the group also contains names of persons in the household, not given in alphabetical arrangement. A special feature is the insertion of the given names and maiden patronymics of married women. In 1887 the complainant published a "Social Register, Newport, 1887," but since then has published no local work for that city. It has published annually, however, general books entitled "Social Register, Summer," containing the country or foreign addresses only of prominent families of New York, Washington, Philadelphia, Chicago, Boston, and Baltimore. It also publishes a book, "Social Register, Visiting Index," the scope of which it is unnecessary to describe. Each of these publications is copyrighted.

The defendant's book purports to contain "the summer and winter addresses of the cottagers of Newport, Jamestown, Middletown, and Portsmouth, Rhode Island; army and navy officers, Naval War College, U. S. Training Station, U. S. Torpedo Station, Fort Adams, Fort Greble, Fort Wetherell, and North Atlantic Squadron." The defendant admits, in general language, that information was obtained by his agents from some of the complainant's books. The exact manner of the use of the complainant's books by the defendant's agents is not in proof. The evidence is such, however, as to warrant the finding that in the preparation of the defendant's book there was a considerable amount of copying from the complainant's books. Items to the number of 15 or 16 are pointed out containing errors existing in complainant's books, and reproduced by the defendant. There is also evidence tending to show that the maiden names of married women appearing in the defendant's book were taken, to a considerable extent, from books of the complainant.

While it has been made to appear that material copyrighted by the complainant is used in the defendant's book, this case presents some peculiarities, and raises the question of fair use of a copyrighted publication. Whether this defendant is guilty of piracy of the Social Register, Washington, for example, admits of some argument. The complainant's book is a local directory of Washington, and gives a limited and selected list of residents of Washington. The principle of selection is social prominence in Washington. I fail to see that the defendant has necessarily availed himself of the judgment of the complainant's compiler as to whom should be selected as a person of prominence. Assuming that he has used this list to ascertain a limited number of winter addresses of summer residents of Newport whose homes are in Washington, it is doubtful if this use was unfair. This question is dealt with in *Drone on Copyright*, p. 413. There it is said:

"In determining whether the part taken is material in extent and importance, a variety of circumstances must be considered—the absolute amount and value of the part; its ratio to the whole from which it is taken, and to the whole in which it is afterward incorporated; its relative value to each of the works in controversy; the purpose which it serves in each; how far the later work may tend to supersede the original, or interfere with its sale; to what extent the original author may be injured, actually or potentially, by the unlicensed use made of his publication; and many special considerations, which need not here be mentioned."

In *List Publishing Co. v. Keller* (C. C.) 30 Fed. 772, Judge Wallace said of publications of this character:

"They are designed to provide a catalogue, in convenient form, of the names and addresses of a selected class of eligible persons. They are original to the extent that the selection is original. Their commercial value depends upon the judgment and knowledge of the author respecting the social standing and society relations of a limited class of the general public. * * * Either of the present parties could lawfully use a general city directory to obtain the correct addresses of the selected persons; nor is it doubted that the defendant has the right to use the complainant's book for the purpose of verifying the orthography of the names or the correctness of the addresses of the persons selected. But if the defendant has used the list to save himself the trouble of making an independent selection or classification of the persons whose names appear in the *Social Register*, although he may have done so only to a very limited extent, he has infringed the complainant's copyright."

While so extended a use of a general city directory would probably not be justified by the weight of authority, yet, if the defendant had first compiled a list of residents of Newport, Jamestown, and vicinity, it is not clear that he might not use the complainant's Washington list, for example, for the limited purpose of finding the winter addresses of a small number of persons. A like question arises in relation to the Boston and Baltimore Registers. It should be observed, however, that by recourse to the complainant's publications the defendant would receive information of a different character from that afforded by an ordinary directory with the ordinary alphabetical classification, for he would be informed as to the group of persons constituting a household, and also as to the maiden names of married women. This information was the product of the complainant's labor and expense, and the complainant is entitled to protection in its use.

While it might be truly said, as to several of these publications, that the defendant's book constituted no invasion of their general field or purpose, it also should be said that scattered throughout these various books is a large amount of information as to households and maiden names which is useful to the owners of the copyright, not only as a part of their local directories, but as a part of another copyrighted publication known as the "*Social Register, Summer*." This purports to give summer addresses, but it likewise gives the family group and the maiden names. A compiler, therefore, who had access to a complete series of the complainant's publications, would be able to construct from them, and without recourse to original sources of information, a very considerable portion of a Newport social book. It thus appears that the value to the complainant of the specific items of information contained in its local books is not wholly dependent upon the use in the local directories. The items are also valuable for use in a more general work, which, to a certain extent, is in the same field with the defendant's publication. Assuming that a publisher issues two directories, in one of which are given the winter addresses and in the other the summer addresses, it is not permissible, without his consent, to unite these in a single book in which both winter and summer addresses are given. Nor do I think it would be a fair use, under the circumstances of this case, to select from the summer register those groups of persons having residences in Newport. The question of fair use must depend to a considerable extent upon actual conditions and practical

business considerations. It is unnecessary to adopt for this case the strict rule that no use of directories of this class can be made in the compiling of other lists. It is enough that we look at the substantial character of the complainant's property rights, and inquire whether the defendant has derived a substantial benefit from the complainant's labors, and has, in any substantial respect, interfered with the complainant by using material which is the property of the complainant. In the defendant's book are given 545 groups. In the New York Social Register appear also 270 of substantially the same groups. According to the complainant's figures, the material of 385 of the 545 groups in the defendant's book appears in the complainant's publications. It is quite true that the defendant has done a very considerable amount of original work in the compiling and editing of his book, that its scope is quite different from that of the local registers, and that it probably could not be used to any great extent as a substitute for any one of these local registers; but, on the other hand, it is true that there is an interference between the summer register and the Newport Social Index, and that the defendant has been aided by the complainant's own publications in a competition with the complainant.

We will next consider the contention of the complainant that the defendant's publication is calculated to mislead the public into the belief that the defendant's book is published by the complainant, and to enable the defendant to sell his publication on the reputation and worth of the complainant's publications. Upon the whole, I am of the opinion that the complainant has not made out this branch of its case. The name adopted by the defendant, "Newport Social Index," is not, on its face, calculated to lead a person to believe that the book is any one of the local social registers, nor the "Social Register, Summer," nor the "Social Register, Visiting Index." While it has been held in *Social Register Ass'n v. Howard* (C. C.) 60 Fed. 270, that the words "Social Register" "are clearly selected arbitrarily to designate the publication of the complainant, and cannot be properly called descriptive in any sense," this was said of the whole title, and is not sufficient to authorize the complainant to prevent the use of the word "Social" alone. The court says:

"Hence the words, when chosen, associated together, and applied to the list of persons selected at will by the compiler, as in the case at bar, become a trade-mark, and are entitled to protection as such."

While the associated words, "Social Register" may become a trade-mark, yet the words "Newport Social Index" are not proven to have caused any actual mistake; and it is not apparent that there is any reasonable probability of their doing so. Previous publications have been called "Society List" and "Society Visiting List." The words "Society" and "Social" are not arbitrary signs. They are descriptive, and have a commonly understood meaning in the terms "society events," "social events," "society gossip," "social gossip," etc. It is legitimate to compile a blue book or society list for a city in which the complainant has no publication; and the word "Social" is one that persons might naturally employ in connection with other words in making up a title to a local book. While the use of the word "Social," like the use of a proper name, might, under particular circumstances, con-

stitute unfair competition, yet such circumstances have not been shown to exist in this case. An inspection of the defendant's book, its size, shape, type, color of binding, etc., precludes the belief that a person familiar with the publications of the complainant would be led by the defendant's title, or by the general appearance of the book, to believe that it was one of the complainant's publications. The feature of family groups in brackets can hardly be regarded as a deceptive similarity. The whole impression, on a comparison of the complainant's and defendant's publications, is rather of substantial difference than of substantial resemblance.

It appears that the defendant issued a prospectus in which his proposed work was entitled "Newport Social Register," and that he contemplated publishing a Newport book under this title. After correspondence with the complainant, this title was abandoned, and the present title chosen; but this fact is not sufficient to convince me that the defendant's book was published with any intention to lead the public to believe that it was a publication of the complainant, or to trade on its reputation, or that it did have a deceptive tendency. The defendant had previously issued publications giving lists of cottage owners in Newport, and, while he was doubtless influenced by the complainant's publications to adopt certain features of its books, and to use its material, it was for the purpose of facilitating his own work in making a book, rather than of profiting by the complainant's reputation.

The complainant is entitled to an injunction upon the ground of infringement of copyrights, but not on the ground of violation of trade-mark, or of unfair competition. As to those portions of the book where material of the complainant and of the defendant is so blended that a separation is impractical, the injunction must be general. *Callaghan v. Myers*, 128 U. S. 666, 9 Sup. Ct. 177, 32 L. Ed. 547. The injunction should not extend, however, to those distinct parts of the book which are not affected by the complainant's copyrights. Upon the proofs it is not satisfactorily established that in making up the list of yachts any substantial use was made of the complainant's publications. In *Kelly v. Morris*, L. R. 1 Eq. 697, 703, the injunction was general, with liberty for the defendant to apply when he should have expunged all matter copied from the complainant's works. Like liberty may be reserved to the defendant in this case.

Let a draft decree for an injunction be presented accordingly.

JANNEY v. PAN-COAST VENTILATOR & MFG. CO.

(Circuit Court, E. D. Pennsylvania. February 23, 1904.)

No. 20.

1. TRADE-NAMES—RIGHT TO PROTECTION BY INJUNCTION—EFFECT OF NONUSER.

The owner of patents for an article of manufacture, and also of the exclusive right to use the name of the patentee as a trade-name in connection with such article, may maintain a suit to enjoin the use of such name by another in connection with an article of the same kind, but not made under the patents, although he is not at the time manufacturing the patented article, nor is it being made or sold by others.

2. SAME—NAME OF PATENTEE—USE IN CONNECTION WITH DIFFERENT ARTICLE.

Complainant acquired by assignment certain patents for ventilators issued to Pancoast as inventor, and also the exclusive right to use the name "Pancoast" as a trade-name upon the patented article. Defendant, incorporated under the name "Pan-Coast Ventilator & Manufacturing Company," having been enjoined from infringement of the Pancoast patents, commenced the manufacture and sale of a different ventilator, upon which it placed its corporate name, and which it advertised as "Improved Pan-Coast" and "New Pan-Coast." *Held*, that the use of the name "Pancoast," or its equivalent, "Pan-Coast," was without right, especially on a different article from that of the patents with which it had always been associated, and was an infringement of complainant's rights as owner of both the patents and the trade-name, which entitled him to an injunction.

In Equity. Suit for infringement of trade-name. On motion for preliminary injunction.

See 122 Fed. 535; 124 Fed. 972.

Albert B. Weimer, for complainant.

A. T. Johnson and A. B. Stoughton, for respondent.

J. B. McPHERSON, District Judge. The undisputed facts of this case are as follows: Richard M. Pancoast, the inventor, took out letters patent No. 476,682 and 605,508, for improvements in ventilators, and on September 16, 1896, assigned his interest therein to the Pancoast Ventilator Company (hereinafter called the "Ventilator Company"), which began to manufacture the patented article. In May, 1897, Pancoast agreed in writing with the Ventilator Company "that he will allow the exclusive use by this company, its assigns or successors, to their using the name 'Pancoast' as the name or trade-mark by and under which their ventilators shall be known or sold." In December, 1898, the directors of the Ventilator Company passed a resolution accepting the proposal of Joseph C. Henvis, who was president of the company and a large stockholder, to "purchase all the U. S. and Canadian patents, and also all patent rights, improvements, contracts, patterns, braces and business and all other property, except book accounts, now owned by this company, in consideration" of the issue of certain stock in a new company to be organized, and empowered the secretary "to make and deliver all proper assignments and transfers of said letters patent, all rights and improvements, and to deliver all patterns, braces, cuts, and all other property, except book accounts, now owned by this company, to the said Joseph C. Henvis, his executors or assigns." What the secretary did under this resolution, does not distinctly appear—apparently nothing, so far as the patents are concerned, for on January 30, 1899, the Ventilator Company assigned them to Henvis as collateral security for a debt. In June, 1899, the Ventilator Company having become insolvent and having been placed in the hands of a receiver, the National Pancoast Ventilator Company (hereinafter called the "National Company") was organized, and Henvis and the Ventilator Company joined in assigning the patents to the National Company. The assignment recited that the patents had been transferred to Henvis as collateral security, going on to say, "And whereas the said Joseph C. Henvis and the said Pancoast Ventilator Co. are now the sole owners of the said patents, and of all rights un-

der the same; and whereas the said National Pancoast Ventilator Co., a corporation of the state of New Jersey, is desirous of acquiring the entire interest in the same;" and then assigning and transferring "the whole right, title and interest in and to the said improvement in ventilators and to the letters patent therefor, aforesaid." A day or two afterwards the patents were assigned by the National Company to Joseph A. Janney, Sr., the present complainant. The assignment was on its face an absolute transfer, but a collateral agreement was made the next day, by which the patents were to be reassigned to the National Company when certain conditions were complied with. These conditions were not complied with, however, and the patents continued to be the absolute property of Janney, as was decided in *Janney v. Pancoast International Ventilator Co.* (C. C.) 122 Fed. 535. Meanwhile Henvis organized a third corporation, the Pancoast International Ventilator Company (hereinafter called the "International Company"), and began to manufacture the patented article and to sell it as the "Pancoast," and later as the "Pan-Coast," ventilator. The suit just referred to was brought to restrain this infringement, and a decree was entered in due course on April 1, 1903, in favor of the complainant. This decree was disobeyed by Henvis and his company, and in September, 1903, he was adjudged in contempt, and required to pay a fine and costs: *Janney v. Pancoast International Ventilator Co.* (C. C.) 124 Fed. 972. About this date he procured a fourth charter in New Jersey for the Pan-Coast Ventilator & Manufacturing Company, the present defendant, of which he is president. He continued to carry on the business of manufacturing "Pan-Coast" ventilators under this corporate name, and in a short time a second charge of contempt was made. Janney alleged that Henvis was still manufacturing the patented article, and a second hearing was had, in which Henvis himself swore, and offered other evidence to prove, that he was no longer manufacturing ventilators under the Pancoast patents, but that he was selling ventilators made after the model of an expired patent, issued not to Pancoast, but to another person. The matter was referred to an examiner to take testimony, but at this point of the proceeding the complainant abandoned the charge, and in lieu thereof has filed the present bill to restrain the use of the word "Pan-Coast" on the ventilators made by the defendant. The business is being conducted by Henvis in the same manner as it has been conducted since the time when the International Company was organized. Janney has never manufactured any ventilators under the patents, and none is now being made by any one, so far as I am informed.

It is conceded that "Pan-Coast" is a mere attempt to avoid what might be the consequences of using the word "Pancoast," and no time need be spent in considering the slight difference between the two names. For present purposes they are identical. As will be seen at once, the situation presented by these facts is unusual. Ordinarily a suit to restrain the use of a trade-mark or a trade-name is brought by a manufacturer whose business is thought to be injuriously affected by an offending rival, but the present complainant does not manufacture the article referred to, and the only injury he sets up in the bill is found in paragraph 9, which contains the following language:

"Your orator is advised, and therefore avers, that, as owner of the patents hereinbefore mentioned, he is the only person entitled to use the word 'Pancoast' in connection with ventilators, and that the defendant, in using the name 'Pancoast' or the word 'Pan-Coast' in its corporate title, in its letter heads and bill heads, advertisements, and on the ventilators themselves, is acting in fraud of your orator's rights. In using the word 'Pan-Coast,' as applied to ventilators, the defendant is not only appropriating a trade-mark and a trade-name which your orator has the exclusive right to use in connection with ventilators, but is also engaged in gross unfairness of trade, as it is seeking to sell to the public, as Pancoast ventilators, ventilators which, according to the statements made by its president and counsel in open court, are not Pancoast ventilators."

In my opinion, however, this is a sufficient foundation for the complainant's right of action. He has a clear title to the patents, and an equally clear right to continue the use of the name "Pancoast" as a trade-name upon the patented article. This right the defendant is usurping, and its usurpation is not justified by the fact that the complainant is, for the moment, not manufacturing the ventilator or using the name. It is perfectly clear, also, that the defendant has no right whatever to use the trade-name "Pancoast," or its equivalent, "Pan-Coast." The name has by continuous use during several years become inseparably associated with ventilators made under the patents owned by the complainant, and the defendant is not selling this kind of ventilator, and does not claim to be selling it. The circulars sent out by the defendant speak of the "Improved Pan-Coast," or the "New Pan-Coast," or the "New Improved Pan-Coast," but the vice of all these designations is that they retain a trade-name to which the defendant has no right. Unquestionably the defendant is striving to get the advantage of whatever reputation the patented article may have acquired, and to make the public believe that the essential qualities of the article are still retained, while improvements have been added. If the complainant were manufacturing the ventilator of the patents, a clear case of unfair competition in trade would be presented, and I cannot see wherein the situation is rendered materially different by the fact that such manufacture is not now being carried on. Suppose the complainant had been manufacturing the patented ventilator, but had closed his factory, with no present intention of resuming business. Surely he would not lose the right to his trade-name merely because he had ceased to use it. His predecessor in title did use it, and did manufacture the article, and I think he has succeeded to the same right.

The defendant's claim of title is wholly without foundation. No doubt the agreement of May 13, 1897, gave to the Ventilator Company the exclusive use of the name "Pancoast," but only "as the name or trademark by and under which their ventilators shall be known or sold," and not as a mere abstract piece of property. As the Ventilator Company was then the owner of the patents, and was manufacturing the patented article, there was no attempt by this agreement to sever the right to use the name from the right to make the article. Whether this can ever be done is a doubtful proposition. It is true that the owner of a patent, who has given his name as a trade-mark for the patented article, may transfer both the patent and the exclusive right to the name, and may thus disable even himself from using the trade-name on articles of a similar kind: *Le Page Co. v. Russia Cement Co.*, 51 Fed. 943, 2 C. C. A. 555, 17 L. R. A. 354; *Burton v. Stratton*

(C. C.) 12 Fed. 703. And in *Kidd v. Johnson*, 100 U. S. 617, 25 L. Ed. 769, the Supreme Court say:

"As to the right of Pike to dispose of his trade-mark [which was his own name] in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to the articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade-mark may be lawfully transferred with it."

See, also, Paul on Trade-Marks, §§ 18, 120, 121.

However this doubt should be resolved when the question is distinctly raised in a proper case, it is clear to my mind that, under the facts now in evidence, whatever Hennis may have got by the resolution of the board of directors of the Ventilator Company on December 10, 1898, he transferred it in June, 1899, to the National Company, and has never regained the title to it since. The resolution did not mention the trade-name at all. It speaks in general terms of "patent rights, improvements, contracts, patterns, braces, and all other property except book accounts," and therefore the trade-name must have been included, if at all, merely by implication. If it was so included, it was by implication transferred by the assignment of June 14, 1899, to the National Company, for the assignment recites that Hennis and the Ventilator Company are now "the sole owners of the said patents and of all rights under the same," and that the National Company is desirous of acquiring "the entire interest in the same," and thereupon assigns "the whole right, title and interest" in the patents to the National Company for its own use "as fully and entirely as the same would have been held and enjoyed by the said Joseph C. Hennis and the Pancoast Ventilator Co., had this assignment and sale not been made." Certainly, as it seems to me, further discussion is needless. The patents and the trade-name had never been separated, and the right to use the name upon ventilators is now the exclusive property of the complainant. The defendant has not a shadow of title either to the patents or to the name, and it seems a waste of time to pursue the subject further.

A decree may be drawn granting the preliminary injunction upon the usual terms.

ARCHER v. BOARD OF LEVEE INSPECTORS OF CHICOT COUNTY.

(Circuit Court, E. D. Arkansas, W. D. February 29, 1904.)

No. 5,258.

1. EMINENT DOMAIN—FIXING COMPENSATION FOR PROPERTY TAKEN—CONSTITUTIONALITY OF STATUTE.

Act Ark. March 20, 1883 (Acts 1883, p. 163), providing for building and repairing levees in Chicot county, which by section 18 provides that the damages sustained by a landowner shall be assessed by a jury of six men selected by the sheriff, who shall examine the property and make an award, which shall be final, is therein invalid, as in violation of Const. Ark. art. 12, § 9, which provides that no property shall be ap-

propriated to the use of any corporation until full compensation shall first be made or secured to the owner, "which compensation * * * shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law"; the board of levee inspectors created by the act, and authorized to appropriate land for levee purposes, being a corporation, within the meaning of such constitutional provision.

2. **SAME—CONSTITUTIONAL JURY.**

Six men appointed by a sheriff to award damages for the taking of property for a public use, on an inspection of the property, merely, do not constitute a jury, in a constitutional sense; and it is immaterial that they are called "jurors" in the act which provides for such proceeding.

3. **SAME—TAKING PROPERTY WITHOUT COMPENSATION—REMEDY OF LANDOWNER.**

A landowner whose property has been taken for a public use without compensation may maintain an action at law to recover damages for the trespass.

At Law. On demurrer to complaint.

Rose, Hemingway & Rose, for plaintiff.

P. C. Dooley, for defendant.

TRIEBER, District Judge. The plaintiff has instituted this action against the defendant to recover damages alleged to have been sustained by him by reason of the trespass of the defendant, who unlawfully, with force of arms, entered upon his premises—a plantation in the county of Chicot—and built a levee thereon, without having made compensation therefor. The demurrer to the complaint is upon the ground that the act of the General Assembly of the state of Arkansas which created the defendant provided for the manner of assessing the damages sustained by the owner of the lands, and that this act excludes all other proceedings to recover such damages. The provision relied on is section 18 of the act of the General Assembly, entitled "An act to provide for building and repairing levees in Chicot county," approved March 20, 1883 (Acts Ark. 1883, pp. 163, 168). This section is as follows:

"Sec. 18. If any person shall feel aggrieved by the running of any levee through his land he shall within ten days after the levee is located give notice to the inspector of the district, who shall then notify the sheriff to summon six land owners of the county not interested in the land through which the levee is to run, and not related to or connected by marriage with the owner thereof, to meet at a time fixed, who shall after being duly sworn proceed to examine the premises, and after taking into consideration the advantages and disadvantages of said levee to claimant, shall award to him such damages, if any, as they may deem just and right. The findings shall be signed by the jurors and delivered to the sheriff, and by him returned to the board of inspectors and entered of record on its minutes, which finding shall be final in the premises. The damages, if any, awarded shall be paid by the board out of the fund herein provided for levee purposes. The sheriff and jurors shall be allowed the same fees as for similar services in the circuit court and to be paid by claimant if no damages are awarded, otherwise to be paid by the board of inspectors out of the levee fund."

In the absence of any constitutional restrictions, there can be no doubt that the Legislature would have the power to provide for the assessment of damages in cases of this kind by a special tribunal or

¶ 3. See Eminent Domain, vol. 18, Cent. Dig. § 729.

commissioners appointed by a court or an executive officer. *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. Such a remedy would not only be unobjectionable, but would probably exclude any other proceeding for the recovery of damages in cases of that kind. But by the provisions of the present Constitution of the state of Arkansas, which was in force at the time of the passage of this act, it is provided (section 22 of the Bill of Rights):

"The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

Section 9 of article 12 of the Constitution is as follows:

"No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

That the defendant is a corporation has been expressly determined by the United States Circuit Court of Appeals for this circuit in *Board of Levee Inspectors of Chicot County v. Crittenden*, 94 Fed. 613, 36 C. C. A. 418. In that case, which was an action against the same defendant, and under the same act as this action, Judge Caldwell, in delivering the opinion of that court, said:

"While it is true that the act does not in express terms say that the board of levee inspectors shall be a body corporate and subject to suit, it confers upon the board all the powers of a corporation. It is authorized to locate, build, and repair levees, and for that purpose condemn lands; to employ engineers and such other agents, attorneys, and employés as may be necessary to carry into effect the objects of the act. * * * These powers are the principal attributes of a corporation, and, although the statute does not in terms declare it to be a corporation, it is sufficient if that intent clearly appears. Whenever the powers conferred upon a board are of such a character that they cannot be performed or made effective without the exercise of the right to sue and be sued, the right is necessarily implied."

A similar act was passed by the General Assembly of this state while the Constitution of 1868 was in force. That act provided for the appointment of commissioners by the circuit court to assess the damages for lands sought to be acquired by a railroad company for a right of way. That Constitution contained the following provision:

"No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made, in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

In *Whitehead v. Arkansas Central R. Co.*, 28 Ark. 460, the Supreme Court of Arkansas held that the act of 1868 (Laws 1868, p. 290) authorizing railroads to have the damages assessed by commissioners appointed by the circuit court was in conflict with the provision of the Constitution above cited, and therefore void.

But it is urged that this act provides for the assessment of damages by a jury. It is true, the act does call the persons who are to assess the damages a jury; but it provides for only six jurors, when the constitutional provision requires a jury of twelve. It is unnecessary to

determine whether, if that were the only defect in the act, the court could not disregard the provision limiting the jury to six, and have the issues tried by a jury of twelve. But is the sheriff's jury provided for by that act a jury, within the meaning of the constitutional provision? A trial by jury, as defined by the Supreme Court of the United States in its latest opinion, is as follows:

"Trial by jury," in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested that there has been little occasion for its distinct assertion." *Capital Traction Co. v. Hof*, 174 U. S. 1, 18, 19 Sup. Ct. 580, 585, 43 L. Ed. 873.

Merely calling it a jury does not make it so. The duties of the sheriff's jury, as defined by the act, are merely those of commissioners. There is no provision for a superintendence by a judge. No one is authorized to instruct them on the law, to advise them on the facts, or to set aside their verdict if it is against the law and evidence. How is the sheriff's jury to know what items are to be considered by them as elements of damage? No provision is made by the act for any one to instruct them as to the law, nor is any one authorized to set aside their verdict, even if it should appear conclusively that the verdict was the result of prejudice, passion, partiality, or misconstruction of the law.

It may be conceded that a proceeding before such a body is not violative of a constitutional provision requiring a trial by a jury, if an appeal can be taken from the decision of that body to a court of record, where a trial *de novo* may be had by a constitutional jury of 12 men, under the superintendence of a judge. But the act not only fails to provide for an appeal, but expressly declares that the finding of the sheriff's jury "shall be final in the premises." This section of the act is therefore clearly in conflict with the Constitution of the state.

The only remedy at law left to the landowner in case of this kind of a trespass is a proceeding such as has been instituted by the plaintiff in this case. It is true, the plaintiff might have filed a bill in equity to enjoin the trespass, but it does not lie in the mouth of the defendant to complain of the plaintiff's failure to avail himself of that remedy. Besides, in view of the fact that an interference by injunction with the building of that levee at this season, when high water, which may subject that entire section of the country to overflow, is almost in sight, the court would not be apt to grant such an injunction, if the rights of plaintiff can be as fully protected by some other means. The plaintiff, by the institution of this proceeding, has declared himself satisfied with a judgment at law for any damages he may suffer by reason of the defendant's trespass on his lands. His right to maintain such an action is beyond doubt, and the demurrer to the complaint will be overruled.

STATE TRUST CO. v. KANSAS CITY, P. & G. R. CO. (WESTINGHOUSE AIR-BRAKE CO., Intervener).

(Circuit Court, W. D. Missouri, W. D. February 15, 1904.)

1. EQUITY PLEADING—MULTIFARIOUSNESS—BILL ASSERTING INCONSISTENT LIENS.

A bill of intervention filed in a suit to foreclose a mortgage on an interstate railroad is multifarious, where it asserts two distinct and inconsistent rights to a preferential lien by the intervener—one on the ground that it furnished supplies necessary to the operation of the road by the mortgagor, which by express agreement were to be paid for from current earnings, and that such earnings were made, but were diverted by the mortgagor to other purposes, which gives the intervener a preferential lien in equity on the corpus of the property; and the second on the ground that intervener has perfected a mechanic's lien, under the statutes of the state, for the same supplies, which entitles it to a lien on the real property of the mortgagor company within the state only, and, under the statute, would require proof that the supplies were furnished for the betterment of the property, and without other security or reliance for payment than the statutory lien.

2. SAME—PROCEDURE—COMPELLING ELECTION.

Where a bill is multifarious, in asserting two rights of action which are inconsistent with and repugnant to each other, although no demurrer is interposed on such ground, the court may on final hearing require the complainant to elect between the two claims, and dismiss the bill as to the other.

In Equity. In the matter of the bill of intervention of the Westinghouse Air-Brake Company.

See 120 Fed. 398.

Haff & Michaels, for intervener.

Lathrop, Morrow, Fox & Moore, for defendants.

PHILIPS, District Judge. Not until the coming in of the master's report, and during the argument on exceptions thereto, was the attention of the court drawn to a particular consideration of the character of the bill of intervention herein. The bill discloses that the intervener is claiming under two distinct liens—one, in assertion of an equitable lien, preferential to the mortgage under which the Kansas City, Pittsburg & Gulf Railroad was sold under foreclosure proceedings; the other, under a mechanic's lien filed a few days after the appointment of receivers in said foreclosure proceedings. It at once occurred to the court that the situation presented an anomaly in equitable procedure. A closer examination of the bill and the findings of the master has persuaded the court that this condition produced by the double aspect of the bill ought to be obviated. The bill is clearly multifarious. "By multifariousness in a bill is meant improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant." Story's Eq. Plead. (10th Ed.) par. 271. "The joinder of distinct and independent matters, each of which would constitute a cause of action, in the same bill, brought by a single complainant against the same defendant. * * * No general rule can be laid down as to what constitutes multifariousness.

The court must exercise a sound discretion in determining from the circumstances of each case whether the bill is liable to that objection. * * * A reason given for this is the inconvenience of mixing up distinct matters, which may require very different proceedings or decrees by the court, and embarrass the defendant in his proper defense against each." Fletcher on Eq. Pleadings, pars. 107, 108.

The bill shows on its face that about four-fifths of its averments and recitals are occupied in showing that the intervener is entitled to a preferential equitable lien, based upon the distinct averments that the supplies furnished by intervener to the mortgagor, the Kansas City, Pittsburg & Gulf Railroad Company, under a distinct understanding between the vendor and vendee, were indispensably necessary to its operation, and that the same were to be paid for out of the current earnings of the road. And then, in recognition of the settled rule of law, to entitle the vendor to the preference sought, it is alleged that the earnings chargeable with such lien were in fact realized, and were diverted to other uses than the current expenditures of the road, amply sufficient to have paid, if applied according to the understanding of the parties to the payment of, the debt in question. In short, as contended for by counsel for intervener at the hearing, it was sought by the bill and by the proofs to bring the case within the purview of the rulings of the Supreme Court in *Southern Railway v. Carnegie Steel Company*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458—a state of facts and proofs, it must be conceded, hardly consistent with the right to a mechanic's lien for the same debt.

The great volume of evidence taken before the master was directed to the issues respecting the equitable lien; and the master has found that the proof fully sustains them, and has reported in favor of a preferential claim over the mortgagee and the defendant the Kansas City Southern Railway Company, the purchaser under the foreclosure proceedings, to be enforced, if necessary, on the corpus of the railroad property. It is quite observable, on the taking of the evidence, that the minds of intervener's counsel were so occupied with making the proofs before the master essential to establish the equitable preferential lien that the evidence introduced respecting the validity of the mechanic's lien was most meager, leaving its validity very questionable. But the master has also found that the intervener is entitled to have said mechanic's lien enforced against the railroad property in question. Only a single paragraph of the bill is devoted to the averments respecting the existence and validity of the mechanic's lien; and the master has thus turned the matter over to the court to determine which of the two liens shall be enforced, or whether both of them. This double attitude of the intervener, based on both of said alleged liens, is inconsistent and repugnant. The one rests entirely upon general rules and principles of equity, and the other, unknown to the common law, is solely the creature of the local statute. The facts essential to create the one are distinct, in material particulars, from those essential to create the other—so much so, that the two claims and relief thereunder cannot exist and be enforced simultaneously. In law, the proof that supports the first is incompatible with the assertion of the other. The very foundation of the claim in equity is that the materials fur-

nished were under an agreement, expressed or implied (and, under the proofs and findings of the master in this case, an express agreement), that the vendor looked for payment to the current earnings of the road, and that there were such earnings, but the same had been diverted by the road to other purposes, which entitle the vendor to the equitable lien on the corpus of the railroad; while the mechanic's lien rests upon a contract between the parties that the materials furnished were to go into the betterment of the railroad, that they did enter therein, and the mechanic's lien was filed in reliance upon this security, that no other security or reliance was intended or given, and that all the acts required by the statute to complete the lien were complied with.

The measure of relief and the judgment of the court on the two liens are different. Under the equity lien, the vendor must look alone to the earnings of the road, on the faith of which he gave the credit. He must therefore show by his proofs that there were such earnings, to which his lien would attach, and that, by reason of their diversion to other purposes and uses than the legitimate expenditures in the operation of the road, the equitable intervention of the court is invoked to subject the corpus of the property, to the extent of the benefit it has received from such diverted fund. Consequently, if there were no such current earnings, and no such diversion, no such lien can be recognized and enforced. Furthermore, the equitable lien, if the materials furnished were employed along the whole extent of the line, should create a charge upon the whole extent of the railroad line from the Missouri river to the Gulf of Mexico, the property bought by the purchaser at the foreclosure sales. It would be subject to the further limitation that if the debt claimed amounted to, say, \$50,000, but the fund diverted was only \$25,000, only 50 per cent. of the debt could be enforced as a lien. It would also be subject to the further condition that the lienor could only share pro rata with other liens of equal dignity. Whereas the statutory mechanic's lien covers "the roadbed, station houses, depots, bridges, rolling stock, real estate, and improvements of such railroad," limited, however, to such property in the state of Missouri, where the lien was filed. Section 4239, Rev. St. Mo. 1899. By section 4240 of this statute, such lien "shall attach to the buildings, erections, improvements, roadbed and property mentioned from the date of the commencement of such work and labor, or from the time such materials were furnished or delivered, and shall be prior to all mortgages or encumbrances placed upon the property affected by this lien subsequent to the passage of this article." From which it is apparent that no other lienor can come in and share in the proceeds of the judgment for the enforcement of the lien; and, by section 4250 under which the lien is sought to be enforced, "the judgment, if for the plaintiff, shall be against such defendant as in ordinary cases, with the addition that if no sufficient property of the defendant can be found to satisfy such judgment and costs of suit, then the residue thereof be levied" on the property covered by the lien.

It being a statutory lien, the judgment of this court would have to follow absolutely the statutory direction. There is no prayer in this bill for such judgment. But the first prayer is that said claim of the petitioner be adjudged and decreed to be an indebtedness and liability

contracted by the Gulf Railway for current expenses, "and necessary to keep said railroad a going and continuous business, and concern, from day to day, and that said claim be decreed a lien on the corpus of the property sold at the foreclosure sale, and on the proceeds of said sale, and on the funds and assets in the hands of the receivers"; and, second, for a decree declaring said claim on said open running account to be a lien by virtue of the statute upon the roadbed, station houses, depots, bridges, rolling stock, real estate, improvements, and all property whatsoever which did belong to the said Gulf Railroad, and which is now held, owned, controlled, or operated by the defendant Southern Railway Company, prior to any mortgages or liens whatsoever; and, third, ordering and directing that there be paid to the petitioner out of the funds now or hereafter in the hands of said receivers, or out of the funds realized from the sale of said property under said foreclosure, or by the said Southern Railway Company, or its assigns, out of the treasury or funds in its hands, sufficient to pay the amount of the petitioner's claim.

The prayer for judgment on the mechanic's lien is about as indefinite and extensive as the description of the property given in the mechanic's lien, which seems to have proceeded upon the assumption that the lien extended to all the road and property of the Gulf Railroad Company, both in and outside of the state, when it appears from the bill of complaint, and especially the records of this court in the foreclosure proceedings, that the line of railroad extended over independent corporations, created under the laws of the states of Texas, Arkansas, and Kansas.

In such condition of the bill of complaint and the findings of the master, what can or should the court do? It is a condition of legal complications, embarrassments, and contradictions, for which the intervenor, by his bill of complaint, is primarily responsible. The usual remedy for such manifest and irreconcilable multifariousness is by demurrer, which the defendants did not interpose. In so far as the defendants are concerned, the failure to demur could be held to constitute a waiver on their part; but the court may, however, take the objection at the hearing *sua sponte*, for the court is not bound to allow a bill of such a nature, although the party may not take the objection in season. Story, Eq. Plead. (10th Ed.) § 271; Greenwood v. Churchill, 1 Myl. & K. 559. "Such a bill may be dismissed by the court of its own accord, even if not objected to by the defendant." Fletcher, Eq. Plead. § 227.

As said by Mr. Justice Gray in *Hefner v. Northwestern Life Insurance Company*, 123 U. S. 752, 8 Sup. Ct. 339, 31 L. Ed. 309:

"Multifariousness as to subjects or parties within the jurisdiction of a court of equity cannot be taken advantage of by a defendant, except by demurrer, pleading, or answer to the bill, although the court, in its discretion, may take the objection at the hearing or on appeal, and order the bill to be amended or dismissed."

In view of the fact that the evidence has been taken and completed on both issues tendered in the bill, the court will not avail itself of its right to dismiss the bill, as there seems, from the cursory examination the court has made of the evidence, an apparently meritorious claim to

equitable relief; but the court will require the intervener to make its election in writing as to which one of the liens sought to be enforced it will stand upon for final decree, and dismiss the bill as to the other claim.

THE SICILIAN PRINCE.

(District Court, S. D. New York. January 29, 1904.)

1. COLLISION—OVERTAKING STEAM VESSEL—CONSTRUCTION OF RULES.

A steam vessel coming up with another from a direction more than two points abaft her beam does not cease to be an overtaking vessel, required by article 24 of the inland navigation rules (30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) to keep out of the way, because of the fact that the overtaken vessel is at the time going astern.

2. SAME—EVIDENCE CONSIDERED.

While the steamship *Sicilian Prince*, on the east side of the channel in Upper New York Bay, was turning in order to head out to sea, and was going astern in a northwesterly direction, she was overtaken by the steamer *Jefferson*, coming down the bay, and a collision resulted. The *Jefferson* was going at a speed of about 14 knots, nearly her full speed, with an ebb tide, and maintained such speed until the collision. She was overhauling another steamer, which was on her starboard side, and passed to the right of the *Sicilian Prince*, although whether she was far enough behind such steamer to have passed to starboard under her stern was in dispute. *Held*, that she was in fault for not keeping out of the way as an overtaking vessel as required by the rules; for being on the wrong side of the channel, also, in violation of the rules; and for not reducing her speed and falling behind the other steamer, if necessary, to leave her free to pass to starboard before she reached the *Sicilian Prince*. *Held*, also, that the *Sicilian Prince* was guilty of contributory fault in that, while backing across the main channel in a crowded harbor, and having seen the two steamers approaching when a mile distant, and stopped her engines, she failed to give further attention to them, or to repeat her signal that she was going astern, when the action of the *Jefferson* indicated that it had not been heard.

3. SAME—ENTRIES IN LOG.

Where no entries in relation to a collision are made in the ship's log, or when the entries which are made are intentionally meager, vague and perfunctory, or when portions of the log probably containing entries relating to a collision have been removed, the presumption is that the vessel whose log has been so kept was in fault.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libellant.

Convers & Kirlin, for claimant.

HOLT, District Judge. This libel was filed to recover damages caused by a collision between two steamers, the *Sicilian Prince* and the *Jefferson*, which occurred on April 2, 1903, in the Upper Bay of New York, about opposite the Erie Basin. The *Sicilian Prince* had been anchored that afternoon on the west side of the bay, just below the Statue of Liberty. The tide was ebb, so that, while at anchor, she lay headed in a northerly direction. She weighed anchor, and started to go to sea, and in order to do so was obliged to turn completely around. She went from her anchorage across to the east side of the channel under a port helm, without succeeding in turning down the

stream. She thereupon backed across the channel to the west side, and then again crossed to the east side, but again failed to turn enough to go out to sea. She stopped near Buoy 14, on the east side of the channel, having at that time got turned so as to head about southeast. She then again started to back up into the channel, and while backing her officers noticed two steamers, which were the El Paso and the Jefferson, coming down from New York on substantially parallel courses, the El Paso leading, and being more to the westward. The Sicilian Prince, while these two steamers were at a considerable distance, estimated by different witnesses at from half a mile to a mile, sounded three blasts on her whistle, to indicate that she was going astern. The witnesses on the Jefferson deny that they heard three blasts, but testify that they heard what they understood to be two blasts from the Sicilian Prince. They state that they thought that this was a signal given to a tug with a tow, which they assert was then in the neighborhood of the Sicilian Prince. The witnesses on the Sicilian Prince deny that there was any such tug in their vicinity. Immediately after sounding the three blasts, the Sicilian Prince stopped her engines. Her witnesses state, in substance, that the engines remained stopped two or three minutes, and that she had substantially ceased to have sternway; that the two steamers came on down the bay practically without changing their course, the Jefferson bearing down close to the Sicilian Prince; that the Jefferson, when about a ship's length from the Sicilian Prince, sounded one blast on her whistle; that the officer at the stern of the Sicilian Prince, when the Jefferson was from about 60 to 100 feet away, noticing the danger of a collision, telegraphed to the bridge an order to go ahead, and that this order was transmitted from the bridge to the engine room, and the engines immediately put in motion. The bow of the Jefferson passed the Sicilian Prince, and the entire vessel almost wholly cleared her. Just before the collision, the Jefferson, seeing that one was inevitable, put her wheel hard astarboard, to throw her stern away and lessen the blow. The starboard quarter of the Sicilian Prince struck the port side of the Jefferson about 60 feet from the stern, causing considerable damage to the Jefferson, but very trifling damage to the Sicilian Prince.

The evidence establishes, in my opinion, that the Jefferson approached the Sicilian Prince from a direction which was in fact more than two points abaft the beam of the Sicilian Prince, and that, even upon the view of the evidence most favorable to the Jefferson, it was certainly a matter not free from doubt whether the direction was not more than two points abaft the beam of the Sicilian Prince; and that the place of the collision was near the easterly side of the channel, about 200 or 300 yards northerly or northwesterly from Buoy 14. In my opinion, therefore, the Jefferson was in fault, for the reason that, being an overtaking vessel, she did not keep out of the way of the Sicilian Prince, as required by rule 24; for the reason that she did not keep to that side of midchannel which lay on her starboard side, as required by rule 25; and for the reason that if, as alleged by the witnesses for the Sicilian Prince, the Jefferson was sufficiently behind the El Paso so that she was free to port and pass to the right under her stern, she did not do so; and, on the other hand, if, as alleged by the witnesses

for the Jefferson, her bow overlapped the El Paso, so that she could not safely port without danger of a collision with the El Paso, she was in fault for approaching so near to the Sicilian Prince in such a situation, and should, before approaching so near, have stopped, and fallen behind the El Paso, so as to be free to port and pass to the right in safety. The collision happened in the daytime. The weather was clear. There were no other vessels in the neighborhood. The main channel there is more than half a mile wide. The Jefferson was making about 14 knots an hour, very nearly her full speed, and did not slacken speed at all before the collision. She was a little faster than the El Paso, and was overhauling her, and apparently preferred to take the risk of shaving close to the Sicilian Prince, rather than stop for a few minutes and drop back, or change her course.

The extraordinary theory asserted by the captain of the Jefferson in his testimony that, as the Sicilian Prince was going astern, her stern was to be deemed her bow, and she was bound to keep out of the way under the starboard-hand rule, while the Jefferson had the right of way, and was bound to keep her course and speed, is, in my opinion, entirely untenable. The sole test under rule 24, as to what is an overtaking vessel, is whether she is coming up with another vessel from a direction more than two points abaft her beam; and, in my opinion, the question whether the overtaken vessel is going ahead or astern is immaterial on the question whether another vessel is an overtaking vessel. Any steam vessel under way, whose engines are going at full speed astern, is required by rule 28 to indicate that fact by three short blasts on the whistle; and the neglect of an overtaken vessel, going astern, to give such a signal might be sufficient, under all the circumstances of a case, to exonerate an overtaking vessel for a collision. But the presumption in all cases is that a vessel which overtakes another and comes in collision with it is in fault.

The question whether the Sicilian Prince should also be held to have been in fault is one upon which I have felt much doubt. The faults of the Jefferson, in my opinion, were clear; and it is undoubtedly the general rule that, if one vessel is plainly in fault, any reasonable doubt as to the contributory faults charged against the other vessel should be resolved in her favor. The *Victory*, 168 U. S. 423, 18 Sup. Ct. 149, 42 L. Ed. 519, and cases cited. But upon full consideration I think that the Sicilian Prince committed faults too serious to be overlooked. She was backing across the main channel of a crowded harbor. She saw the El Paso and the Jefferson coming down the harbor, a long distance away. All of the witnesses say half a mile or more; several put it at three-quarters of a mile or a mile; and Braun, the pilot, an unusually competent observer, puts the position of the Jefferson at a mile and a half away when he first noticed the vessels coming, and a mile away when the three blasts of the whistle were sounded. The Sicilian Prince had previously started astern at full speed, and had been going astern at full speed two or three minutes. After sounding the signal that she was going astern, her engines were stopped. The only apparent reason for stopping was to avoid the danger of a collision with the two approaching steamers. The witnesses on the Sicilian Prince testify that when the collision occurred the engines had

been stopped two or three minutes, and that the Sicilian Prince had then ceased to have any sternway. Some of the witnesses even say that the ebb tide was then moving her down towards the buoy. But upon all the evidence I do not believe that the Sicilian Prince had ceased to have sternway. The manner in which the vessels came together in the collision seems to me to show that the Sicilian Prince was still forging astern to some extent. The entry about the collision in the chief officer's log is as follows: "While coming astern in slewing ship round, stern touched SS. Jefferson, who was coming down harbour; damage, if any, unknown. Steamer's sternway indicated by three blasts on whistle." This entry admits, and from all the evidence I conclude, that the Sicilian Prince was still making sternway to some extent when the accident happened. I think, under these circumstances, that she was in fault for keeping no proper lookout, and paying no proper attention to the vessels to avoid which she had stopped her engines, and for not repeating her signal that she was going astern, or, if she had substantially stopped, for not sounding alarm whistles. She admittedly saw the two vessels coming down, and gave them a signal that she was going astern, but it was when they were a very long distance away. No answer was received, and there was nothing to indicate that the approaching steamers had noticed or understood the signal. The engines on the Sicilian Prince were stopped, and apparently were stopped solely because the El Paso and the Jefferson were coming across her path, but the officers and the lookout on the Sicilian Prince apparently paid no further attention to those two vessels, and did not notice their approach until the Jefferson, about a ship's length away, sounded one whistle. The officer at the stern, who should have been on the watch for them, first thought that there was danger of collision when the Jefferson was from about 60 to 100 feet away. He then gave an order to go ahead at full speed, but the order was too late. If those on the Sicilian Prince had noticed that the two steamers were continuing to bear down in her direction, I think her pilot should have suspected that the three blasts previously given had not been heard, or had been misconstrued, and should have repeated the signal that she was going astern, while the Jefferson was still a sufficient distance away. Any vessel backing across a channel, in the way of other vessels navigating it, is bound to exercise extreme care to notify the other vessels of her maneuver.

The records of the logs of the Sicilian Prince are unsatisfactory. The meager entry in the chief officer's log has been already quoted. The chief engineer's log and the engineer's scrap log, in its present condition, contain no entries about the collision. The scrap log shows that a leaf has been cut out between the pages containing entries of March 30th and of April 3d, and no explanation is given why or how this page was removed. The meagerness of the entry in the chief officer's log, the absence of any entry in the engineer's log, and the removal of the leaf in the scrap log all seem to me to have been intentional. It is the universal custom of all vessels to keep a log, and the statutes of the United States require them to do so. This requirement is not fulfilled by having a book called a log, in which no entries are made, or in which the entries which are made are intentionally meager,

vague, and perfunctory, or in which leaves probably containing entries relating to transactions in litigation are removed. The legitimate inference in all such cases is that, if the true facts were entered in the log, they would be unfavorable to the vessel.

My conclusion is that both the Jefferson and the Sicilian Prince were in fault, and that, therefore, there should be a decree in favor of the libellant and against the Sicilian Prince for half the damages suffered by the Jefferson, with a reference to ascertain the amount.

In re FORBES et al.

(District Court, D. Massachusetts. February 11, 1904.)

No. 8,338

1. BANKRUPTCY—PARTNERSHIP—PETITION BY ONE PARTNER AGAINST FIRM AND COPARTNER.

Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury.

In Bankruptcy.

Southard & Parker, for petitioner.

Clement G. Morgan, for respondent.

LOWELL, District Judge. This is a petition in the usual form filed by one partner to bring his firm and his copartner into bankruptcy. The copartner, being served, has, by his answer, denied "that he has committed the act of bankruptcy alleged in the petition, or that he is insolvent," and has also denied that the partnership existed at the date of the petition or at any other date. He has claimed a jury trial. The court has to consider if a jury trial can be had, and, should it be ordered, what issues are to be submitted to the jury.

Some difficulties arising in the bankruptcy of partnerships, and especially in dealing with voluntary petitions by one partner, were stated by this court in *In re Carleton* (D. C.) 115 Fed. 246. Neither the act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], nor the act of March 2, 1867, c. 176, 14 Stat. 517, nor the general practice of courts of bankruptcy under either act, has required an allegation of an act of bankruptcy in a petition filed by one partner to bring into bankruptcy his partnership and partners. The act of 1898 does not require an allegation of insolvency, though the allegation that the partners are unable to pay their debts, which is contained in Form No. 2, promulgated by the Supreme Court under authority of the act, comes almost to the same thing. On the other hand, General Order 8, under the act of 1898, and General Order 18, under the act of 1867, alike have provided that a partner refusing to join in a partnership petition filed by his copartner is entitled to resist the prayer of the peti-

tion as if it had been filed by a creditor, and "shall have the right * * * to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy." The general order thus appears to provide that the nonassenting partner may disprove that which the petitioning partner need not allege. If it be suggested that the general order is intended to require that the former make his defense by way of confession and avoidance, the answer is obvious that it is hard to imagine the course of a trial in which a respondent is required by affirmative proof to negative generally the commission of any act of bankruptcy, no specific act having been alleged anywhere in the pleadings.

If we pass from the statute itself, the general orders and forms duly promulgated thereunder, and the unreported practice of courts of bankruptcy, to reported decisions, we shall find that under the act of 1867 the inferior federal courts uniformly held that the petition of one partner to put into bankruptcy his firm and copartners need allege no act of bankruptcy, though it might do so. See cases cited in *In re Carleton* (D. C.) 115 Fed. 246, 248. An allegation of insolvency, required in all cases by the act of 1867, was held sufficient. Unless the petition alleged an act of bankruptcy, the nonassenting partner was shut up to disproof of insolvency. These decisions thus limited the effect of the general order, and for many purposes they treated the petition of one partner as a voluntary petition. On the other hand, the Supreme Court in *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, held that as to a nonassenting partner adjudged bankrupt upon the petition of his copartner, the case was one of "compulsory or involuntary bankruptcy," for the purpose of classifying preferences. The apparent conflict between the statute, the forms, the practice, and many decisions of inferior courts on the one hand, and a general order and a dictum of the Supreme Court on the other, was thus inherited from the act of 1867. While General Order 8, under the act of 1898, has not removed the difficulty, it has neither increased nor created it. See *In re Penn*, Fed. Cas. No. 10,927. To overthrow the general practice and the unanimous decisions of courts of bankruptcy, because opposed to a dictum of the Supreme Court, is dangerous; dangerous also to disregard a clear expression of that court's opinion, because opposed to the unbroken practice of all courts of bankruptcy under two bankrupt acts as well as to many reported decisions of those courts.

To decide the present case, the general nature of partnership proceedings in bankruptcy must be considered, since there lies the origin of the confusion. For some purposes a partnership has been treated as an entity apart from the partners; for other purposes it has been treated as a congeries of partners. Some courts have suggested that the act of 1898 has adopted for bankruptcy the theory of an entity separate from the partners. Sections 1 (19), 5a; *In re Meyer*, 98 Fed. 976, 39 C. C. A. 368; *In re Mercur*, 122 Fed. 384, 58 C. C. A. 472. Yet this treatment of a partnership is irreconcilable with other provisions of the statute. Section 5h of the act provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt. This is, in effect, a provision that the partnership shall not be made bankrupt

except by an adjudication of all its partners. Adjudication without accompanying distribution of the bankrupt estate would be worse than a vain form, for it would confuse inextricably questions of preference, lien, attachment, and the like. The remedy given by clause "h" to the trustee is, in substance, the equitable remedy found so unsatisfactory in the days of Lord Eldon. See *In re Wilcox* (D. C.) 94 Fed. 84, 95. The negative provision of clause "h" is more definite than the affirmative provision of clause "a," which does not declare under what circumstances the adjudication of a partnership shall be made, or what shall be its form or effect. Section 5b contemplates that the adjudication under a joint petition shall be both joint and several. If the adjudication were joint only, there would be no object in providing that the joint creditors alone shall elect the trustee. Still again, section 5c gives to the court which has jurisdiction of one partner "jurisdiction of all the partners," and says nothing about jurisdiction of the partnership as an entity. Read as a whole, Form No. 2 agrees with section 5h, and not with the theory of entity. It is in terms the petition of individuals. It sets out that "they" owe debts which "they" cannot pay, and that "they" desire the benefits of the bankrupt act. The joint debts are styled "the debts of said partners," not the debts of the firm, and the joint assets "the property, real and personal, of the said partners." It is true that the last paragraph of the petition contains a prayer that "the firm may be adjudged by a decree of the court to be bankrupts," but the use of the plural shows that the word "firm" is there a collective noun, as further appears from the fact that the prayer is obviously intended to cover a separate as well as a joint adjudication.

But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as *In re Dunnigan* [D. C.] 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estates of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy. Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all its partners. See *Vaccaro v. Bank of Memphis*, 103 Fed. 436, 43 C. C. A. 279; *In re Blair* (D. C.) 99 Fed. 76; *Davis v. Stevens* (D. C.) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and the analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceedings is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference be-

tween a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See *In re Mercur*, 122 Fed. 384, 58 C. C. A. 472.

The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actually committed by all the partners. Even their privity is not essential. "An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases." *Lowell on Bankruptcy*, 43. A voluntary petition is itself treated as an act of bankruptcy. *In re Fowler*, 1 *Lowell*, 161, Fed. Cas. No. 4,998; *Lowell on Bankruptcy*, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See *In re Murray* (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court.

WOOD et al. v. SEWALL'S ADM'RS.

(District Court, E. D. Pennsylvania. February 12, 1904.)

No. 48.

1. SHIPPING—CLAIMS BY CHARTERER AGAINST OWNER—COUNSEL FEES PAID BY CONSIGNEE.

The charterers of a vessel to carry a cargo which they had sold for delivery in a foreign port cannot recover counsel fees paid by the consignee and deducted from the price of the cargo, the employment having been made because the master refused to deliver the cargo until payment of a claim for demurrage which was in dispute between him and the charterers, where the master's claim was reasonable and made in good faith.

2. SAME—CHARTER PARTY—REPRESENTATIONS BY OWNER AS TO CAPACITY OF SHIP.

A representation made by the owners of a ship as to her cargo capacity, which was a material inducement to the making of a charter, and without which the charter would not have been made, became a part of the contract where there was nothing inconsistent therewith in the charter, and the owners are liable to the charterers for the damages sustained by them because of the failure of the vessel to carry the tonnage represented.

3. SAME—DEMURRAGE.

A shipowner is not entitled to demurrage from a charterer for delay in the sailing of the vessel after she was loaded, which was due to the claim of the master that the cargo was in excess of that actually loaded, and his refusal to sign bills of lading for the correct quantity.

In Admiralty. Suit to recover damages for breach of charter party.

N. Dubois Miller and Biddle & Ward, for libellant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. Early in February, 1901, the libellants, who are merchants of Philadelphia, and had a contract with the Dutch government to deliver 3,441 tons of iron pipe at the port of Soerabaya, on the Island of Java, not later than November 30, 1901, were looking about for a sailing vessel to carry this cargo. The ordinary length of a voyage from Philadelphia to Soerabaya is about three months, and they were anxious to secure a vessel that had capacity for the whole shipment, and would sail as soon as possible after April 10th, when the pipe was expected to be ready. Accordingly, Haldt & Cummins, who were their brokers in Philadelphia, inquired of Arthur Sewall & Co., of Bath, Me., who were owners of ships, whether they could furnish such a vessel as was desired. To this inquiry, which was apparently made on February 12th—the letter of that date is not in evidence—the following reply was sent on the next day:

"Your favor of the 12th inst. at hand, and we note shippers of the Soerabaya pipe are particularly anxious for an earlier ship. We have one that will come around about the latter part of April, but she will carry more than the one due the middle of May. The earlier ship will take about 4600 tons to load her, which we presume is more than your parties have to forward. We have nothing else that we can put before you at this time. Should you not find such a vessel as you want at the desired time, perhaps we can treat with you

[3. Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

later. Our ship coming around in May is just right for the order. She carries 3400 tons, and is a fine steel ship insuring at a lower rate than wooden tonnage."

The brokers answered on February 15th, saying:

"Your favor of the 13th received. We are unable to interest the Soerabaya pipe shipper in your 3400 ton ship due in May, for two reasons, first, the contract calls for delivery at Soerabaya not later than October, and they fear she may be too late. Second, the pipe will be all ready by April 10th, and as the pipe is valued at \$125,000 they will lose the interest on this amount for one month at least, which would mean a loss of \$625 interest.

"If you will write us fully in a strain that will allow us to present your letter to the shipper, showing the position of the ship, giving her name, making her capacity as large as possible as the cargo may run slightly over 3400 tons, and showing when she would probably arrive at Soerabaya, we are sure it would have considerable effect and might influence them to decide to close with you, although we do not think that \$9 per ton freight can be had, as you know they have been offered a steamer at 36/."

On the 16th, Sewall & Co. replied as follows:

"Your favor of the 15th inst. at hand.

"The ship we are talking for the Soerabaya order is the Kenilworth, now on passage from San Francisco to the U. K. She sailed on November 7th, and allowing ample time she should reach your port by the latter part of May. This certainly ought to put her into Soerabaya during the month of October. She is a fine steel ship. Her cargoes have run from 3400 to 3500 tons.

"As regards rate, while we feel that our ideas, as previously expressed, are not out of the way, we might endeavor to meet shippers' views and accept \$8.50 provided they are inclined to favor the vessel; other terms as named in your letter under date the 8th inst."

These representations concerning the capacity of the ship induced the libelants to accept Sewall & Co.'s proposition, and on March 7th a charter party was agreed upon. This instrument described the ship as "of the burden of 2179 tons, or thereabouts, register measurement," and chartered her to the respondent for the voyage from Philadelphia to Soerabaya on the terms following, *inter alia*:

"The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, and receive on board during the voyage aforesaid, the merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel, a full and complete cargo, both under and on deck, of cast iron water pipe, say about 3400 gross tons. Charterers to allow sufficient pipe to be reeved in loading the vessel, to enable the vessel to load to her usual dead weight capacity; certificate of proper loading by the surveyor of the port of Philadelphia to be furnished the shippers at ship's expense. * * * Vessel to report, ready to receive cargo, at Philadelphia not later than May 10, 1901; otherwise charterers have the option of cancelling this charter party. April loading desired. * * * Freight payable without discount or commission on proper delivery of cargo. * * * The pipe to be delivered alongside ship on lighters, as fast as it can be loaded."

Demurrage at the rate of \$217 per day was agreed upon, and the vessel was to have an absolute lien on the cargo for freight, dead freight, and demurrage.

The ship was then in Liverpool, but she arrived in Philadelphia about the middle of April, and began taking in cargo on the 19th day of that month. Loading continued until May 9th, by which time all of the shipment, except 180 tons, had been put on board. At this point the vital question in dispute arises. The master refused to receive

any more cargo, declaring that the vessel was loaded down to her marks, and could not safely take the remaining tons. At this time she was drawing 22 feet $3\frac{1}{2}$ inches forward, and 21 feet $11\frac{1}{2}$ inches aft, with a freeboard of 4 feet 1 inch. The master testified that this was 3 inches lower than she had ever been before under his command, although he said that he had carried 3,465 tons on each of two other voyages, with 3 inches less draft. He insisted, therefore, that there must be some mistake about the weights that were marked on the pipe, and that he had already taken on board more than 3,400 tons. There was no dispute that the weights as marked showed that only 3,258 tons had been loaded, and the libelants contended that the weights were correct, but the master persisted in his refusal to take on any more cargo. He declined to sign the bills of lading offered by the libelants showing that only 3,258 tons were on board, and in consequence of this dispute the ship could not be cleared, and was delayed four days, while letters and telegrams were exchanged between Bath and Philadelphia. On May 11th the master made a formal protest, setting out his side of the controversy, and he was sustained by his owners in every particular. Finally the master tendered a bill of lading, which set out how many pipe had been shipped, "weight * * * unknown. Cargo to be weighed at destination at master's option, for determination of freight," and contained a clause claiming \$868 demurrage for four days' detention. The libelants accepted this bill under protest, and the master put to sea without taking the remainder of the pipe on board. This was forwarded by two steamships from New York, via Singapore, and part of the claim in suit is for the additional expense thereby caused. When the Kenilworth reached Soerabaya, there was some difficulty about the payment of the freight, and after part of the cargo had been unloaded the master refused to deliver the rest until he should be paid, not only the freight, but also his claim for demurrage. The Dutch officials took the advice of several lawyers upon the matter, and finally followed their counsel and paid the master his full claim. There were no facilities for weighing the pipe at Soerabaya, and the freight was collected and paid upon the marked weight of 3,258 tons. The Dutch government deducted from the contract price the sums paid for demurrage and as fees to its own lawyers, and these two sums make up the balance of the libelants' claim.

Concerning the sum paid for fees, only a word need be said. The Dutch government may not have been justified in deducting them from the contract price, but I do not see how they can be recovered from the respondents. The master took no part in the employment of the lawyers, and no ground appears upon which his owners can be held liable for this money. It is true that the dispute between the libelants and the master was the reason why legal advice was needed, but the dispute was reasonable and in good faith upon both sides, and the libelants were as much or as little to blame for the controversy as the respondents. The libelants' claim for this sum should be made to the Dutch government.

The important question of fact in the case, as already stated, concerns the capacity of the ship, and the amount of cargo that was actually put on board. Here the testimony is in conflict, but I think the

libelants' testimony is better in quality and ought to prevail. Undoubtedly the ship was represented as capable of carrying 3,400 tons, and this was an essential inducement to the contract. Without such a representation, she would not have been chartered at all. This being so, it seems to me that the representation became a part of the contract, and that the contract would be broken if she should prove unable to carry the specified weight. The circumstances of the case, in my opinion, show that the parties regarded the correspondence on this subject as not merely words of expectation, but words of contract, to use the language of *Morris v. Levison*, L. R. 1 C. P. Div. 155. In *Wilfred v. Myers* (D. C.) 40 Fed. 170, a similar conclusion concerning a representation about capacity was reached. The syllabus of the case states the point decided:

"Brokers tendered to defendant a vessel, for charter, of a certain registered tonnage. Defendants, being unable to find the cubical capacity of the vessel described in any of the published ratings of vessels at that port, made inquiry of the brokers, who informed them that it was a certain amount, and defendants then agreed to accept it. A charter party was drawn up, in which defendants inserted the represented cubical capacity, but the brokers gave notice that they had no authority to guaranty cubical capacity, and it was agreed to send the charter party to the vessel's agents, who, on receipt of it, declined to guaranty the capacity. Held, that there was no contract, as the representation made by the brokers as to the capacity was, under the circumstances, a part of the contract on the part of the defendants, whatever it may have been on the part of the brokers."

In *Clydesdale Co. v. Brauer Steamship Co.* (D. C.) 120 Fed. 854, Judge Adams held that representations concerning the speed of a vessel were material under the facts there in proof, as the following paragraph from the opinion will show:

"The respondent desired to charter an eleven-knot steamer, which it made known to the owner through a broker in New York, where the negotiations took place, who cabled it to the owner's agent in Glasgow, who communicated it to the owner. An answering cable from the agent in Glasgow was sent to the broker in New York, which, among other things, contained a statement that the vessel's average speed was eleven knots an hour, which it was computed by the agent would save the charterer from £100 to £250 per month over vessels of less speed. This was exhibited by the broker to the Brauer Company. I hold that the representation was material, and, if it was untrue, the charterer was entitled to rescind the contract, provided it exercised due diligence in asserting the right."

In *Bacon v. The Poconoket* (D. C.) 67 Fed. 262, Judge Butler had occasion to consider a similar question in this district, and enforced a representation concerning title, because it was material and had induced the making of the contract. And in *Mackill v. Wright*, L. R. 14 App. Cas. 106, a marginal note upon a charter party, concerning the character of the cargo, was held to override a guaranty that the ship would carry 2,000 tons dead weight. Lord Watson said:

"During the same meeting at which the charter party was signed (whether before or after signature does not clearly appear), a note, unauthenticated by their subscription or otherwise, was by consent of both parties written upon its margin, specifying the 'largest pieces' of machinery which were to be included in the cargo, by number, weight, and measurement. These, as described in the note, were to consist of twenty-three pieces in all, of which twenty appear to have required about 375 tons stowage space, calculated at 40 cubic feet per ton, with an aggregate dead weight of 200 tons. For the purposes

of this case, it is not necessary to consider whether the note in question ought to be regarded as *pars contractus*, or as an unsigned jotting, because in either view it leads practically to the same legal result. Assuming it to be a mere memorandum, it nevertheless amounts to a distinct representation by the charterers that the appellants would not be required, under their guaranty, to carry more than twenty-three pieces of machinery of the size and character which it describes. That being the case, if the fact that the Lauderdale did actually stow and carry only 1,690 tons dead weight of cargo was attributable to the respondents having sent forward large machinery in excess of their representation, their claim to a ratable deduction from freight is as effectually barred as if the representation had been embodied in the contract, and made an express condition of the guarantee.

No doubt, where the writing is inconsistent with the representations, the rule concerning the effect of parol evidence upon a written instrument may require a different conclusion, but, in my opinion, there is no such inconsistency here. Upon the contrary, the charter party itself distinctly states that a full and complete cargo shall consist of "about 3400 tons," and, when the previous correspondence is looked to for light concerning the meaning of the word "about," it will be seen at once that the parties evidently intended it to mean somewhat more than 3,400 tons, rather than somewhat less; for the libelants' brokers wrote, on February 15th, that "the cargo may run slightly over 3,400 tons," and it was in reply to this statement that Sewall & Co. declared "her cargoes have run from 3400 to 3500 tons."

How much, then, did she actually take on board? As already stated, I think the weight of the evidence is in favor of the libelants upon this point. The master's testimony concerning two previous cargoes that are said to have weighed 3,465 tons each was uncorroborated, although one of them had just been delivered at Leith, and evidence from other persons concerning the weight of each must have been available. Upon the other hand, the evidence concerning the method of weighing and marking the pipe by the manufacturers shows that so large an error as 180 tons would be almost impossible to make, especially when it is borne in mind that the weighing was checked by inspectors sent over by the Dutch government for the very purpose of watching the manufacture. I am forced to the conclusion, therefore, that the master had only 3,258 tons on board when he refused to accept the rest of the shipment, and that he was wrong in refusing to accept the bills of lading that were offered by the libelants. No doubt he was perfectly honest in the position he assumed, but he took the chance that he might be wrong, and, as he is now shown to have been mistaken, the delay of four days must be laid to his own account. Moreover, if he had tendered at first the bills of lading that he finally offered, they might have been accepted then under protest, as they were at last, and the delay might thus have been avoided.

Unless the items of their bill are disputed, the libelants are entitled to a decree for the amount of their claim, except the counsel fee of \$80. If a dispute exists, a commissioner will be appointed.

In re DOMENIG.

(District Court, E. D. Pennsylvania. March 1, 1904.)

No. 1,431.

1. BANKRUPTCY—PROVABLE DEBTS—CLAIM OF WIFE FOR SERVICES.

Under the Pennsylvania statute of 1893 (P. L. 344), which permits a wife to contract directly with her husband for payment for her services rendered in his business outside the family relation, the wife of a bankrupt may prove a claim for services rendered under such a contract against his estate in bankruptcy.

2. SAME.

The Pennsylvania statute of 1893 (P. L. 345, § 3), providing that a wife may not sue her husband, except for divorce or for recovery of her separate property after his desertion, does not prevent her from proving a claim against his estate in bankruptcy, which is not a proceeding against him, nor even adverse to him.

3. SAME—COMPETENCY OF WIFE AS WITNESS.

The Pennsylvania statute of 1887 (P. L. 158, § 2b), which forbids husband and wife to testify "against each other," does not render the testimony of a wife incompetent in support of a claim filed by her against her husband's estate in bankruptcy.

In Bankruptcy. On certificate from referee.

Alfred Heymann and Samuel J. Ephraim, for claimant.
Benjamin Alexander, for trustee.

J. B. McPHERSON, District Judge. The facts of this case appear in the following extract from the opinion of the learned referee:

"Louisa Domenig, wife of the bankrupt, has filed proof of debt, claiming the sum of four hundred and sixteen dollars (\$416) for wages at eight dollars per week from August 27, 1901, to August 25, 1902. Of this sum the sum of one hundred and four dollars (\$104) is claimed as entitled to priority, the same being earned within four months before the date of the commencement of the proceedings.

"The claimant testified in support of her claim, and it was agreed that her husband, the bankrupt, would testify in corroboration of her evidence.

"The trustee and creditors have not offered any evidence.

"The claimant testifies that she was married to the bankrupt in 1892, and afterwards was separated from her husband. How long she lived separate from her husband is not shown by the testimony. The evidence is that on the 25th day of August, 1901, she returned to her husband to live with him, and she says that her husband wanted her to come back, and she said she would, provided that he would make a settlement with his creditors, and move away from the place where they were living. Her evidence is as follows:

"I told him he never gave me any money, and if he would promise me he would give me a certain amount I could see my way clear to come back, and he said, "Yes."

"Q. What amount did he promise?

"A. First he said ten dollars; but I said on account of the way business went I would take eight.

"Q. In consideration of the eight dollars, what were you to do?

"A. Take care of the house, put up lunches, tend bar, and everything else when he was away, which I did."

¶ 3. Federal courts following state practice as to competency of witnesses, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Bank of California v. Cowan*, 21 C. C. A. 278.

"She testifies that when he was away from the saloon she took charge of the bar; that she generally attended bar three times a day, and sometimes oftener; that if her husband had business down town she was there (at the saloon) every day; that she cleaned the saloon.

"She also testifies that the sum of eight dollars was to be hers, and that her husband allowed her the money needed for conducting the house in addition to said sum of eight dollars.

"She testifies that she had employment when her husband proposed that she should return and live with him, and that it was upon the strength of the promise to pay her eight dollars a week that she returned to him. She testifies that her husband did not pay her any money whatever for the services she rendered.

"The liquor saloon which her husband conducted was at the corner of Girard avenue and Germantown avenue, and during the time for which the wages are claimed the claimant and her husband kept house at 1181 Germantown avenue, which house is about half a square distant from the saloon.

"The claimant further testifies that during the year in question her husband did not employ a bartender or any other help in the saloon; and that when her husband was absent she was there to attend bar.

"She states that she went to this saloon every day three times; that she went to 'clean out the place' and to relieve her husband while he went home to get his meals; and that she prepared the cold lunches which were served at the saloon, and carried them in a basket from the house to the saloon."

In the similar case of *Nuding v. Urich*, 169 Pa. 289, 32 Atl. 409, the Supreme Court of Pennsylvania has decided that "a husband may contract directly with his wife for the performance of extra and unusual services in the course of his business outside of the family relation, and such contract will be deemed a waiver by him of all claim to her wages, and she will be entitled to be paid for such services out of the proceeds of a sale of her husband's property." This conclusion is based upon the court's construction of the act of 1893 (P. L. 344), which relates to husband and wife, and enlarges her capacity to acquire and dispose of property. In New York a statute upon the same subject, but not in the same language, has been held insufficient to justify a similar conclusion: *Re Kaufmann*, 5 Am. Bankr. Rep. 104, 104 Fed. 768. But in this case *Nuding v. Urich* should be followed as an authoritative construction of the Pennsylvania statute. It is urged, however, that the claimant was an incompetent witness—this point was not raised in *Nuding v. Urich*—and the third section of the act of 1893 is relied upon to support this position. That section is as follows:

"Hereafter a married woman may sue and be sued civilly in all respects and in any form of action and with the same effect and results and consequences as an unmarried person, but she may not sue her husband, except in a proceeding for divorce, or in a proceeding to protect and recover her separate property whensoever he may have deserted or separated himself from her without sufficient cause, or may have neglected or refused to support her, nor may he sue her, except in a proceeding for divorce, or in a proceeding to protect or recover his separate property whensoever she may have deserted him, or separated herself from him without sufficient cause, nor may she be arrested or imprisoned for her torts." Page 345.

In my opinion, this section does not apply, for the claimant does not "sue" her husband when she seeks to share in a fund that is being distributed among the creditors of his insolvent estate. Her real contest is with the other claimants, whose shares will be diminished if she succeeds, and her husband has not the slightest direct pecuniary interest in the result. A discharge in bankruptcy will extinguish all his debts, her debt among the rest, and it is of no importance to him

how the insufficient fund is divided. If he has any interest at all, it is indirect, and is not antagonistic to her claim, for it arises out of the probability that he may profit personally to some extent by the money that she may recover. Nor does the act of 1887 (P. L. 158, § 2b), which forbids husband and wife to testify "against each other," render her incompetent as a witness, assuming the act to apply in a federal court. This clause was considered by the Supreme Court of Pennsylvania in *Norbeck v. Davis*, 157 Pa. 399, 27 Atl. 712, and was decided not to disqualify her in a dispute where interpleader proceedings had been begun to determine the ownership of goods that had been seized as the husband's property, but where he had disclaimed ownership, so that the real contest was between the wife and the execution creditor. The court said, on page 405, 157 Pa., page 713, 27 Atl.:

"Without doubt, in a contest between her and her husband as to the ownership of the property, she would have been incompetent. Public policy in such case determines the incompetency. Such antagonism promotes marital discord; therefore the law will not tolerate it. By the fifth section of the act of May 23, 1887 [P. L. 159], the policy of the law in this particular is restricted to cases where they offer to testify against each other. Are they in that attitude here? The husband is the defendant in the execution, and the creditor alleges the property seized belongs to his debtor; but the debtor, the husband, disclaims all ownership, and alleges it is his wife's. How does she testify against him when she asserts a right which he concedes? She claims and he disclaims the property. The creditor's averment of title in him does not constitute him the owner. The fact that seizure, under execution, if consummated by sale, will result in payment of part of his debts, does not establish title in him. If the husband actually claimed the property, and was on the side of the execution creditor, then the antagonism which the law contemplates would exist, and render the wife incompetent. But the law does not close her mouth as a witness solely because she is the wife of a debtor whose creditors have seized her property to satisfy his debts. Contention must result from the individual hostile assertion of property in the same thing, before the 'against each other,' which disqualifies, can be said to exist."

And in *Suplee v. Laffin Mfg. Co.*, 21 Wkly. Notes Cas. 557, the present Chief Justice, then on the common pleas bench of Philadelphia county, stated the reason for the rule of incompetency as follows:

"Husband and wife are excluded from testifying against each other on grounds of public policy, for the sake of domestic peace. The rule making parties incompetent to testify has been wholly removed by statute, and that in regard to husband and wife is confined to cases where domestic discord would result."

Undoubtedly, contracts of this kind between husband and wife ought to be scrutinized with the utmost vigilance, and should never be allowed unless the evidence is clear and convincing in every particular. Ordinarily there is little evidence to support them, except the testimony of the husband and the wife themselves, and the husband is usually interested nearly as much as the wife in favor of her claim. Much will necessarily depend on the manner of the witnesses while under examination, and referees should feel themselves obliged to consider of their own motion the credibility of the witness, and of the story that is told, even if there should be no opposing testimony. The mere fact that the witness has not been contradicted does not require the acceptance of the testimony. In the present case the referee has found that the contract was made, and I see no sufficient reason for setting his finding aside.

The order of the referee is approved.

THE SOUTHWARK.

(District Court, E. D. Pennsylvania. February 15, 1894.)

No. 116.

1. ADMIRALTY—LIMITATION OF ACTIONS.

While statutes of limitation, as such, are not enforced by courts of admiralty, such statutes will ordinarily be followed by analogy in the absence of exceptional circumstances.

2. SAME—AMENDMENT OF LIBEL—LACHES.

The fact that pending a suit in rem to recover for breach of a contract of affreightment the damages sustained by libellant, with interest and the costs, have increased to a sum in excess of the stipulation given for the release of the vessel, is not such an exceptional circumstance as will authorize the court to permit an amendment of the libel to bring in the shipowner, and add a cause of action against it in personam, after the lapse of nine years from the filing of the libel, and after a new action would be barred applying by analogy the local statute of limitations. In such case the shipowner might have been joined in the first instance, or at any time thereafter, within the statutory period, and the effect of the lapse of time on the amount of the damages was apparent.

In Admiralty. On motion for leave to amend libel and for process in personam against owner of steamship.

Horace L. Cheyney, for libellant.

J. Rodman Paul and Howard H. Yocum, for respondent.

J. B. McPHERSON, District Judge. This action in rem was brought in February, 1895, to recover for damage to cargo amounting to \$6,036. A stipulation in the sum of \$7,500 was entered, and the vessel was released. The taking of testimony proceeded in a leisurely fashion, and the cause did not come up for argument until the 8th day of June, 1900. The libel was dismissed by the District Court in September of that year (104 Fed. 103), the decree being affirmed by the Circuit Court of Appeals in the following May (108 Fed. 880, 48 C. C. A. 123). On appeal to the Supreme Court, however, the decree was reversed in an opinion filed a few weeks ago; and, the parties having agreed that the damage amounted to the sum claimed, it is now discovered that the stipulation is not large enough to cover principal, interest, and costs. The libellants therefore ask to amend so as to add a charge of fault against the International Navigation Company, the owner of the vessel, who is also the claimant, and pray for process in personam. The petition is resisted on the ground of undue delay, nearly nine years having gone by since the suit was begun, and, in my opinion, this objection should prevail. While it is true that statutes of limitation, as such, are not enforced in courts of admiralty, it is also true that the analogy of the statutes is ordinarily followed, unless there is something exceptional in the case. In *The Sarah Ann*, Fed. Cas. No. 12,342, Mr. Justice Story said:

"Now, courts of admiralty, like courts of equity, govern themselves in the maintenance of suits by the analogies of the common-law limitations, and are not inclined, unless under very strong circumstances, to depart from these

¶ 1. See Admiralty, vol. 1, Cent. Dig. § 320.

limitations. But, independently of any statutable limitations, courts of admiralty will not entertain suits for stale demands. The party who seeks redress there must come within a reasonable time, or the court will not incline to exert its powers actively in his behalf."

In *Scull v. Raymond* (D. C.) 18 Fed. 553, it was said by Judge Brown, of the District Court for the Southern District of New York:

"As respects the second defense—the statute of limitations—though this is not strictly a bar in admiralty, there does not seem to be sufficient reason why it should not be followed by analogy in this court as in equity. *Willard v. Dorr*, 3 Mason, 95 [Fed. Cas. No. 17,679]; *The Sarah Ann*, 2 Sumn. 206, 212 [Fed. Cas. No. 12,342]; *Saunders v. Buekup, Blatchf. & H.* 269 [Fed. Cas. No. 12,373]; *Ben. Adm.* § 575; 2 *Conkl. Adm.* 22. The defendant was at all times during the eight and a half years prior to the commencement of this suit a well-known merchant in this city, accessible daily. The libellant, it is true, was during most of this time diligently pursuing his remedy in rem (*The Zodiac* [D. C.] 5 Fed. 220); but this has never been held to be a ground for the extension of the statutory period of limitation in regard to remedies in personam."

In the later case of *Nesbit v. The Amboy*, (D. C.) 36 Fed. 925, the same learned judge adhered to this position; saying:

"But the policy of statutes of limitation as statutes of repose must be respected in courts of admiralty as much as in courts of common law. In the careful brief furnished by the libellant no case is cited where any suit has been sustained after the lapse of the statutory period. In *Willard v. Dorr*, 3 Mason, 91 [Fed. Cas. No. 17,679], though the services were rendered 12 years previous, the cause of action did not accrue, in consequence of the capture of the ship, until within the statutory period. In my judgment, the court is not warranted in extending the statutory period in the exercise of its discretionary power in admiralty suits, except for some cause of practical disability to sue, or for some peculiarities of a maritime nature that demand recognition in a maritime court, and make it plainly a matter of justice that this discretion should be applied. In the present case nothing of this kind exists. The defendants did not in any degree induce the delay, or encourage the expectation of settlement. The libellant's delay was wholly voluntary; and, much as the loss of an apparently just demand may be regretted, I feel constrained to hold the claim is barred."

In *Southard v. Brady* (C. C.) 36 Fed. 560, Judge Lacombe, sitting in the Circuit Court on appeal, used the following language:

"Exceptional circumstances will sometimes lead a court of admiralty to pronounce a claim stale after a lapse of time less than the legal statutory period of limitation. Where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations."

The opinion examines numerous decisions, pointing out that:

"In those cases where it is held that the respondent must show that some special interest has been prejudiced by the delay, in order to avail of the defense of staleness, it will be found that the delay was for less than the period prescribed by the local statute in common law actions."

In *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387, the Court of Appeals for the Second Circuit followed *The Sarah Ann* and *Southard v. Brady*; saying:

"Inasmuch as the present action was commenced within six years from the time when the cause of action accrued, and there are no special circumstances to charge the cargo owner with laches, we think there is no equitable bar to the suit upon the ground of delay. Where there is nothing exceptional in the case, courts of admiralty govern themselves by the analogies of common-law limitations."

Many other authorities might be cited to the same effect, but these are sufficient to make the rule clear that should be applied in the present case. If the analogy of the local statute is to be applied, it is perfectly well settled in Pennsylvania that no amendment can be made in an action either at law or in equity, so as to introduce a new cause of action, or to bring in a new party, after the statute of limitations has run: *Furst v. Building Ass'n*, 128 Pa. 183, 18 Atl. 341; *Grier v. Assurance Co.*, 183 Pa. 334, 39 Atl. 10.

Therefore, if nothing exceptional can be found in the present case to justify the delay, the present application to amend ought to be refused. I have considered the reasons advanced by the libelants, but I do not think that they show any unusual circumstances to excuse the failure to bring an action in personam at an earlier day against the owner and claimant of the vessel. There was no doubt of the libelants' right to join an action in personam with an action in rem for the breach of a contract of affreightment (*The Planet Venus* [D. C.] 113 Fed. 387, where most of the authorities upon the subject are collected), and they could therefore have sued the navigation company in the first instance, or have brought it in by amendment at any later time within the statutory period. Moreover, the libelants could not have been insensible to the lapse of time, and they are chargeable with knowledge of its effect upon the amount of the stipulation considered in connection with the amount of the claim. It was within their power at any time to ask the court to increase the amount of the stipulation, so that their interest in the event of final recovery might be fully protected: *Coote*, Adm. Prac. (2d Ed.) pp. 31, 32. Nothing of this kind was done, however, and, as it seems to me, the situation instead of being exceptional, wears a familiar aspect. There was the usual delay in preparing for a final hearing in the district court—perhaps a somewhat longer delay than is customary—and the usual interval of time before the appeals could be heard and determined. As was decided in two of the cases already cited, the fact that the libelant was prosecuting an action in rem is not a sufficient excuse for his failure to bring the action in personam.

The petition to amend and for process in personam is refused.

WHEATON v. WESTON & CO.

(District Court, E. D. Pennsylvania. August 3, 1903.)

No. 9.

1. SHIPPING—ACTION FOR BREACH OF CHARTER PARTY—FAILURE TO AFFIX REQUIRED REVENUE STAMP.

Under the provisions of War Revenue Act June 13, 1898, c. 448, 30 Stat. 460, which require charter parties to be stamped, and make unstamped instruments which are within its provisions incompetent as evidence, an action cannot be maintained for breach of an unstamped charter party which was executed while such provisions were in force, and which was subject to tax thereunder, for want of competent evidence of the contract.

2. INTERNAL REVENUE—WAR REVENUE TAX—CHARTER PARTIES.

The words "registered tonnage," in War Revenue Act June 13, 1898, c. 448, Schedule A, 30 Stat. 460, imposing a stamp tax on contracts for

the charter of "any ship or vessel or steamer," graduated according to the registered tonnage of such ship, vessel, or steamer, are not used in a technical sense, and to be applied only to the particular class of vessels known as "registered vessels," as distinguished from "enrolled or licensed vessels," which would exempt from the tax all but such registered vessels, but is of broader scope, and applies to every ship that is required to be measured and to have her measurements recorded.

In Admiralty. On final hearing.

Willard M. Harris, for libellant.

Francis C. Adler, John F. Lewis, and Horace L. Cheyney, for respondents.

J. B. McPHERSON, District Judge. This action is founded upon the breach of a charter party, and includes several items of claim, to each of which an appropriate defense has been taken. I shall only notice, however, the general defense that is made to all the items, namely, that the charter party, which was executed in October, 1899, was not stamped as required by the war revenue act of June 13, 1898, 30 Stat. 460, c. 448, 2 Supp. Rev. St. 793. The relevant provisions of the act are as follows:

"Charter Party: Contract of agreement for the charter of any ship, or vessel, or steamer, or any letter, memorandum or other writing between the captain, master, or owner, or person acting as agent of any ship, or vessel, or steamer, or any other person or persons, for or relating to the charter of such ship, or vessel, or any steamer, or any renewal or transfer thereof, if the registered tonnage of such ship, or vessel, or steamer, does not exceed 300 tons, \$3.00. Exceeding 300 tons and not exceeding 600 tons, \$5.00. Exceeding 600 tons, \$10.00."

And by section 7:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than \$100, at the discretion of the court; and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court." 30 Stat. 452, c. 448, 2 Supp. Rev. St. 784 [U. S. Comp. St. 1901, p. 2292].

The charter party in question required a \$5 stamp, but when offered in evidence was found to be without a stamp of any denomination. Objection to the admission of the paper was immediately made by the respondents, and was insisted upon at the argument of the case. In view of the foregoing provisions of the statute, it seems to me to be unnecessary to discuss the matter. The paper, having been unstamped, is not competent evidence, and cannot be considered. There is nothing, therefore, before the court to show what the contract between the parties was, and the foundation of the libellant's case is accordingly destroyed.

A decree may be entered dismissing the libel, with costs.

On Rehearing.

(March 1, 1904.)

A reargument of this case has been had, in deference to the after-discovered opinions of the attorney general, delivered August 5, 1898,

and December 2, 1898 (22 Attorney General's Opinions, 168, 270), to the effect that the words "registered tonnage" were used in a technical sense by the act of 1898 (30 Stat. 460; 2 Supp. Rev. St. 793), and are to be applied to "a particular class of vessels known as registered vessels, as distinguished from enrolled vessels and licensed vessels." The ship whose charter party was in question was either an enrolled or a licensed vessel, and, if the opinions referred to are correct, the charter party did not require a stamp at all. I regret to be obliged to differ from the conclusion reached by the attorney general, but I cannot help believing that the clause of the war revenue act that is under consideration was not concerned with the difference between registered vessels and vessels that had not been registered, but was chiefly concerned with the capacity of the ship, and intended to lay the tax in proportion to the ability of the ship to carry cargo, and her ability, therefore, to earn profits for the owners. It is true that registered vessels form a distinct class, which are dealt with in title 48 of the Revised Statutes [U. S. Comp. St. 1901, pp. 2801-2954], and that enrolled vessels and licensed vessels form two other classes, which are dealt with in title 50 [U. S. Comp. St. 1901, pp. 2957-2997]; but so far as the tonnage of each class is concerned, this is ascertained by precisely the same method of measurement, and is registered in the same office, namely, in the collector's office of the proper district. See sections 4152, 4155, 4312, 4319, 4321, and 4322 [U. S. Comp. St. 1901, pp. 2812, 2822, 2859, 2961, 2964]. The phrase "registered tonnage" is applied indiscriminately to these three classes, and means, I think, merely the capacity that has been ascertained and registered as provided by law, no matter what the size or business of the ship may be. I have never seen the phrase "enrolled tonnage" or "licensed tonnage"; so far as I know, "registered tonnage" is the language that is always used, whether the ship is engaged in foreign trade, or in domestic trade, or in the coasting trade or the fisheries. Take, for example, the act of 1882 (Act Aug. 5, 1882, c. 398, 22 Stat. 300, 1 Supp. Rev. St. 378) which amends section 4153 of the Revised Statutes [U. S. Comp. St. 1901, p. 2812]. The act applies to "every vessel of the United States," makes certain provisions concerning measurement, and then declares that, after the proper deductions are made from the gross tonnage, "the remainder shall be deemed the net, or register, tonnage of such vessels," thus applying the words "register tonnage" to every vessel, whether registered, enrolled, or licensed. And the sentence immediately succeeding seems to me to be conclusive:

"That the register or other official certificate"—this "other official certificate" is the enrollment or license that is provided for by sections 4319 and 4321 of the Revised Statutes—"of the tonnage or nationality of a vessel of the United States, in addition to what is now required by law to be expressed therein, shall state separately the deductions made from the gross tonnage and shall also state the net or register tonnage of the vessel. But the outstanding registers or enrollments of vessels of the United States shall not be rendered void by the addition of such new statement of her tonnage, unless voluntarily surrendered," etc.

Here the phrase in question is expressly used concerning both registered and enrolled vessels, and I am unable to see anything in the foregoing clause from the act of 1898 to suggest that the meaning of

the phrase was intended to be limited. On the contrary, as the purpose of the statute was to raise revenue, it seems unlikely that the largest class of charter parties—those dealing with vessels engaged in domestic, or the coasting, trade—should be exempted, unless there was some good reason why such instruments should not be taxed. No such reason was suggested upon the reargument, and none is given in the opinions that have been cited. With great deference, therefore, I venture to think that the attorney general—or his assistant, by whom the opinions were prepared—may have inadvertently confused registered vessels with registered tonnage; for “registered vessels” is undoubtedly a technical term, and is only applied to one class of ships, while “registered tonnage” is of broader scope, and is continually applied to every ship that is required to be measured and to have her measurements recorded.

The decree originally directed may be entered, dismissing the libel, with costs.

GENERAL ELECTRIC CO. v. RE-NEW LAMP CO. et al.

(Circuit Court, D. Massachusetts. February 2, 1904.)

No. 1,664.

1. TRADE-MARKS—INFRINGEMENT—RECONSTRUCTED ARTICLES.

A concern engaged in buying burned out electric incandescent lamps and reconstructing the same is not entitled to resell them with the trade-mark of the original manufacturer therein, where it was affixed by the maker for legitimate trade-mark purposes, and in the process of reconstructing the lamps can be obliterated at a small cost.

2. SAME.

Evidence held not to establish the claim that complainant, a manufacturer of electric lamps, affixed its trade-mark to the inside of the stem for the purpose of enabling it to prevent others from remaking and reselling such lamps after they were burned out, but to show that such location was selected for legitimate trade-mark purposes.

In Equity. Suit for infringement of trade-mark. On final hearing. For former opinion, see 121 Fed. 164.

Richardson, Herrick & Neave, for complainant.
Jesse C. Ivy, for defendants.

BROWN, District Judge. This is a bill to enjoin the use by the defendants of the complainant's trade-mark “G.E.” on electric lamps. The general character of the case is set forth in the opinion of this court on the petition for a preliminary injunction, reported in 121 Fed. 164. At that hearing it was the defendant's contention that the complainant had placed within the stem of an electric lamp a nonremovable label bearing the letters “G.E.,” as a device to hinder the defendant in its business of repairing and renewing electric lamps; and that, under color of a claim for the protection of a trade-mark, the complainant was in reality seeking to destroy the defendants' business. Reserving any opinion on the merits of this contention, either in fact or in law, a preliminary injunction was denied, because of doubts whether the complainant's case was in substance an ordinary trade-mark case, and be-

cause of the novelty of the legal questions which would arise if the defendants should establish their contentions of fact. The defendants, by their answer, renew the contention that the letters "G.E." in the stems of the lamps are nonremovable, and were put in the stems, not as a trade-mark, but in pursuance of a scheme to prevent the remaking of the lamps.

Upon final hearing, I am of the opinion that the defendants have not established their contentions of fact. It is therefore unnecessary to consider the complainant's argument that the complainant's motive in locating its trade-mark within the inner stem of the lamp is immaterial; nor is it necessary to consider the scope of the legitimate uses of a trade-mark, nor the applications of the rule that a court of equity will not shut its eyes to the evident character of a transaction, or suffer itself to be used to effect an ulterior and unavowed purpose.

Upon the evidence, it must be held that the complainant's trade-mark, affixed to the inner stem of the lamp, is practically removable in the remaking of lamps, since it can be obliterated at an expense of 55 cents per thousand lamps, by applying to the exterior of the stem, and over the complainant's trade-mark, a small quantity of chemical paste. Since the bulb is opened in remaking, to insert new filaments, and to fasten the ends of the leading-in wire with carbon paste, the application of a similar paste for the obliteration of the trade-mark would seem an obvious expedient. While the defendants say that this method was discovered by them since the filing of the bill, yet the method is so simple, and was so readily available to common judgment and ordinary skill before the filing of the bill, that it must be held that, while the complainant's trade-mark was nonremovable in the ordinary use and sale of the lamps, it was not nonremovable, in any practical sense, in the remaking of lamps according to the defendants' method. To remove it, it was not necessary to make a "discovery," but to use ordinary and obvious means.

It also becomes very doubtful if the complainant's officers were in any degree influenced to adopt the peculiar location of the trade-mark because they thought it nonremovable in remaking. The complainant has shown good business reasons for applying its trade-mark "G.E." to some portions of an electric lamp. In doing this, it naturally adopted a practice so common that it could give rise to no reasonable inference of a scheme to attack the defendants' business. Its application to the inside of the inner stem might tend to support an inference that the location was chosen with the object of preventing removals in remaking; but the complainant shows, also, good business reasons for affixing the label to the interior of the stem. Indelible trade-marks had been etched on the glass of lamps of other makers. It was suggested by an agent of the complainant that, "from an advertising point of view, we have nothing so good as the ten or twelve million incandescent lamps that we distribute through the world annually, provided that it would be practicable to put some indelible trade-mark, and provided that our customers would not object." Etching was discussed, but considered more expensive. In the correspondence between employes of the complainant, there is no reference to the business of remaking lamps; on the contrary, this correspondence

is strong evidence that it was the real purpose of the complainant to affix an indelible trade-mark for the ordinary purposes of a trade-mark, and not, as the defendants allege, as a part of a scheme to attack its business of remaking lamps. It is also apparent that, with this indelible label in the stem, it will be impractical for vendors of lamps to acquire a reputation for themselves, based upon the merits of the complainant's manufacture; since, if they affix their own labels to complete lamps, the complainant's indelible labels will still remain to indicate their origin. In the former opinion it was said:

"It may be that, upon a full investigation of the facts, it will appear that the complainant's use of its trade-mark in its present position is a natural use, growing out of ordinary business considerations. If that fact be established, the doubts as to the complainant's title to relief would probably disappear. The complainant could hardly be required to forego an appropriate and proper application of its trade-mark merely for the reason that incidental business complications might result to the defendants."

Upon full hearing, I am of the opinion that the complainant's use of its trade-mark in the stem of the lamp is a natural and proper use growing out of ordinary business considerations; that it did not, in fact, tend to destroy the defendants' business, or appreciably reduce their profits; and that there is no sufficient or substantial reason to justify an allegation that the complainant, either alone or in combination with others, did devise a scheme to attack the business of the defendants.

The defendants' contention that agreements between the complainant and 84 allied corporations in various cities are in restraint of trade and illegal, in my opinion, has no bearing whatever upon the question of the right of the complainant to protection for its trade-mark, and requires no discussion. Nor is there any merit in the defense that the complainant has been guilty of such improper practice in the use of its trade-mark as to bar it from invoking equitable relief. Assuming that it did renew or reconstruct lamps, and sell them to the trade without notice of this fact, there is no evidence of any imposition on the public, or that a lamp remade by the complainant was not, in every substantial respect, the same as a new lamp made by it. A "G.E." lamp remade by the defendants is not a "G.E." lamp, but a new construction. This question is dealt with in the former opinion. A "G.E." lamp remade by the complainant is a "G.E." lamp, since in remaking it becomes substantially a new "G.E." lamp. If of equal merit with the former, there is no imposition on the public in selling it as a "G.E." lamp. But neither this nor other points to the same general effect are of sufficient importance to require discussion. The case, upon the facts, becomes a simple one. The complainant has a valid trade-mark. The defendants, without legal justification, put forth lamps bearing this trade-mark. Though they did so without any intent to deceive, and have been honorable in intention and in their business methods, and, so far as appears, have caused no actual deception, yet the use of this trade-mark, in violation of its legal rights, entitles the complainant to an injunction.

A draft decree may be presented accordingly.

BOARD OF COM'RS OF WOODSON COUNTY v. TORONTO BANK et al.

(Circuit Court, D. Kansas, Third Division. March 12, 1904.)

No. 342.

1. REMOVAL OF CAUSES—JURISDICTION—BURDEN OF PROOF.

When the jurisdiction of the federal court over a case removed into that court from a state court depends upon a question of fact, the existence of such jurisdictional fact must be well pleaded in the petition for removal filed in the state court, and, if issue is joined on the truth of the allegations contained in such petition for removal, the burden of proof rests upon the removing party to establish the existence of such jurisdictional fact in the federal court by the greater weight of testimony.

2. SAME—MATTERS OF LAW.

The cases removed from a state court into the federal court, in which the petition filed by plaintiff in the state court is conclusive in the federal court on the question of its jurisdiction, are cases in which the question of jurisdiction of the federal court depends upon the legal construction of plaintiff's petition as to the joint liability of defendants, or other matter of law.

(Syllabus by the Court.)

On Motion to Remand.

Biddle & Lardner, A. F. Florence, and J. C. Culver, for plaintiff.

A. J. Jones and Edward C. Gates, for the United States Fidelity & Guaranty Company.

POLLOCK, District Judge. This is an action brought by the board of county commissioners of Woodson county, Kan., upon a surety bond given by the Toronto Bank of Toronto, Kan., as principal, and the United States Fidelity & Guaranty Company (hereinafter called the Guaranty Company) as surety, to indemnify the county against loss by reason of deposits of the public funds of the county with said bank. The penalty of the bond is \$5,000. The bank, being indebted to the county in the sum of over \$9,000, failed. The bond, upon its face, contains a recital that the bank is a body corporate. It is executed by "The Toronto Bank, W. P. Dickerson, Cashier." The petition alleges "that the Toronto Bank was legally organized under and by virtue of the laws of Kansas prior to the 13th day of January, 1902, and that said bank continued to be a legally organized bank, and continued to do a regular banking business, from the date of its organization until the 14th day of January, 1903." The action was brought to recover the amount of the penalty named in the bond. Upon the filing of the petition in the state court, process was duly issued, commanding the appropriate officer to summon the Toronto Bank and the Guaranty Company to appear and answer the same. The Guaranty Company was duly served with process. The return of the officer as to the Toronto Bank reads:

"State of Kansas, Woodson County—ss.: Received this writ this 8th day of May, 1903. May 8, 1903, I was unable to find the president or cashier or any officer of said the Toronto Bank in Woodson county, Kansas, whereon

¶ 1. See Removal of Causes, vol. 42, Cent. Dig. § 166.

to serve this writ, and served this writ by leaving a certified copy at the regular place of business of said bank in said Woodson county, with the receiver in charge of said the Toronto Bank.

"S. L. Dickerson, Sheriff."

It appears from the record that W. P. Dickerson, the person executing the bond for the bank, upon its failure fled the country, and one J. D. Cannon was duly appointed receiver thereof. In due form and proper time the defendant Guaranty Company filed in the state court its petition, duly verified, and bond for removal of the case into this court. This petition alleges, among other matters, as follows:

"The controversy in said suit is, and at the time of the commencement of this suit was, between citizens of different states, and that your petitioner, the defendant in the above-entitled suit, was at the time of the commencement of this suit, and still is, a corporation duly created, organized, and doing business in and by virtue of the laws of the state of Maryland, and was at the time of the commencement of this suit, and is still, a resident and a citizen of the city of Baltimore, in the said state of Maryland, and a nonresident of the state of Kansas, and it is the only real defendant in this action. * * * And your petitioner further respectfully shows that the Toronto Bank, named in the petition filed by plaintiff in the above-entitled action as one of the defendants, is now, and was at the time of the commencement of this action, a private bank, owned by an individual, which fact was well known to plaintiff at the time of the commencement of said suit, and that the owner of said bank has not been made a party defendant in said action, nor has any attempt been made to serve him with process in said suit, and that the said owner of said bank was at the time of the commencement of said action, and still is, as your petitioner is informed and verily believes, a non-resident of the state of Kansas, and is not a citizen of said state, and is a resident and citizen of the state of Texas, and that the said alleged defendant, the Toronto Bank, is simply the name under which said individual had carried on a banking business; that said bank is not, nor never was, incorporated under the laws of this or any other state, and that the name 'The Toronto Bank,' as defendant in said petition, was and is a nullity, and the alleged service of process on said the Toronto Bank is and was void."

An order of removal was duly entered by the state court, and record filed in this court. Plaintiff moves to remand the case to the state court.

In support of the allegations of its petition for removal, the Guaranty Company files affidavits showing conclusively that the Toronto Bank is not, and was not at the date of the execution of the bond, or of the commencement of this action, a body corporate, but was a private bank owned and managed by said W. P. Dickerson; that, upon the failure of the bank, to avoid criminal prosecution, Dickerson fled the state, and remains absent therefrom. It is apparent from the record and proofs in the case there is but one party defendant to the action, the Guaranty Company; that the Toronto Bank is not the name of any person, in law, capable of being made party defendant in an action, but is a mere business name used by Dickerson in the operation of his banking business. This is not a case of separable controversy, or fraudulent joinder of a resident defendant to defeat the jurisdiction of this court, but is a case of one cause of action against one defendant. It is probable a joint cause of action does exist against both Dickerson, who executed the bond in his business name, as cashier, and the Guaranty Company, for breach of the conditions of the bond; but Dickerson was neither made party to the action, nor served with process.

The insistence of counsel for plaintiff is this: That the bond, upon its face, purports a joint obligation; that the allegations of the petition state a joint cause of action against the Toronto Bank, as a body corporate, and a citizen of Kansas, and the Guaranty Company, a corporation under the laws of Maryland, and a citizen of that state, and that this motion to remand must be determined from a consideration of plaintiff's petition, independent of the allegations of the petition for removal, and proofs offered in its support. Whether the citizenship of the parties, or other jurisdictional fact essential to confer jurisdiction upon this court, actually exists, is always a question of fact, which must be determined, in case of removal into this court from a state court, by this court from the allegations of the petition for removal, if no issue is joined thereon, or from the proofs offered in support of such petition, if issue is joined thereon. *Plymouth Mining Company v. Amador Canal Company*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232; *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76. In this case no issue is taken with the Guaranty Company upon its petition for removal. The proof by it offered in support of the allegations found therein as to the jurisdictional facts is conclusive. The cases relied upon by plaintiff as holding that the jurisdiction of this court must be determined from the petition of plaintiff filed in the state court, and there pending at the time of the application for removal, are cases in which the jurisdiction of the federal circuit court was dependent upon a question of law, such as the joint liability of the defendants in the case, or other matter of law, and did not depend upon a question of fact, such as the amount in controversy, the citizenship of the parties, fraudulent joinder of a party defendant to defeat the jurisdiction of the court, or other question of fact.

It follows, there being but one actual defendant in the case, and the requisite citizenship of the parties being shown, the motion to remand must be overruled.

ALLEN V. HOLLANDER.

(Circuit Court, D. Massachusetts. February 3, 1904.)

No. 1,542.

1. BANKRUPTCY—AVOIDANCE OF TRANSFERS MADE BY BANKRUPT—SUFFICIENCY OF DELIVERY.

By an agreement entered into in good faith, a debtor who was a dealer in carriages undertook to transfer certain carriages to a creditor, to be sold by him at stipulated prices, and the proceeds applied on the indebtedness. An informal paper, in the nature of a bill of sale, as security, was executed, describing the carriages, which were delivered to an agent for the creditor, who removed them into a separate room in the debtor's warehouse, where they were tagged with the creditor's name, and there left to be sold by his agent. *Held*, that there was such a delivery as to pass the property, as against a trustee in bankruptcy of the debtor, appointed in proceedings instituted more than four months thereafter.

In Equity. Suit by trustee in bankruptcy to require an accounting by defendant for property transferred to him by the bankrupt.

Burdett & Snow and Charles W. Stapleton, for complainant.
F. W. Kittredge, Robert A. Jordan, and Abraham Benedict, for defendant.

ALDRICH, District Judge. The plaintiff, a trustee under involuntary bankruptcy proceedings, seeks to compel an accounting for certain property described in the bill, which it is claimed was not legally transferred to the defendant more than four months before the adjudication in bankruptcy.

It is stipulated between the parties here that notes 38, 44, 45, 46, 47, 48, 49, and 50, amounting to the sum of \$3,900, were given by Gray, and delivered to Hollander, the defendant, and that Gray had the money on them from Hollander, but it appears that Hollander obtained the money which he advanced to Gray by depositing these notes in a bank or banks. I find that Gray and Hollander, early in September, acting upon the idea that Hollander was to take care of the notes, and treating the money which Hollander had advanced as an indebtedness, undertook to effect a transfer of the property in question from Gray to Hollander in discharge of such indebtedness. It is beyond question that the parties, early in September, undertook to make Hollander secure, and to discharge this indebtedness by transferring the carriages in question, except one brougham, which is the third carriage mentioned in the plaintiff's bill. The plaintiff claims, however, that the transaction was not a legal one, as against creditors, and that, as trustee in bankruptcy, he is entitled to an accounting for the value of the carriages; and such claim is based upon the idea, first, that, Hollander's liability being contingent, he was not a purchaser for value, or, as a pledgee, that he was not a holder of the property for an actual, existing indebtedness; and, second, whether this is so or not, that there was no sufficient delivery four months before bankruptcy proceedings to pass title to the property from Gray to Hollander.

There is no point taken that the indebtedness or liability, whichever way it is to be designated, was not sufficient in amount to become an adequate consideration for a transfer of the property; the point being that, the liability being contingent, it was not of a kind to make him a holder for a valuable consideration. On this phase of the case, I find that the parties undertook to effect a transfer of the property for the money which Hollander advanced to Gray, and that Hollander was to pay the notes.

Now, as to delivery, I find that Mr. Hollander, feeling uneasy in respect to his affairs with Gray, had some negotiations with him or his agent with reference to the matter, and, to make him secure, an informal paper, in the nature of a bill of sale, for security, describing the carriages, was executed by Gray to Hollander in the early days of September, 1898 (dated September 7th). This paper was delivered to one Cross, as the agent of Hollander.

I also find that, at or about the time the paper was executed, the carriages specified therein were tagged with the name of Hollander, and set apart from the other carriages for him, by moving them to another part of the building (that is to say, to the several floors of No. 22 Wooster street), and put into the keeping of Cross, as the agent of Hollander. The carriages were moved to No. 22, which, it is understood,

is under the same roof, and a part of what had been occupied as a warehouse and salesrooms; but No. 22 had been, or was about to be, given up as such. Whether occupancy of No. 22 had actually been surrendered as a part of Gray's salesrooms is not made certain by the evidence, but, whether it had actually been surrendered or not, the carriages were removed to that place for the purpose of making the change of possession more apparent, thus bearing upon the question of intention as to delivery. A few days thereafter, and not later than the 12th of September, Mr. Hollander went to New York, examined the carriages, discussed and considered the question whether the delivery was sufficient to transfer the property to him, approved of the transaction and the place to which the carriages had been removed, and the parties fixed the price at which the carriages should be sold and applied on the indebtedness; and it was agreed between them that Cross should remain the agent of Hollander, to sell the carriages for Hollander, if he could, and account to him for the money. The carriages remained there in such possession of Cross until the 10th of October, 1898, when the defendant removed them to Amesbury, Mass., his place of business.

I find, as a matter of fact, that the transaction was bona fide and in good faith, and that the idea of the transaction was to make Hollander secure; that Gray undertook to deliver the carriages to Hollander, in good faith, upon the indebtedness or liability which has been described; and that Hollander accepted them upon such indebtedness or liability at the prices designated, both parties believing that the transaction was legal and binding. The involuntary bankruptcy proceedings were instituted on the 19th of January thereafter.

Upon the foregoing facts, it would seem that the transaction was so far perfected, and the delivery of such a character, that the transfer became binding and effective as between the parties; and it cannot be seen that the trustee in bankruptcy, under the circumstances of this case, is in a position to avoid a transfer of property like this. The trustee does not stand quite like a subsequently attaching creditor in good faith, or like a subsequent bona fide purchaser for value. Neither is this a case where the bankrupt undertook to convey property in fraud of his creditors. It is the familiar case in which one creditor, more alert than others, in looking out for his own interests, undertook to make himself secure, and, not succeeding in getting money, took property which was to be applied on the indebtedness or liability at an agreed amount. Aside from the question of the sufficiency of the delivery, or, in other words, the question whether the change in possession was sufficient, which is in the nature of a legal question, the case stands no different than it would if Gray had in good faith paid one of his creditors so much money in discharge of indebtedness or liability more than four months before bankruptcy proceedings.

In view of the recent decision in *Dunn v. Train* (C. C. A.) 125 Fed. 221, the conclusion is that the delivery was sufficient to answer the purposes of the law, and to pass the property. Certain New York cases have been called to our attention, like *Button v. Rathbone*, 126 N. Y. 187, 27 N. E. 266. That was a case with respect to an unfiled chattel mortgage in New York, where the statute declared such mortgage void as against subsequent purchasers and mortgagees in good faith; and

it was held that marking and setting aside was not sufficient, in view of the statute. That is not this case, for a trustee in bankruptcy is neither a subsequent mortgagee, nor a subsequent purchaser in good faith. He represents the body of creditors. And the question is whether a creditor who in good faith has undertaken to secure himself by receiving property in discharge of his claim should, in a bankruptcy proceeding instituted more than four months thereafter, be compelled to account to a trustee, as the representative of the bankrupt estate, upon the ground that the delivery was not sufficient in law; and that question, in the absence of fraud, is not quite like a question of delivery and sufficiency of change of possession, presented by a subsequent bona fide purchaser for value, or a subsequently attaching creditor in good faith.

The case of *Prentiss Tool & Supply Co. v. Schirmer*, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737, is another case based upon the New York statute. In that case there was no delivery of the goods, and it is said that the transaction was presumptively fraudulent as against attaching creditors, which presumption was treated as conclusive unless it should be made to appear on the part of the plaintiff that the sale was made in good faith, and without any attempt to defraud creditors or purchasers. It cannot be seen that the general law of New York, independent of cases based upon local statutes designed for the protection of subsequent bona fide purchasers and subsequently attaching creditors, is different in respect to delivery and change of possession from what has recently been held in the case of *Dunn v. Train*, to which we have referred.

It must be always assumed that delivery and change of possession are necessary to a transfer of title, and, such assumption being made, the question of the sufficiency of delivery and change of possession becomes a mixed question of law and fact. But, as observed, when the question whether, upon the facts, the delivery and change of possession are sufficient to answer the purposes of the law, is raised by a subsequent bona fide purchaser for value, or a subsequently attaching creditor in good faith, it stands differently than when raised by the debtor himself, as between him and a creditor, or by a trustee in bankruptcy. In *re New York Economical Printing Company*, 110 Fed. 514, 517, 49 C. C. A. 133; In *re Garcewich*, 115 Fed. 87, 53 C. C. A. 510; In *re Kellogg*, 118 Fed. 1017, 56 C. C. A. 383.

The conclusion is that the delivery was sufficient in this case to pass the property, as against the trustee, and that the defendant should not be held to account. Bill dismissed.

MATHESON v. HANNA-SCHOELKOPF CO. et al.
(Circuit Court, E. D. Pennsylvania. February 20, 1904.)

No. 57.

1. FEDERAL COURTS—EQUITY—COSTS—FEE BILL—PLEADINGS.

United States Supreme Court equity rule 25 provides that in order to promote brevity, etc., the regular taxable costs for every bill and answer

¶ 1. Right to costs in equity, see note to *Tug River Coal & Salt Co. v. Brigel*, 17 C. C. A. 368.

shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be, otherwise it shall not exceed \$3 for every bill and answer. Rev. St. § 913 [U. S. Comp. St. 1901, p. 683], declares that the forms and modes of proceeding in suits of equity in the Circuit and District Courts shall be according to the principles, rules, and usages which belong to courts of equity, except when otherwise provided by statute or by rules of court in pursuance thereof. *Held* that, in the absence of an express rule of the Circuit Court dealing with the taxation of costs in equity, such court had power to allow costs for the drawing of the pleadings, decrees, and order of court in accordance with the established practice as authorized by a state statute (Acts Pa. 1842, § 9 [P. L. 433], and Acts Pa. 1864 [P. L. 775]) authorizing the taxation of 10 cents a line for the first page, and 6 cents a line for each subsequent page.

2. SAME.

Such allowance was not prohibited by Rev. St. § 823 [U. S. Comp. St. 1901, p. 632], forbidding solicitors in equity to receive any other compensation than that specified in section 824, and also declaring that nothing therein contained shall prevent attorneys from charging or receiving from their clients such reasonable compensation as may be agreed on, or may accord with general usage in the respective states, "in addition to taxable costs."

3. SAME—DEPOSITIONS.

The testimony of a witness taken before a master, and thereafter admitted in evidence before the master and before the Circuit Court on exceptions to his report, is a deposition within Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], authorizing the taxation of \$2.50 costs for each deposition taken and introduced in evidence in the cause.

4. SAME—MASTER'S REPORT—PRINTING.

Since United States Circuit Court equity rules 1 and 6, for the Eastern District of Pennsylvania, only provide for the printing of the pleadings and evidence on the hearing of exceptions to a master's report, costs cannot be allowed for printing the report, in the absence of a special order requiring the printing thereof.

Hector T. Fenton, for appellant.
Joseph C. Fraley, for appellee.

J. B. McPHERSON, District Judge. The first exception is to the action of the clerk in allowing the following items to the complainant's counsel:

Drawing bill of complaint	\$12 40
" replication to company's answer.....	2 20
" " Hanna's answer	2 20
" interlocutory decree	5 70
" final decree	1 80

These costs were taxed according to the fee bill established by the court of nisi prius, under the authority conferred by section 9 of the Pennsylvania act of 1842 (P. L. 433), and established also by the court of common pleas of Philadelphia county under the act of 1864 (P. L. 775). The relevant clause of the fee bill is as follows:

"For drawing bill, answer or other pleading, demurrer, exceptions, interrogatories and any decree or order of court, for every page of thirty lines, each of ten words, ten cents for each line of the first page, and six cents per line for each subsequent page."

Under this clause costs in equity have been taxed in this court for many years, and the validity of such taxation was upheld by Judge

Dallas in *National Harrow Co. v. Hensch*, 12 April Sessions, 1894, in equity. An appeal from this decision was dismissed by the Circuit Court of Appeals (81 Fed. 1005, 26 C. C. A. 686, 39 U. S. App. 765), but probably on the ground that no appeal lay from a decree for costs. In the Circuit Court, however, the question whether the taxation was valid was distinctly raised, for the first exception to the bill of costs was to an item, "Preparation of answer, \$24.30," and the objection was distinctly put on the ground that "there is no authority in law for the allowance of this item." No opinion was filed, but the dismissal of the exception necessarily involved the decision that the item was authorized by law. The authority was no doubt found in the Twenty-Fifth equity rule of the Supreme Court of the United States, which reads as follows:

"In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill and answer."

Nothing is said in this rule, or in any other, concerning costs to be allowed in respect of other pleadings than the bill and answer, but I think the authority of the Circuit Court to allow them is to be found in section 913 of the Revised Statutes [U. S. Comp. St. 1901, p. 683], which declares:

"The forms of mesne process, and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the Circuit and District Courts, shall be according to the principles, rules and usages which belong to courts of equity and of admiralty respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof," etc.

There is no express rule of the Circuit Court dealing with the taxation of costs in equity, but the established practice is the best evidence that the court has adopted the state fee bill, and has directed the clerk to apply it. The federal courts, as is well known, exercise the jurisdiction and follow the practice of the English court of chancery, whose power to fix and award costs is probably founded upon a statute of Richard II, and has always been freely used. 5 Ency. Pl. & Prac. 114.

It is urged, however, that section 823 of the Revised Statutes [U. S. Comp. St. 1901, p. 632] forbids solicitors in equity to receive any other compensation than is specified in section 824. This argument is based upon the fact that section 823 declares that "the following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States," etc. But I think this argument overlooks the qualification that is found in the next sentence, which saves the right of solicitors, attorneys, and proctors to charge to, and receive from, their clients such reasonable compensation as may be agreed upon, or may accord with general usage in the respective states, "in addition to the taxable costs." This section can only mean, I think, that whatever costs were then properly taxable in favor of attorneys, solicitors, and proctors are still to be

theirs, in addition to the compensation provided for by section 824. The first exception is accordingly dismissed.

The second exception is to the allowance of \$2.50 for each deposition taken before the master and admitted in evidence before him and before the Circuit Court on exceptions to his report. This objection is based upon the argument that the testimony of a witness examined before a master is not a "deposition," within the meaning of section 824. It would be a work of supererogation to discuss this question after Judge Hammond's careful and exhaustive examination of the subject in *Ferguson v. Dent* (C. C.) 46 Fed. 88, and I content myself, therefore, with referring to his opinion as a conclusive reason for the dismissal of this exception.

The third exception, however, which objects to the cost of printing the master's report, must be sustained. Rules 1 and 6 of the equity rules of the Circuit Court for this district only provide for the printing of the pleadings and the evidence, and a master's report is neither. Therefore, as no special order for the printing of the report was made, the item must be disallowed.

Thus modified, the clerk's taxation is approved.

IN RE SWEETSER.

(District Court, D. Massachusetts. February 2, 1904.)

No. 7,811.

1. BANKRUPTCY—PROVABLE DEBTS—EFFECT OF TAKING NEW PROMISE FROM BANKRUPT.

A creditor of a bankrupt, who after the bankruptcy has taken a new promise based on the original debt, is not thereby precluded from maintaining his proof against the estate in bankruptcy, and receiving dividends thereon, and at the same time proceeding against the bankrupt on the new obligation, so long as he receives but a single satisfaction of his debt.

In Bankruptcy. Under Act March 2, 1867, c. 176, 14 Stat. 517.

Warren O. Kyle, for assignees.

Hollis R. Bailey, for Hammond.

LOWELL, District Judge. Sweetser was adjudicated bankrupt in 1878, and obtained his discharge in 1881. He was indebted to the Florence Machine Company upon several notes given for goods sold to him. The company duly proved these notes in 1878. After proof, but before discharge, the company took new notes for the old indebtedness, some from the bankrupt and some from his wife. What has become of the notes offered in proof does not appear. Probably they were surrendered. One or two of the wife's notes have been paid in whole or in part. In 1895 judgment was recovered against the bankrupt on his whole indebtedness to the company, including that accruing before and after bankruptcy, on which judgment nothing has been paid. In 1881 a bill in equity was brought by the company to obtain payment out of a legacy to the bankrupt, which the creditor alleged did not pass to his assignees in bankruptcy. The bill is still

pending. In 1901 the assignees filed a petition to expunge the original proof, which has been denied by the register, and the case comes before the court on appeal. By reason of the new notes and of the attempts, partially successful, to obtain payment of the debt, new or old, the assignees contend that the company's proof should be expunged or diminished.

The first question for the court to consider is this: Can the creditor of a bankrupt, at one and the same time, share in the estate in bankruptcy and hold valid obligations of the bankrupt based on the same original debt, but given by way of new promise after bankruptcy proceedings have been begun? Must the creditor (1) choose between (a) proceeding against the bankrupt estate on his proof, and (b) against the bankrupt by virtue of his new promise, or (2) may he proceed against both (a) the estate and (b) the bankrupt at the same time, so long as he receives but a single satisfaction on his debt? It is the settled doctrine of the federal courts that a promise given after bankruptcy to pay a debt barred thereby is valid, provided the promise is unequivocal. There is no sufficient reason why the creditor may not thereafter pursue both his remedies at the same time. What he realizes from the bankrupt estate will go in diminution of the bankrupt's new obligation. The bankrupt who, out of mere morality, has revived his obligation discharged by bankruptcy, ought not to find his revived obligation to one creditor increased for the benefit of others. It appears to me, therefore, that there is nothing contrary to law in a creditor's maintaining his proof against the bankrupt estate and receiving dividends therefrom, while at the same time he seeks to enforce a new promise against his original debtor, always provided that the actual debt is paid but once.

In *Miller's Appeal*, 35 Pa. 481, 482, 483, Mr. Justice Strong said:

"By the deed of assignment, the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but whatever it was he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made." "It amounts to very little to argue that Miller's recovery of the \$2,402.87 operated with precisely the same effect as if a voluntary payment had been made by the assignor after his assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an owner by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determined the extent of his ownership."

This principle was held by the Supreme Court applicable to the insolvency of national banks (*Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640), and it is applicable, I believe, to bankruptcy for the purposes of the case at bar. If there be anything to the contrary in *In re Montgomery*, Fed. Cas. No. 9,730, I cannot agree with it. The creditor, by accepting a new promise, might well be supposed to surrender the original promise of his debtor, if that were in question; but there is no reason to suppose that his acceptance of a new note operates as a surrender of his share in the bankrupt estate, which surrender would inure, not to the benefit of the

new promisor, but to that of other creditors unconnected with the new transaction. On the one hand, the old debt is not merged in the new promise, for the old note and debt, as note and obligation, ceased to exist upon the bankrupt's discharge, and, on the other hand, there is no reason why an equitable undivided share of land, goods, or money should merge in a promissory note. True, the creditor's undivided share of the bankrupt estate is limited by the amount of the old debt; but if the creditor's ownership in the bankrupt estate be only by way of security for a debt otherwise unenforceable, and not an absolute ownership, it remains unreasonable to suppose abandonment of security the necessary result of acceptance of a revived obligation of the original debtor, especially where the abandonment harms both debtor and creditor. See *Mason v. Hughart*, 9 B. Mon. 480.

If waiver of proof does not necessarily follow from accepting a new obligation, I see nothing to show that the creditor in this case intended to waive his proof. In fact, the officers of the Florence Company probably thought little or nothing about the matter. The estate was not likely to pay dividends. Doubtless they hoped less from the old proof than from the new promise; but there is nothing to show that they gave up the company's rights under the former, and the fact that something was paid upon the new debt does not diminish the proof, for the payment was not made from the bankrupt estate. After due proof of claim, the right to share in that estate depended thereon, and not on the notes themselves. It is true that at one time the old indebtedness to the company arising from these renewal notes was combined in one account with a new indebtedness for goods sold and delivered after bankruptcy, and payments were made on the combined account; but I am disposed to agree with the register that the payments thus made were intended by both parties to apply to the new indebtedness, and not to the old. This application of payments was, and still is, for the benefit of both creditor and debtor. It was not suggested that any one of the original notes has been paid in full. As to the judgment recovered against the bankrupt, it must be taken to have been recovered on the new promise. If a creditor can accept a new promise without abandoning his proof, he must be able without abandonment to sue and recover judgment upon the new promise.

There is nothing in the contention of the assignees that the claim of the company was not duly assigned to Hammond, whom the register has subrogated to the company's proof. At the time of formal subrogation the company was dissolved, but before its dissolution it had parted with all its rights, and that Hammond is beneficially entitled to all those rights was not disputed.

UNITED STATES v. BELT.

(District Court, M. D. Pennsylvania. February 29, 1904.)

1. INDIANS—SCOPE OF STATUTE PROHIBITING SALE OF LIQUOR—CARLISLE STUDENTS..

Act Jan. 30, 1897, c. 109, 29 Stat. 506, prohibiting the sale of liquor "to any Indian, a ward of the government, under the charge of an Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government through its departments exercises guardianship," extends to Indian students at the Carlisle school, which is maintained at the expense of the government under the direction of the Interior Department.

Indictment for selling liquor to Indian boys attending the United States school at Carlisle, Pa. On rule for new trial.

George M. Watson, for the rule.

S. J. M. McCarrell, U. S. Atty.

ARCHBALD, District Judge. The defendant was convicted of selling liquor to two Indian boys, one of the Kickapoo and the other of the Caddo Tribe, in attendance at the government school at Carlisle, Pa. This school is in charge of Col. Pratt, a retired officer of the United States army, detailed for the purpose, and is sustained by appropriations for the Department of Indian Affairs, under the direction of the Secretary of the Interior. Like other similar schools, it was established to aid in educating and civilizing the hitherto uncivilized Indians. The prosecution is based on the act of January 30, 1897, c. 109, 29 Stat. 506,¹ which prohibits, in sweeping terms, the selling, giving, or disposing of any malt, ardent, or intoxicating liquor of any kind to any Indian, a ward of the government, under charge of any Indian superintendent or agent, or any Indian over whom the government, through its departments, exercises guardianship. The line of

¹ That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offence and not less than two hundred dollars for each offence thereafter: provided, however, that the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defence to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department."

legislation of which this is a part (referred to in the margin)² originated with the act of 1834,³ and in its initial form was confined to the Indian country. But this limitation was stricken out by the amendment of 1864, and it was simply required as a substitute that the Indian to whom the sale was made should be under the charge of an agent or superintendent, as the result of which a party who makes a sale where that is the case is liable, wherever it may be. It was accordingly held in *United States v. Holliday*, 3 Wall. 407, 18 L. Ed. 182, that a sale was within the act, notwithstanding the fact that the Indian to whom it was made was one of the Chippewa Nation, the tribal organization of which had been practically dissolved, who was living on lands which had been certified to him individually; it being further shown that he received an annual allowance from the government, which was distributed to him, with others, through the head men of the tribe to whom it was paid over by the proper Indian agent. "The policy of the act," says Miller, J., "is the protection of those Indians who are by treaty or otherwise under the pupilage of the government from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison, when they are outside of a reservation, as well as within it." Following this, it was held in *U. S. v. Osborn* (D. C.) 2 Fed. 58, that the sale was a prohibited one, although the Indian, who belonged to a tribe on a reservation under charge of an agent, had been permitted to live off of it for eight or ten years as a domestic in a farmer's family. And in *U. S. v. Earl* (C. C.) 17 Fed. 75, a similar ruling was made; the contention that an Indian must be not only potentially but actually under the charge of an agent not being sustained. In *U. S. v. Hurshman* (D. C.) 53 Fed. 543, a sale to an Indian of the Nez Percés tribe, who was at the time a regularly enlisted soldier in the army, on duty at Ft. Walla Walla, was held to offend. See, also, *U. S. v. Flynn*, 1 Dill. 451, Fed. Cas. No. 15,124; *U. S. v. Byrdick*, 1 Dak. 142, 46 N. W. 571; *Renfrow v. U. S.*, 3 Okl. 170, 41 Pac. 88.⁴

The act of 1897 is even broader in its terms than those which had preceded it. By it, as we have seen, a sale is prohibited "to any Indian, a ward of the government under the charge of an Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government through its departments exercises guardianship." There can be no doubt that this extends to the Indian boys at Carlisle. Temporarily transferred from the reservations to which they belong, which, as declared by Judge Deady in *U. S. v. Clapox* (D. C.) 35 Fed. 575, are themselves in the nature of schools, they are potentially, if not actually, under the superintendents or agents there in charge. And, maintained and educated as they thus are at the expense of the government, under the direction of the Interior Department, they are the unquestioned wards of the nation, which has as much concern to protect

² Act June 30, 1834, c. 161, § 20, 4 Stat. 732; Act March 15, 1864, c. 33, 13 Stat. 29; Act Feb. 27, 1877, c. 69, 19 Stat. 244; Rev. St. § 2139; Act July 23, 1892, c. 234, 27 Stat. 260; Act Jan. 30, 1897, c. 109, 29 Stat. 506.

³ See, also, Act July 9, 1832, c. 174, § 4, 4 Stat. 564.

⁴ But in *U. S. v. Lucero*, 1 N. M. 443, and *U. S. v. Varela*, 1d. 601, a sale to a Pueblo Indian was held not to be illegal.

them from the debasing influence of liquor as if they were on the Western plains. Direct and positive proof of this concern, moreover, has been given. By Act of May 20, 1886, c. 362, 24 Stat. 69, it is required that the nature and hygienic effect of alcoholic drink and narcotics shall be specially taught to all pupils in Indian schools; any officer neglecting or refusing to do so being liable to removal. This may not impose on the act under discussion a construction which is not lawfully there, but it at least warns us not to relax its terms. And, more than this, it affords proof of the guardianship intended by the government to be extended in this very matter over these its wards.

The rule for a new trial is discharged.

In re HARMON.

(District Court, S. D. West Virginia. November 21, 1903.)

1. BANKRUPTCY—CLAIMS—WORKMEN—PRIORITY—ASSIGNMENT—EFFECT.

Under Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing that wages due to workmen, clerks, or servants which had been earned within three months before the commencement of bankruptcy proceedings, not to exceed \$300, to each "claimant," shall be given priority, the fact that a large number of laborers holding claims for labor performed for the bankrupt assigned such claims to two of their number, who were also laborers, and who held claims of their own, in order to save costs in prosecuting suits against the bankrupt to recover such wages, the assignees agreeing to account to their assignors for the amounts due each when collected, did not deprive the claims so assigned of their right to priority.

Certificate of the Referee to the United States District Judge for Review.

The bankrupt, C. P. Harmon, was engaged in business in Raleigh county, W. Va., as a railroad subcontractor, employing numerous workmen. The petition in involuntary bankruptcy was filed against said Harmon by certain creditors on the 29th day of July, 1903. About a week prior to the filing of said petition said bankrupt abandoned his work and disappeared from Raleigh county, largely indebted, and without having paid his laborers and workmen since June 1, 1903. A large number of said workmen immediately instituted suits with attachments against the goods, stock, etc., of bankrupt, in justices' courts of said county. The oral proof taken before the referee shows that at the time of the institution of said suits, and in order to save costs in a number of actions, some 14 of the white laborers assigned the amounts due them, respectively, to one Ed Sisley, a laborer, and a number of the negro laborers assigned the amounts due to them, respectively, to one James Tucker, a laborer, for purposes of obtaining judgments and execution in their names, instead of by separate suits; the said Tucker and Sisley agreeing to account to said laborers for the said amounts due them, respectively, when collected. The amounts ran from \$3.35 to \$46.05, and the total number of accounts so assigned amounted to some 35. The aggregate amount assigned said Tucker, including his own claim for labor, amounted to \$298.50, and the total amount assigned to Sisley, including his own claim for labor, amounted to \$290.78.

At the time of the institution of the actions the attorney for the laborers advised this assignment as a method of saving cost and expense, and as still being within the jurisdiction of the justice, namely, \$300; and the oral testimony shows that it was made in that manner, for that purpose, and to that extent only, the assignees being virtually trustees for the assigning laborers

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 536.

to the extent of their several proportions of the recovery. On the 23d day of July, 1903, such assignments were drawn up by the laborers' attorneys and executed by said laborers to said Sisley and Tucker. The written assignments are attached to and made a part of this record, marked, "Tucker Assignment," and "Sisley Assignment." On the 28th day of July, 1903, said claims were duly proven before the justice, and judgments rendered in favor of said Sisley and Tucker against C. P. Harmon for said respective amounts. On the 29th day of July the petition in bankruptcy was filed.

After the breaking up of Harmon's work, the various laborers sought other work, in mines and on railroad building, and at the time of the first creditors' meeting they were scattered, and their whereabouts were unknown and unascertainable by their attorneys; and accordingly their attorneys, as such, made proof of said Sisley and Tucker claims as priority labor claims, earned within four months of the filing of the petition, as attorney or agent, under Form No. 36, filing with said proofs certified abstracts of the judgments. On motion to expunge oral evidence of two foremen of said Harmon, and of H. C. Ellett, the attorney for said laborers, who was present at the trial, and heard the testimony upon which the judgments were rendered, satisfied the referee that said claims were proper and correct as to amount, and that they were earned by the laborers and said Sisley and Tucker within the four months period, and that the character of the work was such that said wages were properly priority claims.

Counsel for petitioning and general creditors, however, assert that, even if this be so, said claims having been assigned prior to the filing of the petition were not at the time of said filing "due to workmen, clerks or servants," within the meaning of the act, section 64b, subd. 4, Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], and hence should not be allowed as prior claims, and cite *Re Wealund* (Dist. of Minn.) 8 Am. Bankr. Rep. 646, 99 Fed. 399, in support of their contention. This decision (of District Judge Lochren) is directly in point, and holds that assignment before the institution of the bankruptcy destroys the priority to which such debts are entitled, because in such case, at the date of the filing, the debt is not longer "due to workmen," etc.; but the decision merely announces this to be the law, cites no authority, and practically no discussion. The decision not being a binding precedent upon this court, and the referee being unable to concur in the reason or the reasoning of the opinion, he declined to follow it; holding that the assignment does not affect the status or character of the claims made priority claims by the act, and that such status depends upon the nature of the claim, and not upon who proves it in the bankruptcy proceedings. To hold otherwise would, in my judgment, deprive the protected class of the most valuable incident of the protection afforded their earnings, namely, their assignability, as the class of earnings protected are peculiarly such class that the earners thereof are most frequently obliged to realize upon before paid, and can only do so by assigning the same. In my view, they should be given the full protection to their claims, and enabled to realize on them at such time as their necessities demand, with the knowledge in their assignees that they are acquiring protected claims, which will be secure and paid before general creditors. Nor can I see how such a rule can work to the disadvantage of general creditors, as, had the claims not been assigned, the laborers who had earned them could, of course, prove their full amount ahead of the general creditors. This their assignees have done, and no more. Unless the statute, in plain words, and not by forced construction, demands it, I would think it proper that the ordinary effect of the common law relative to assignments should apply here as elsewhere, and the assignee stand in exactly the same position as to a claim assigned as the assignor, which would here give him a position in a class preferred which his assignor possessed.

In the case at bar there exists the additional reasons for allowing the priority: First, that the assignment is proven to have been intended as and actually creating the assignees, Tucker and Sisley, virtually, merely trustees for the laborers; and, second, if the strict letter of the act is resorted to in support of the claim that the wages are no longer "due" to workmen, clerks, or servants, the facts show that both Sisley and Tucker were workmen of Harmon, but did not themselves earn the whole of the claims proven, as the strict

letter of the act does not require such wages to have been earned by the workmen proving them, but only that they shall have been earned within the required period.

Entertaining this view, the referee directed payment by the trustee of said claims as priority claims, and, counsel for petitioning creditors desiring a review of the referee's decision, I hereby certify the facts and my decision, with such portion of the record as is material, for review.

All of which is respectfully submitted.

W. G. Mathews,

Referee in Bankruptcy, S. D. West Virginia.

Charleston, W. Va., November 8, 1903.

Kerr & Kerr and John H. Hatcher, for lien creditors.

Brown, Jackson & Knight, H. M. Anderson, George Kay, and John W. McCreery, for petitioning creditors.

KELLER, District Judge. Upon consideration by the court, the foregoing ruling of the referee is approved in full. I am of opinion that the bankruptcy act was intended by Congress to prefer claims for labor performed within three months prior to the filing of the petition, regardless of the fact that they may have been assigned. And I think this is indicated by the use of the word "claimant," instead of "workman," in section 64, Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

THE IRA A. ALLEN. THE I. TOWNSEND BURDEN. THE HARRIET E. WINNE.

(District Court, S. D. New York. January 18, 1904.)

1. SALVAGE—RESCUE OF CAST-OFF BARGES IN LONG ISLAND SOUND.

A tug with three laden barges in tow was proceeding eastward in Long Island Sound, and when off Saybrook, Conn., the rear barge began to fill, owing to heavy seas, there being a strong wind from the west. The tug cast off the others, and towed the sinking barge into the river, and, at her request, libellant's tug, then lying at her wharf, went to the rescue of the abandoned barges, which were drifting near the shoals, and succeeded in picking them up and towing them safely into the harbor at some risk to herself. The two barges with their cargoes were of the value of about \$23,000, and the rescuing tug was worth from \$20,000 to \$25,000. *Held*, that the service was one of meritorious salvage, which entitled the tug to an award of \$1,500, two-thirds to the owners and one-third to the master and crew. A further award of \$450 made to the tug for 70 hours' work in pumping out the first barge, but not as salvage.

In Admiralty. Suit to recover for salvage services.

Wilcox & Green, for libellant.

James J. Macklin, for claimant.

ADAMS, District Judge. This action was brought to recover for salvage services rendered by the Tug Mabel, owned by the Hartford & New York Transportation Company to the barges Ira A. Allen, I. Townsend Burden and Harriet E. Winne, and their cargoes of coal, iron and wire, on the 9th day of January, 1903, near Saybrook, Connecticut.

¶1. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

The barges started from Jersey City, in tow of the Tug Alert, on the 8th of January, bound for Providence, Rhode Island. The Winne was the first barge in the tow, on a hawser of about 100 fathoms; then came the Allen, also on a hawser of about the same length. The Burden was last in the tow, being attached to the Allen, on a hawser of 80 or 90 fathoms. In passing New Haven, some consideration was given to the question of going into that port for harbor, as the weather indications appeared to be adverse to going on, but the wind hauled around to the north, then towards the west and it was concluded to proceed. About daybreak on the 9th, those on the Alert discovered that the Winne was exhibiting a distress signal. The master of the tug endeavored to communicate with the barge by megaphone but could not succeed, owing to the wind, and he shortened hawser. Being then told by the Winne's master that the boat was sinking, he decided to run her into Saybrook. The sinking condition of the barge was caused by seas forcibly striking her stern. The other barges were left to take care of themselves. There were only two men on each of them and those on the Allen were unable to haul in the hawser, which had been thrown off the Winne. An anchor was, therefore, let go attached to a chain cable, but did not hold.

The Mabel, was waiting at Saybrook for favorable weather to proceed westward. About 7:30 o'clock in the morning in question, having observed the Alert and tow coming into the river, between the two breakwaters at the mouth, with a distress signal flying, she left her wharf, on the west side of the river, near the mouth and went to the Alert. Those on the Mabel were informed by the master of the Alert that he had left two barges outside, and he requested the Mabel to go to their relief. The Allen and Burden were then seen a short distance outside the breakwaters, drifting to the eastward, dragging the anchor which the Allen had let go, and in evident danger of getting on the shoals, to the eastward of the river's channel, near the mouth. These shoals were dangerous places for vessels to get ashore upon. Other vessels had been lost there in previous years, and on this occasion they were exposed to the full sweep of the westerly wind, which created considerable combers where the water was shallow. The tide was ebb and the current running east directly upon the shoals. Before the Mabel reached the barges, the anchor chain of the Allen had parted and they were then practically helpless. At this time the hawser by which the Allen had been towed was dragging in the water. The seas were then breaking on the decks of the barges. The first attempt of the Mabel to get a hawser on the Allen was unsuccessful, on account of the heavy seas, and the barges were then getting dangerously near the shoals. A second attempt was more successful and the barges were made fast to the Mabel and she towed them safely into the river. On the way, she was met by the Alert, which had left the Winne up the river. The Alert then took the Burden and the Mabel continued on with the Allen. Both barges were landed at a protected wharf, belonging to the libellant at Saybrook Point, at about 9:30 o'clock A. M.

The Mabel then, upon request of the master of the Winne, which needed pumping, went to her assistance. The Winne, was lying on the mud, above libellant's wharf, with several feet of water in her, which

had entered through a leak in the stern and through another leak on the port side forward, caused by the strain the barge had been subjected to in the rough waters of the Sound. The value of the cargo, consisting of pig iron and wire, principally the latter, was \$13,200. The Winne was worth \$6,000. The services of the Mabel in this connection, can scarcely be deemed of a salvage character, as neither the boat nor cargo was in danger when the efforts were enlisted. The barge and cargo did, however, need pumping, which services the Mabel rendered, with some intervals, until the barge started for New London, the morning of the 11th. These services, lasting about 70 hours, were valuable and worth between \$5 and \$8 per hour.

The barges Allen and Burden were each of the value of \$4,000 and their cargoes were worth \$15,376, making a total value of \$23,376. It is probable that a great part of this value was saved from serious loss, by the services of the Mabel. She was worth from \$20,000 to \$25,000, and subjected to some risk of going ashore by the services, and to some danger of the thrown off hawser getting into her screw. If the barges had gone on the shoals, it is probable that they would have been destroyed, although some of the cargo might have been saved.

The Mabel's services to the barges Allen and Burden were of a decidedly meritorious character, though of short duration, and I conclude that there should be a recovery of \$1,500 salvage, one-third to go to the crew in proportion to their wages, of which the master should have \$50 extra. The libellant should also recover \$450 for the pumping services to the Winne.

Decree accordingly.

L. E. WATERMAN CO. v. LOCKWOOD. SAME v. JOHNSON. SAME v. LOCKWOOD et al.

(Circuit Court, D. Massachusetts. February 8, 1904.)

Nos. 951, 1,223, 1,224

1. COSTS—TRAVEL AND ATTENDANCE.

In a suit in equity the successful party is entitled to tax costs for travel and attendance.

2. SAME—DEPOSITIONS TAKEN IN SEVERAL CASES.

Under Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], providing for the taxation of \$2.50 costs for each deposition taken and admitted in evidence, where depositions, though written out but once, were taken to be read in several cases, and were entitled and admitted in evidence in each, on the joint trial thereof the successful party was entitled to tax costs thereof in each case, in the absence of an agreement to the contrary.

3. SAME—SUPERVISING RECORD—CLERK'S FEE.

Where the record in several cases tried together was printed but once, it was proper for the clerk to tax one fee for supervising the record as authorized by rule 23, par. 7, and divide the amount of such fee among the three cases.

4. SAME—WITNESS FEES.

Where three cases were tried together, and each witness who testified was sworn in each case. they were properly allowed three witness fees.

5. SAME—SPECIAL EXAMINER—SWEARING WITNESSES—FEES.

Where three cases were tried together, and each witness was sworn and each exhibit was marked in each case, the special examiner was entitled to three fees for each witness and each exhibit marked.

6. SAME—SPECIAL EXAMINER—DEPOSITIONS—FEES—ATTENDANCE.

Under Rev. St. § 847 [U. S. Comp. St. 1901, p. 652], entitling commissioners taking depositions to an attendance fee of \$3 per day, and to 10 cents a folio for certifying and filing such depositions, where a special examiner took depositions which were read and used in three cases tried together he was entitled to a fee of \$3 a day in but one case, and to 10 cents a folio for certifying and filing the depositions in the second and third case.

7. SAME—EVIDENCE FURNISHED TO DEFENDANT.

Where, in a suit in equity, plaintiff furnished a copy of the evidence to defendant, the clerk properly taxed to plaintiff 10 cents a folio therefor.

In Equity.

Walter S. Logan, for complainant.

Oliver R. Mitchell, for defendants.

LOWELL, District Judge. The complainant disputes items 1, 12, 14, 16, and 17 of the clerk's taxation of costs. Objections made to items 3, 4, 5, 6, 7, 8, 9, and 10 were not pressed in argument, and are taken as withdrawn.

Item 1. Travel and attendance. The taxation is sustained upon the authority of *Nichols v. Brunswick*, 3 Cliff. 88, Fed. Cas. No. 10,239.

Item 12. Attorney's fee for depositions taken. Each case involved the same question of law and fact, and depended upon the same evidence. The plaintiff was the same in all three cases; the defendants in 951 and 1,223 were different. In 1,224 the party defendant in 951 was joined with others. An attorney's fee for each deposition taken was taxed in each of the three cases. The taxation is sustained on the authority of *Wooster v. Handy* (C. C.) 23 Fed. 49, 63; *Archer v. Hartford Ins. Co.* (C. C.) 31 Fed. 660. In the first case it was said: "Each of the depositions allowed for was taken and admitted in evidence in each suit in which it was entitled. It was for the parties to agree that the fee should be taxed but once for the group of cases, if that was to be the rule. Otherwise the fee was taxable, because the deposition was taken in each case, and admitted in evidence in each case, although the writing was not repeated for each case." The complainant contends that an agreement to tax but once was actually made in the case at bar, but the evidence submitted does not sustain the contention.

Item 14. Clerk's fee for supervising record. The taxation is sustained under paragraph 7 of rule 23. For the validity of the rule, see *Jordan v. Agawam Co.*, 3 Cliff. 239, Fed. Cas. No. 7,516; *U. S. v. Sanborn* (C. C.) 28 Fed. 299; *Tesla El. Co. v. Scott* (C. C.) 101 Fed. 524. The record was actually printed but once. The clerk's fees have been taxed as for one record only, and the amount divided equally among the three cases. There can be no doubt that the amount thus taxed is that fixed by the rule. Whether it should have been taxed in one case or divided equally among three need not now be considered, as the result here is the same.

Item 16. Each witness who testified, having been sworn in each case, was allowed three witness fees, as having testified in three cases.

The taxation is sustained on the authority of *The Vernon* (D. C.) 36 Fed. 117, and *Archer v. Hartford Ins. Co.* (C. C.) 31 Fed. 660. It was further contended that one witness was paid travel between New York and Boston, and another witness travel between Philadelphia and New York, while the examination should have been had in New York and Philadelphia, respectively. Under all the circumstances, it does not appear to have been unreasonable to hold the examination in Boston and New York rather than in New York and Philadelphia, and the taxation is sustained.

Item 17. A special examiner was allowed three fees for each witness sworn and for each exhibit marked. As each witness was sworn and each exhibit was marked in each case, the allowance was proper. The examiner was also allowed triple fees for attendance and for taking each deposition, which he certified in each case. The fair intent of section 847, Rev. St. [U. S. Comp. St. 1901, p. 652], in general accordance with which these fees were here computed, will be carried out if the special examiner is allowed a fee of \$3 a day for attendance in only one case, and is allowed for the depositions certified and filed in the second and third cases at the rate of 10 cents for each folio instead of 20. The taxation is modified accordingly. The questions concerning the multiplication of fees have not been passed upon hitherto in this district. In all other respects the taxation conforms to the established practice. See, also, *Edison Co. v. Mather Co.* (D. C.) 63 Fed. 559. If there be anything to the contrary in *Tesla Co. v. Scott* (C. C.) 101 Fed. 524, I prefer to follow the uniform practice in this circuit, sustained by that of the Second Circuit, rather than a decision which reverses the former practice in the Third Circuit. The clerk taxed to the plaintiff 10 cents a folio for a copy of the evidence furnished to the defendant. Concerning this item I have more doubt, but have decided not to overturn a long-established practice.

Defendant's counsel objects to the disallowance of the witness fee paid to him. No fee in such case has ever been allowed in this district, and the disallowance is approved.

LOUISVILLE & N. R. CO. v. BITTERMAN et al.
(Circuit Court, E. D. Louisiana. February 18, 1904.)

No. 13,166.

1. INJUNCTION—AIDING IN VIOLATION OF CONTRACT—DEALING IN NONTRANSFERABLE RAILROAD TICKETS.

A railroad company is entitled to an injunction to restrain ticket brokers from buying and selling tickets issued by it to persons who, in consideration of reduced rates, have contracted not to transfer the same, the non-transferability being stated on their face.

In Equity. On motion for preliminary injunction.

Denegre, Blair & Denegre, for complainant.

H. L. Lazarus, Girault Farrar, and J. O'Connor, for defendants.

PARLANGE, District Judge. The fundamental question in this matter is not whether a statute forbidding any person from engaging

in the business of buying and selling any railroad tickets whatever would be upheld by this court; but the question is whether the defendants can and should be enjoined from buying and selling railroad tickets issued at reduced rates to persons who contract and bind themselves not to transfer them, the nontransferability being clearly apparent on the face of the tickets.

At times, during the course of the argument on behalf of the defendants, it seemed to be assumed by their counsel that the matter in hand was whether the defendants could be enjoined from buying and selling any railroad tickets—transferable as well as nontransferable tickets. No such question is herein involved.

Great reliance was placed by defendants' counsel on a decision of the Court of Appeals of New York holding that a statute evidently intended to destroy and prohibit practically the business of railroad ticket brokers, regardless of the nature of the tickets dealt in, would not be sustained by the courts. A similar decision by the Court of Appeals of Texas was also pressed upon the attention of the court. It is perfectly clear that it was not held in these cases that a person who has by contract, for a valuable consideration, bound himself to a railroad company not to transfer a ticket, will be allowed by the courts to violate his contract, and that outsiders, whose purpose is personal gain, will be allowed by the courts to assist the ticket holder in violating his contract.

The necessities of the defendants' case compel them to deny the validity of a contract between a railroad company and a ticket holder whereby, in consideration of a reduced rate, the ticket is made non-transferable. But it is clear beyond question that the matter has been settled adversely to the defendants' contention. It is equally clear that all the other contentions raised on behalf of the defendants, such as multifariousness and the doctrine of "clean hands," in equity, as applied to the facts in this case, have all been held by the courts to be without force.

It was also contended on behalf of defendants that the Supreme Court of this state has held favorably to their views. This contention is based solely upon the fact that an application, similar to the present case, was made to the Civil District Court for the parish of Orleans, praying for an injunction similar to the one herein prayed for. Upon the refusal of the injunction by the lower court, an application was made to the Supreme Court of the state for a mandamus to compel the issuance of the injunction, which application was refused by the Supreme Court without reasons assigned. The application to the Supreme Court was not made by appeal nor under the power of the Supreme Court to supervise the lower courts. It is therefore absolutely incorrect to assume that the Supreme Court believed that the railroad company had no case warranting an injunction simply because that court refused to mandamus the lower court to take action in a matter which was clearly left to the discretion of the lower court. And there are other grounds upon which the Supreme Court may have based its action without holding that as matter of law no injunction should issue in similar cases.

It was also argued on behalf of defendants, with great earnestness and insistence, that the public policy of this state and of the United States is opposed to the views of the law taken by complainant. The only fact presented in support of the contention that the suit was in opposition to the public policy of the state of Louisiana is that a certain bill relating to railroad ticket brokers was defeated in the state Legislature of 1902. It is obvious that that bill must have been intended to destroy and prohibit absolutely the entire business of railroad ticket brokers, regardless of the nature of the tickets dealt in. But the minority of the committee which reported the bill clearly show by their minority report that they, although opposed to the bill, were convinced that a contract not to transfer a railroad ticket—under proper conditions, of course—is binding and valid, and should be enforced. It can also be shown that there is no announcement of the public policy of the United States which could be held to militate herein against the complainant or in favor of the defendants.

It should be specially noticed that in this case there is no denial, but, on the contrary, an admission, that the defendants deal in the class of tickets in question, and the defendants contend that they have the right to deal in them. The matter, therefore, turns mostly, if not entirely, on questions of law, upon all of which I find against the defendants.

In this case this court, through Judge Boorman, issued an injunction concerning the United Confederate Veterans' Reunion tickets, after full argument. But the matter has been reargued before me *de novo*, as though this court had not already passed on the questions of law involved. Judge Boorman having virtually declined to issue an injunction including all nontransferable tickets to be issued at any time in the future, I see no reason to re-examine that question, and to pass upon it at the present time. A preliminary injunction will issue as to the nontransferable Mardi Gras tickets.

The railroad company must give in this case a bond of \$5,000 to hold the defendants harmless against any damages in the case.

NOTE BY THE COURT.

See, in support of the opinion, *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 890, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Boylan v. Hot Springs R. R. Co.*, 131 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Angle v. Chicago, etc., R. W. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Nashville, etc., R. W. Co. v. McConnell et al. (C. C.)* 82 Fed. 65; *Delaware, etc., R. R. Co. v. Frank et al. (C. C.)* 110 Fed. 689; *Penn. R. R. Co. et al. v. Beekmann et al.*, 30 Wash. Law Rep. 715, in Supreme Court of the District of Columbia, decided October 13, 1903; *Klinner et al. v. Lake Shore, etc., R. R.*, 47 Ohio Law Bul. (No. 18) 294, in Circuit Court for the Eighth Circuit of Ohio, decided February 10, 1902; *Schubach v. Judge*, 78 S. W. 1020, in Supreme Court of Missouri, October term, 1903; *Hirt v. Judge, Id.*; *Leonard v. Judge, Id.*; *Wabash R. R. Co. v. Wasserman et al.*, in Circuit Court of the City of St. Louis; *Wood's R. R. Law*, vol. 3, § 847; *A. & E. Ency. Law* (1st Ed.) *verbis* "Tickets and Fares," vol. 25, p. 1091.

BORN et al. v. SCHNEIDER et al.

(Circuit Court, N. D. Illinois, N. D. February 8, 1904.)

No. 26,203.

1. FEDERAL COURTS—ORDERS—APPEAL—TIME.

An application for leave to appeal from an order cannot be granted where the application was not made within six months from the date the order was entered.

2. SAME—ORDERS—VACATION—TERMS OF COURT—INTERVENTION—JURISDICTION.

Where a new term of court intervened between the making of an order and the making of a motion to vacate the same, the court lost jurisdiction to consider the motion.

3. SAME—PETITIONS—STRIKING FROM FILES—NONAPPEALABLE ORDER.

Where a motion for leave to file a petition for leave to intervene was marked "Filed" by the clerk, by mistake, before leave to file had been granted, an order striking the petition from the files until such time as the court should pass on the petitioner's right to file the same was an order merely purging the records of the court of a mistake, and was therefore unappealable.

Chas. B. Stafford, for complainants.

J. A. & H. R. Baldwin, E. A. Frost, Wilson, Moore & McIlvaine, Willard & Evans, Flower, Vroman & Musgrave, and J. B. Leake, for defendants.

Runnells & Burry, for interveners.

KOHLSAAT, District Judge. The bill herein was filed December 19, 1901, by the complainants, as stockholders and creditors of the National Bank of Illinois, against the defendants, as directors of said bank, seeking to hold said defendants liable for losses sustained by reason of their negligence as such directors. On December 14, 1901, Boyd et al. had filed their bill in this court against the same defendants, seeking to hold them for damages sustained by Boyd et al., as depositors and creditors, growing out of the alleged negligence of said defendants. On December 19, 1901, the Boyd bill was amended by adding the words "in behalf of themselves and all other persons in like manner interested." To the last-named bill a demurrer was filed, which demurrer the court sustained on June 17, 1903, and ordered the bill dismissed for want of equity. On the same day the petitioners herein (all being parties complainants in the said Boyd suit) presented their motion for leave to file an intervening petition in this cause, whereupon the following order was entered:

"Now come James Boyd et al., by their solicitors, and enter their motion for leave to file their intervening petition herein, and thereupon said motion is continued for future consideration."

No notice of the presentation of said motion was given. The next day the solicitors for Boyd et al. left with the clerk of this court a petition praying, among other things, "that an order may be entered in this cause making them parties complainant to this cause." This was indorsed: "June 18, 1903. Motion for leave to file, and continued"—and was presented without notice. On July 2, 1903, on motion of complainant herein, this cause was dismissed. A new term of court began July 6th. On July 15th Boyd et al. filed their petition and

motion to set aside the order of dismissal of July 2d. On the same day the court entered an order finding that the petition then found in the files in said cause was by error marked by the clerk as having been filed therein on June 18, 1903, and that no leave to file the same had been given, and ordered that the same be stricken from the files, and also ordered that the motion of petitioners to set aside the order of July 2, 1903, dismissing this cause, be overruled and denied. The December term of the court began December 21, 1903. On January 8, 1904, Boyd et al. filed a petition herein for an appeal. It is difficult to determine from the petition for appeal from just what order of the court an appeal is desired, but it is from either the order of July 2, 1903, or July 15, 1903. If it is from the order of July 2d, the prayer comes too late, since the six months allowed by law expired on January 2, 1904. If it is from the order of July 15, 1903, which, as above set out, was an order denying petitioners' motion to set aside the order of July 2d, and striking from the files the petition for leave to intervene filed without leave of court and by mistake, then the appeal cannot be granted, for several reasons:

1. A new term of court having intervened between July 2d and July 15th, the court had no jurisdiction to consider a motion to set aside the order of July 2d after the term, except for fraud, which the court then found did not exist.

2. The order of July 15th was not an appealable order, so far as it denied the motion to vacate the order of July 2d. The motion to vacate can have no more effect upon the question of limitation of time than could a motion for a new trial. Both must be made during the term in order to be entertained. This rule is too well settled to need citation of authorities.

3. It is apparent from the record that the motion for leave to file the petition for leave to intervene was the matter before the court. Consequently it was manifestly a mistake of the clerk to mark the petition "Filed." As to that part of the order of July 15th which strikes the petition from the files as prematurely filed, I hold said order to be unappealable. It simply struck the petition from the files until such time as the court could pass upon the right to file it. Their rights were preserved by their motion at the preceding term. They had abundant opportunity to present and have the judgment of the court upon their right, as well as to appeal from the order of July 2d. By its order of July 15th, the court was simply purging its records, by correcting a mistake of the clerk made apparent by petitioners' own motion entered June 17th preceding, and certain orders of the court wherein it is evident that their motion was pending for the purpose of securing an order of court giving leave to file an intervening petition.

The question of the right of the petitioners to intervene is not before the court—only the question of their right to appeal from one of the orders entered July 2d and July 15th, respectively. Outside of the indefiniteness of the petition as to which order is appealed from, I am of the opinion that no appeal lies, and the motion made January 8, 1904, is denied.

DOMINION NAT. BANK OF BRISTOL v. OLYMPIA COTTON MILLS et al.

(Circuit Court, D. South Carolina. February 25, 1904.)

1. FRIVOLOUS ANSWER.

Where an answer by the maker of a note, in an action thereon against him and the guarantors thereof, the jurisdiction of which depends on diverse citizenship, does not set up a good defense by the allegation that one of the other defendants is a citizen of another state, the privilege of suit in which he has claimed, yet it will not be struck out as frivolous, it requiring an argument and careful examination to answer the defense.

C. T. Haskell, for plaintiff.

W. C. Miller, for defendants.

SIMONTON, Circuit Judge. This case comes up on a motion to strike out the defense as frivolous. The complaint by the Dominion National Bank of Bristol is on a promissory note, of which this is a copy: "\$5,000. Columbia, S. C., Oct. 20, 1903. Thirty days after date Olympia Cotton Mills promises to pay to the order of Dominion National Bank Five Thousand Dollars at their office Bristol, Va.—Tenn., Value received." On the back of this note appears the names of W. H. Rose, W. A. Clark, Robt. W. Shand, Wm. H. Lyles, W. G. Childs, Geo. A. Shields, W. B. Lowrance, J. S. Moore, W. B. Smith Whaley, all of whom are made defendants in the suit under section 141, Code Civ. Proc. S. C.

The plaintiff is a citizen of Tennessee and Virginia. The complaint avers that each defendant is a citizen of South Carolina. Each one of the defendants has been served with process. W. B. Smith Whaley files a statement, imperfectly verified, that he is a citizen of Massachusetts, and claims the privilege of suit in the district of his residence. All the other defendants but the Olympia Cotton Mills have filed answers. The Olympia Mills files this paper:

"The Olympia Cotton Mills, the above-named defendant, especially appearing under protest for the purpose of this plea and for no other, says: That it is, and was at the time of the institution of this suit, a resident and citizen of Columbia, in the state of South Carolina, and the plaintiff is, and was at the time of the institution of this suit, a resident and citizen of the states of Virginia and Tennessee, and that one of the defendants to this suit, to wit, Wm. B. Smith Whaley, is, and was at the time of the institution of this suit, a resident and citizen of Boston, in the state of Massachusetts, and the other defendants to this suit are, and were at the time of the institution of this suit, residents and citizens of Columbia, in the state of South Carolina, and that the suit is not brought in the district of the residence of the plaintiff, or in the district of the residence of all of the defendants, in that it is not brought in the district of the residence of the said Wm. B. Smith Whaley, he residing in a different state from the plaintiff and the other defendants. Wherefore, insisting upon its exemption from suit in this court, the defendant the Olympia Cotton Mills moves to dismiss this suit for want of jurisdiction."

Whereupon the plaintiff moves to strike out this defense as frivolous.

The Code of Civil Procedure of South Carolina provides for only two modes of defense to a complaint, demurrer and answer. No other

† 1. Averments of citizenship to show federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 261.

defense is known. Section 164, Code Civ. Proc. The paper set out at length above is not a demurrer. Construing it as all code pleading must be construed, liberally (section 180, Code Civ. Proc.), it can be treated as an answer setting up the defense of want of jurisdiction.

The position taken by the defendant is that in the Circuit Court of the United States each plaintiff in cases resting on diversity of citizenship must be capable of suing each defendant, and each defendant capable of being sued by each plaintiff (*Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435); that W. B. Smith Whaley, one of the defendants, is a citizen and resident of Massachusetts, to be sued only in the district of his residence.

There can be no doubt that if W. B. Smith Whaley is a citizen of the state of Massachusetts he has the right to insist on a suit in his own district. But this is a personal privilege—one that he can waive. And, if it be made, he alone can make it and in his own behalf. *Harrison v. Urann*, 1 Story, 64, Fed. Cas. No. 6,146; *Hinckley v. Byrne*, Deady, 225, Fed. Cas. No. 6,510; *Bensinger Co. v. National Cash Register Co.* (C. C.) 42 Fed. 81; *Jewett v. Bradford Bank* (C. C.) 45 Fed. 801; *Smith v. Ry. Co.* (C. C.) 64 Fed. 1. If, however, the nonresident defendant be an indispensable party to the suit it cannot be maintained if he assert his privilege. *Excelsior Pebble Phosphate Co. v. Brown*, 74 Fed. 323, 20 C. C. A. 428; *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; *Anderson v. Watts*, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078.

Now, is W. B. Smith Whaley an indispensable party to the suit against the Olympia Mills? Section 157, par. 3, of the Code of Civil Procedure of South Carolina, provides that if all the defendants have been served judgment may be taken against any or either of them severally, where the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against any of them alone. This suit is against the maker of a promissory note. It also includes certain defendants who are not indorsers in the technical sense, but who can be held as guarantors of the note. *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341. The contract of the maker is to pay at all events. It has no relation to or connection with the contract of those who write their names on the back of the note. It is therefore the several contract of the Olympia Mills, on which it could have been sued alone, and so the case comes within section 157. Were this case for trial on its merits, this would be the conclusion, and the defense set up would be overruled. But it is a very different question at this time to set aside the defense as frivolous. A frivolous defense is one which at first glance can be seen to be merely pretensive, setting up some ground which cannot be sustained by argument. There are cases in the Supreme Court which, without close investigation, sustain the position of the defendant. Indeed, were not the distinction kept in mind which has been made, they would sustain the defense. It requires an argument and careful examination to answer it. So it cannot be said to be frivolous. *Boylston v. Crews*, 2 S. C. 422.

The motion is refused.

TEXAS COTTON PRODUCTS CO. v. STARNES.

(Circuit Court, W. D. Texas, Austin Division. February 3, 1904.)

1. COURTS—JURISDICTION—EFFECT OF DISMISSAL OF FORMER SUIT AFTER REMOVAL.

Where, after the removal of a suit, the plaintiff procures an order dismissing the same without prejudice, the jurisdiction of the federal court ends, and the fact of the removal does not affect the jurisdiction of the state court to entertain a new suit on the same cause of action.

2. FEDERAL COURTS—INJUNCTION TO STAY PROCEEDINGS IN STATE COURT.

Neither the fact that a plaintiff, who after removal dismissed his suit without prejudice, has instituted a new suit on the same cause of action in the state court from which the removal was made, nor that he has reduced his demand to a sum below that necessary to give the federal court jurisdiction, takes the case out from the operation of Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], which prohibits such court from granting an injunction staying proceedings in any state court.

In Equity. Suit for injunction.

The bill in this suit, duly verified, was brought by the Texas Cotton Products Company, a New York corporation, against W. T. Starnes, a citizen of Texas, to restrain the prosecution of a suit by Starnes in the district court of Williamson county, Tex. It appears from the allegations of the bill, considered in connection with the exhibits thereto attached, that on December 18, 1902, the defendant, Starnes, instituted in the state court a suit to restrain the plaintiff in this suit from operating its plant, which is situated in the immediate vicinity of Starnes' residence. In that suit Starnes alleged that the operation of the plant of the Texas Cotton Products Company constituted a nuisance, and he prayed its abatement, and also sought to recover damages resulting to his property, and for the annoyance and suffering of his family, in the sum of \$2,500. The Texas Cotton Products Company filed its petition and bond December 24, 1902, for the removal of the cause to this court. On February 10, 1903, the following order was entered by the court, dismissing the suit:

"Now on this the 10th day of February, A. D. 1903, came the complainant, W. T. Starnes, by his attorney, and craved leave of the court to have his bill herein dismissed without prejudice to the reinstitution of his said suit; which leave having been granted, complainant says that he will not further prosecute this suit. Wherefore it is considered, ordered, adjudged, and decreed by the court that complainant's bill be and the same is hereby dismissed, but without prejudice to the reinstitution of said suit."

Subsequently, on December 23, 1903, Starnes instituted in the district court of Williamson county, Tex., another suit upon the same cause of action, in which he claimed \$1,900 damages, but in his second suit neither injunction nor other equitable relief was prayed. The present bill seeks to enjoin the prosecution of this second suit in the state court, which, it may be added, has not been removed to this court. The bill proceeds upon the theory that, upon removal of the first cause from the state to the United States court, the latter acquired jurisdiction of the suit and of the subject-matter, and such jurisdiction, thus acquired, could not be divested by the voluntary dismissal of the suit and its subsequent reinstitution in the state court, upon pleadings falsely alleging the amount of damages sustained, for the purpose of depriving this court of its previously acquired jurisdiction. The defendant objects to the jurisdiction of the court upon two grounds, but it will be necessary to consider only the following:

"It affirmatively appears from the allegations of the bill that there is no action or suit pending in this court, and was not when the bill was filed, by

¶ 2. Federal courts restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

this defendant against the complainant, and therefore this court is without jurisdiction to interfere with defendant in the prosecution of any cause of action which he may have against complainant in the courts of the state of Texas."

Eugene Williams, for plaintiff.

Nunn, Ward & Neal and West & Cochran, for defendant.

MAXEY, District Judge (after stating the facts as above). After the removal of the cause, first instituted in the state court, the plaintiff, Starnes, procured an order of this court dismissing the suit, without prejudice to his right to reinstitute the same. That he had the right, under the circumstances of the case, to an order of dismissal, there can be no doubt. *Pullman Car Co. v. Transportation Co.*, 171 U. S. 145, 146, 18 Sup. Ct. 808, 43 L. Ed. 108; *Chicago & Alton Railroad Company v. Union Rolling Mill Company*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *City of Detroit v. Detroit City Railway Co. (C. C.)* 55 Fed. 569. And after the suit was dismissed it was entirely out of this court, and Starnes, by the terms of the order, had the right to institute another suit in any court of competent jurisdiction. He saw proper to bring his second suit in the state court, and, although he claims less than \$2,000, no reason is perceived why he may not so do, notwithstanding the amount may not be sufficient to confer jurisdiction upon this court. *Gassman v. Jarvis (C. C.)* 100 Fed. 146; *Hooper v. Atlanta, etc., Ry. Co.*, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931; *McIver v. Florida, etc., R. R. Co. (Ga.)* 36 S. E. 775; *Rodman v. Mo. Pac. Ry. Co. (Kan.)* 70 Pac. 642, 59 L. R. A. 704; *Hughes v. Green*, 84 Fed. 833, 28 C. C. A. 537. The case of *Railroad Company v. Fulton*, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520, relied upon by counsel for the plaintiff, has been thoroughly considered in several of the cases above cited, and the courts have uniformly declined to follow it.

It may be noted that the plaintiff, in the present bill, has not removed nor attempted to remove the second suit to this court. That suit remains, where it was instituted, in the state court, and the purpose of the plaintiff is to restrain its further prosecution. Under these circumstances the case comes clearly within the inhibition of section 720 of the Revised Statutes, which provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Upon this point it was said by Mr. Justice Bradley, as the organ of the court, in *Haines v. Carpenter*, 91 U. S. 257, 23 L. Ed. 345: "In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the federal courts are expressly prohibited from doing. By the act of March 2, 1793 [1 Stat. 334, c. 22, § 5], it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes [U. S. Comp. St. 1901, p. 581], and extends to all cases except where otherwise provided by the bankrupt law." See, also, *United States v. Parkhurst-Davis Co.*, 176 U. S. 317, 20 Sup. Ct. 423, 44 L. Ed. 485; *Moran v. Sturges*, 154 U. S. 256, 14 Sup.

Ct. 1019, 38 L. Ed. 981; In re Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782; In re Sawyer, 124 U. S. 219, 220, 8 Sup. Ct. 482, 31 L. Ed. 402; Sargent v. Helton, 115 U. S. 348, 6 Sup. Ct. 78, 29 L. Ed. 412; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; Leathe v. Thomas, 97 Fed. 136, 38 C. C. A. 75.

There are, it is true, certain exceptions to the general rule above announced, but, as the second suit, instituted by Starnes in the state court, has not been removed to this court, and therefore the jurisdiction of this court has not attached, it becomes unnecessary here to indicate such exceptions or limitations as may exist.

The prayer for injunction is denied, and the bill is dismissed.

**In re CONDEMNATION OF LAND AT NAHANT (UNITED STATES,
Petitioner).**

(District Court, D. Massachusetts. January 22, 1904.)

No. 1,334.

1. EMINENT DOMAIN—CONDEMNATION OF LAND FOR PUBLIC USE—RIGHT OF TOWN TO COMPENSATION FOR EASEMENT.

A town has a beneficial interest in an easement of aqueduct acquired by it for water pipes through private land, by whatever title it is held, as distinguished from property acquired by it for a strictly public use, and it is entitled to compensation when such property is condemned for another public use, whether by the state or United States.

2. SAME—EASEMENT OF AQUEDUCT IN HIGHWAY.

In laying a water pipe under a public highway a town acts in the same capacity as a nonmunicipal water company, and its rights are no greater, and under the law of Massachusetts, on the taking of the highway for a superior public use, neither the town nor the company is entitled to compensation for the easement.

Proceeding by the United States for Condemnation of Land for the Purpose of Fortification.

Dunbar & Rackeman and William Hoag, for town of Nahant.

Henry P. Moulton, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

LOWELL, District Judge. The United States is proceeding to condemn land in Nahant for the purpose of fortification. The proceedings are conducted under St. Mass. 1902, p. 289, c. 373. The town claims compensation in two cases: First. For an easement of aqueduct through private land, which easement it acquired by condemnation. The water pipe thus laid is used and needed not only to furnish water to the land taken by the present proceedings, but also to other parts of the town. Second. For its rights, however styled, which have arisen from its laying under highways in the land now taken water pipes used and needed for both the purposes above mentioned, and sewers which are necessary to its system of sewerage. By the statute referred to, Massachusetts has given to the United States the rights which the former possesses to condemn land for a public use. In re Certain Land in Lawrence (D. C.) 119 Fed. 453.

In the first case the government does not seriously dispute the right

of the town to compensation. As has often been said, a town may own real estate by the same tenures, yet in two different capacities: (1) In the case of streets, parks, and schoolhouses, for example, the use is strictly public, and there is no beneficial ownership in the town. This is true, it seems, whether the town has condemned an easement in the land, has acquired an easement therein by voluntary grant, or has taken title in fee simple. *Easthampton v. County Commissioners*, 154 Mass. 424, 28 N. E. 298, 13 L. R. A. 157. There the town's title was in fee. It is immaterial that the town can sell the land—a schoolhouse, for example—and use the proceeds as it sees fit. And in the case of a highway it makes no difference, I suppose, if the town has taken the fee in the land, as is now common practice in Boston. It is the nature of the use, and not the nature of the legal title, which determines whether the town's ownership is beneficial or not. (2) On the other hand, a town may hold real estate for uses not strictly public—a city hall or a cemetery, for example—in which estate the town has a beneficial interest, and for which compensation must be made if it is taken for another public use by state or nation. *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515. Waterworks fall into the second class, and the easement of aqueduct vested in the town must be paid for as if that easement were the property of an individual or a private corporation.

A more interesting question concerns the town's right to compensation for aqueducts laid under highways. In *New England Telephone Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835, it was held by the Supreme Court of Massachusetts, whose decisions in this matter are binding upon this court, that corporations which, under authority of statutes and ordinances, have built and maintained conduits under public highways, are not entitled to compensation where the highway itself is taken for a public use deemed superior by the Legislature. Does the right of a town which maintains waterworks differ from that of a nonmunicipal water company? In laying a water pipe under a highway, both act in a like capacity. For manifest public convenience the town, which has charge of the highway, not as owner, but as delegate of the state, grants a license to one organization or the other to lay pipes under the highway for the supply of water. The town owns the pipes like a private owner, but not an easement in the land. In *Sears v. Crocker*, 184 Mass. —, 69 N. E. 327, the Supreme Court declared that a subway held by the municipality "in its private or proprietary capacity for its own property" was so held only as a structure, and not as an easement in the land. The city's private ownership in the tunnel was declared to be like that of a private gas company in its pipes. The reasoning in *Sears v. Crocker*, combined with the decision in *New England Telephone Co. v. Boston Terminal Co.*, disposes of the case at bar. To avoid misconception, it should be added that the owner of pipes laid under a highway in some cases may well recover for damage done to his right of aqueduct where the highway is discontinued. If a corporation, private or municipal, owns an easement of aqueduct through private land, and afterwards a highway is laid out over the same land in the line of the aqueduct, and if, still later, the highway is discontinued, and the land

is taken for a superior public use, the corporation must be entitled to compensation. To hold otherwise would require that upon the laying out of the highway the corporation should be paid damages as if its easement were then destroyed. See *Boston v. Brookline*, 156 Mass. 172, 30 N. E. 611. So, if a town should condemn an easement of aqueduct through private land, and should afterward lay out a highway over the aqueduct, it may be that the town would be entitled to compensation upon the taking of the land under the highway for a superior public use. This case presents no such question. As the purpose of national defense is paramount, the comparative value of the public uses in question does not arise here, as it did in the *Lawrence Case*.

In re TOOTHAKER BROS.

(District Court, D. Connecticut. February 12, 1904.)

No. 1381.

1. **BANKRUPTCY—PETITION FOR REVOCATION OF DISCHARGE—SUFFICIENCY.**

A petition for the revocation of a discharge in bankruptcy need not allege the legal conclusion that the facts did not warrant a discharge where the facts are set out.

2. **SAME.**

A petition by a creditor alleging that a voluntary bankrupt, for the purpose of defrauding his creditors, made an assignment of a chose in action to his wife without consideration, and omitted any mention of such asset from his schedules sufficiently shows that the bankrupt made a false oath to his schedule to require a revocation of his discharge if the allegation is proved, where, under the laws of the state, the assignment was ineffectual to convey the chose in action from his estate.

3. **SAME—FRAUDULENT TRANSFERS—GIFTS.**

Creditors may attack a fraudulent transfer of property by a bankrupt to his wife as a gift, although made more than four months prior to the bankruptcy.

In Bankruptcy. On demurrer to petition for revocation of discharge.

L. E. Stanton and Bacon & Spellacy, for petitioners.

Joseph L. Barbour, for bankrupt.

PLATT, District Judge. The important allegations of the petition are: (1) Charles F. Murray filed a petition asking to be adjudged a bankrupt December 18, 1901. (2) His schedules declared his assets to be \$50, and all exempt. (3) There appearing to be no assets, a trustee was not appointed. (4) A discharge was granted April 21, 1902. (5) Before December 18, 1901, the date of filing the petition, said Murray was possessed of an asset, which was a claim against the Hartford Telegram Company for \$1,006.65 for services rendered. (6) For the purpose of concealing said asset and depriving his creditors of dividends to be derived therefrom, and for the purpose of defrauding his creditors, said Murray, on July 18, 1901, assigned said asset to his wife. (7) Said assignment was without any consideration, and for the

sole purpose of concealing the claim from his creditors, and was and is void. (8) Said asset was omitted from the schedules, and by means of the assignment he concealed the existence of the said asset from his creditors, and was guilty of an offense which would have prevented him from receiving a discharge, if known to the court. (9) The petition was brought within the year, and without laches. To the petition a demurrer is filed by said Murray. There are two reasons given for the demurrer: (1) That it is not alleged that the actual facts did not warrant the bankrupt's discharge. (2) That there is no allegation of any fact, which, if known to the judge when the bankrupt's discharge was granted, would have been ground for a refusal to grant such discharge.

The first cause of demurrer is without merit. If the facts set forth would have warranted the judge in refusing the discharge, there is no force in asking that the petitioners, after presenting them in detail, should assert the conclusion of law, which it would remain the duty of the court to infer from the facts.

The second cause of demurrer requires more thought. To sustain it, however, the counsel for Murray is forced by the logic of the situation to contend that a bankrupt may transfer property to his wife without consideration, and in fraud of his creditors, and with the latter purpose in view, at any date which shall be more than four months prior to his petition in bankruptcy, and with like fraudulent purpose may fail to mention such property in his schedules, and yet demand a full bill of financial health in spite of the protestations of his creditors. The question should be governed by the provisions of the bankrupt law as existing prior to the amendment of 1903, and I do not think that the amendment throws any light upon the intention of Congress, in this regard, when enacting the Law of 1898. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. I am satisfied that section 67, subd. "e," has no application in a case where property has been fraudulently transferred by an insolvent debtor as a gift. In *re Schenck* (D. C.) 116 Fed. 555. Furthermore, under section 70, subd. "e," it is clear that, if the transfer to the wife is invalid under the laws of this state, a trustee could have avoided it.

The attempted transfer of July 18, 1901, conveyed no interest in the chose in action. It remained an asset of Murray's estate, and was an asset when he filed the schedules which accompanied his petition of December 18, 1901. By omitting to place it in the schedules, he was enabled to escape a trustee from whom to conceal it. But his oath to the schedules as prepared brings him within the provisions of the first ground for refusing a discharge. Whether or not, for purely technical reasons, he is free under the second ground, it is unnecessary to decide.

If the main allegations of the petition were to be filed as a specification against a discharge, they should be more carefully drawn, but for the present purpose they are sufficient. If they can be sustained by evidence, the discharge ought to be revoked.

Let the demurrer be overruled, with costs.

THE RUTHERFORD.

(District Court, E. D. Pennsylvania. March 4, 1904.)

No. 9.

1. SHIPPING—INJURIES TO SEAMEN—LIABILITY OF VESSEL—EVIDENCE.

Where a seaman claimed that an injury, consisting in the freezing of his hands, resulted from his being compelled by the master to remain in the pilot house, at the wheel, for a long period of time, in very low temperature, and to rub the frost from the glass of the pilot house with his bare hands while he steered the vessel, but it appeared that there was a stove and plenty of coal in the pilot house, together with waste which could have been used to wipe the glass, and that the injury was more probably due to the fact that plaintiff only had a thin pair of gloves, which were wholly inadequate to keep his hands warm, and on his return home he only visited a physician for such injuries five times during one month, the evidence did not justify a recovery against the vessel.

In Admiralty.

Clifford S. Beale, for libellant.

John G. Lamb, for respondent.

J. B. McPHERSON, District Judge. The libellant was a deck hand on board the barge Rutherford—a vessel that was carrying coal from Philadelphia to Boston, in December, 1902. On the 9th of that month, while the tow was just outside the harbor of Boston, the weather was bitterly cold. A severe northwest wind was blowing, and the water was covered with a dense vapor, that speedily froze upon almost any object it touched. The tow lay to for several hours, waiting for the vapor or fog to rise, and during this time the libellant's hands were so severely frost-bitten that he was almost incapacitated for further work during the voyage, and has suffered much pain and inconvenience from his injuries. He charges that the vessel is to blame for his hurt and suffering, and sets out the fault complained of as follows:

"(1) * * * That, notwithstanding the regular morning trick of the libellant at the wheel was from eight o'clock a. m. until ten o'clock a. m., he was compelled by the master of the barge on the morning of December 8, 1902, to take the wheel at 7:30 a. m., and compelled to remain until 12:40 p. m. During the time the libellant was at the wheel as aforesaid, the vapor, etc., froze on the glass of the pilot house on account of the low temperature and insufficient heat in said pilot house, and the libellant was ordered and compelled by the said master to continually rub the front glass of the pilot house alternately with his raw hands, while he steered with the other, in order to keep the glass in front of him free from ice, so he could see through said glass. The said master did not remain in said pilot house, but occasionally visited it.

"(2) That the weather was not of such severity to cause any danger to the vessel or the rest of the tow, but they were lying to on account of the thickness of the weather. That, on account of being compelled to keep the glass of the pilot house free from ice with his bare hands, they became extremely cold. The libellant complained to the said master of the cold as above, but, notwithstanding the fact that there were other deck hands, and that there was no danger, the master, willfully, maliciously, negligently, and with utter disregard of life and safety, ordered and compelled the libellant to remain at the wheel and keep the glass free of ice with his bare hands. The libellant feared to leave the wheel, or to disobey the orders of the said master. That, in consequence of said master's actions and orders as aforesaid, the hands of the libellant were frozen so badly that the flesh has gone from his fingers, and his hands rendered useless."

There is a decided conflict in the testimony upon this subject, but I think the weight of the evidence is in favor of the following findings of fact, which I quote from the brief of the respondent's counsel:

"The said tug, with this barge and two others in tow, arrived outside of Boston Harbor on December 9th. It was intensely cold, and, because of the presence of vapor on the water, caused by the cold weather, they lay outside the harbor until the next morning, with just speed enough to hold the tow, waiting for the vapor to rise. The Rutherford was the barge next to the tug. The pilot house was heated by a stove, and there was fire in it that morning certainly as late as six o'clock. There was plenty of coal, and it was the duty of some one of the crew to keep up the fire. The captain took the wheel while the crew were at breakfast. After breakfast that morning, at seven o'clock, the captain sent the men forward to break the ice off the anchor, and kept the wheel himself. The vapor had caused a frost to collect on the inside of the glass in the pilot house, and, as it was necessary to see the tug, in order to follow in her wake, the captain wiped a small spot in the glass clear for that purpose. He used a piece of cloth or waste for that purpose. There was a locker in the pilot house, where the waste was kept. There was plenty on board, and it was the duty of the man who tended the lamps to see that waste was kept in the pilot house. The person who tended the lamps at that time was the libellant.

"As this was libellant's first trip, and he was poorly clad, the captain, after about three-quarters of an hour, called him in from chopping ice, put him at the wheel, and went out himself and took libellant's place at chopping ice, after instructing libellant how to keep the glass clear with the cloth or waste. They worked at clearing away the ice until about 10:30 that morning.

"Libellant claims that the captain came back to the pilot house and ordered him to stop using a cloth or cap to clear the glass, and made him use his bare hands for that purpose, and that in consequence of this they were frozen; that he called the captain's attention to his hands next day, and asked him to be permitted to go to a hospital in Boston to have them attended to, but he was refused. The libellant came back with the barge to Philadelphia, attended to his duties on the trip, then left the service about December 18th. He did not seek medical attendance until some four weeks afterward. He then visited a doctor five times from the middle of January until the early part of February, and has had no medical attendance since."

Upon these facts, no fault of the vessel is discernible. The libellant was unfortunate enough to suffer severely from the cold, but I think the testimony shows satisfactorily that his injury was more probably due to the insufficient covering of his hands than to any other cause. He had only a thin pair of gloves or mittens, wholly inadequate to keep his hands warm; and to this fact, I think, his misfortune was largely due. I am unable to accept the theory set up in the libel—that the master ordered him to use his bare hands—and it is quite clear that he could not have used them alternately in the manner he describes. I have no doubt that he suffered much pain, for it is well known that an injury of this kind is very hard indeed to bear; but the extent of the injury, I think, must certainly have been exaggerated, for, even after he returned to his home in Philadelphia, he did not think the matter serious enough to require him to go to a physician for more than a month. It seems to have been a regrettable case of injury due to exposure in severe weather, but the libellant was not the only sufferer, for the master of the barge himself suffered also from frost-bitten hands, due to exposure at the same time. I am sorry for the libellant's misfortune, but I can see no ground for laying the burden of his injury to the account of the vessel.

A decree may be entered dismissing the libel.

LEMAN v. BALTIMORE & O. R. CO.

(Circuit Court, N. D. Illinois, N. D. February 8, 1904.)

No. 26,784.

1. FEDERAL COURTS—PLEADING—AMENDMENT—STATE PRACTICE.

Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684], providing that the practice, pleadings, and forms in civil causes, other than equity and admiralty causes, in Circuit and District Courts, shall conform, as near as may be, to those existing in like causes in courts of record of the state within which such Circuit or District Court is held, includes the state practice with reference to amendment of pleadings, unless otherwise directed by statute.

2. SAME—DEATH—TRANSITORY ACTION—JURISDICTION.

Where plaintiff's intestate, a citizen of Illinois, was killed, by reason of defendant's alleged negligence, in the state of Pennsylvania, an action for his death was transitory, and was therefore properly brought in Illinois.

3. SAME—FOREIGN STATUTES—PROCEEDS.

Such action was properly based on the Pennsylvania statute providing that the right of action shall vest in the widow, etc., and the proceeds of the suit, when recovered, would be distributed by the courts of Illinois, or the federal court in which the recovery was had, according to the Pennsylvania statute.

4. SAME—PARTIES PLAINTIFF—CHANGE—EFFECT.

Where an action for wrongful death occurring in Pennsylvania was erroneously brought in the name of decedent's administrator, instead of by decedent's widow, as provided by the Pennsylvania statute authorizing such action, an amendment of the declaration, after a demurrer thereto on that ground had been sustained, substituting the name of decedent's widow for the name of the administrator wherever his name appeared in any material allegation therein, did not constitute the commencement of a new cause of action, or work a discontinuance of the original suit.

W. S. Stahl, for plaintiff.

Pam, Calhoun & Glennon, for defendant

KOHLSAAT, District Judge. This cause comes on to be heard upon the motion of defendant that the cause stand dismissed as of November 28, 1903, upon the following state of facts: The suit was instituted by the administrator of Louis M. Niman, deceased, formerly a citizen of Illinois, to recover \$35,000 for negligence of the defendant which resulted in causing the death of plaintiff's decedent at Glenwood, Pa. There is sufficient in the pleadings to disclose the fact that plaintiff sought to recover under the statute of Pennsylvania, where the accident occurred, which statute does not limit the amount to be recovered to any arbitrary sum. Heretofore, following the decision of the Pennsylvania court in *Books, Adm'r, etc., v. Borough of Danville*, 95 Pa. 158, this court sustained a demurrer to the declaration on the ground that the right of action under the Pennsylvania statute vested only in the widow, in the facts of this case. Whereupon, by leave of court, the plaintiff, Leman, on November 28, 1903, amended the declaration.

¶ 1. Conformity of practice in common-law actions in federal courts to that of state courts, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.

¶ 2. See *Death*, vol. 15, Cent. Dig. §§ 50, 51.

ration by substituting the widow wherever his own name appeared in any material allegation. Defendant insists that such substitution worked a dismissal of the case as of the date of its filing, and cites the case of *Zukowski v. Armour*, 107 Ill. App. 663. The facts of that case are these: Plaintiff brought suit to recover for personal injuries against certain parties "doing business as Armour & Co." Later he amended by changing name of defendants to "Armour & Co., a corporation." On plea filed denying the incorporation at the time of the accident, plaintiff again amended so as to make defendants the same as in his first declaration, and dismissed the suit as to the corporation. The court held that the amendment act of Illinois did not sanction an amendment involving the substitution of defendants, and that the effect of the amendment in that case was to terminate the suit; citing *Black v. Womer*, 100 Ill. 328. Some question is raised as to the law which controls in the matter of amendments. Section 914 of the Revised Statutes [U. S. Comp. St. 1901, p. 684] provides that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in Circuit and District Courts, shall conform, as near as may be, to those existing in like causes in the courts of record of the state within which such Circuit or District Court is held. This must be held to include the practice in reference to amendments, unless otherwise directed by statute. *Rosenbach v. Dreyfuss* (D. C.) 1 Fed. 391.

The suit was properly brought in this court, being a transitory cause of action. *Dennick v. R. Co.*, 103 U. S. 11, 26 L. Ed. 439; *Shedd v. Moran*, 10 Ill. App. 618; *Steamship Co. v. Kane*, 170 U. S. 112, 18 Sup. Ct. 526, 42 L. Ed. 964; *Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116; *Stewart v. B. & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. It was properly based on the Pennsylvania statute, and the proceeds of such a suit would be distributed by the courts of Illinois and this court according to the Pennsylvania statute, and the remedy must be under the Pennsylvania statute. Same cases. The Illinois statute applies only as showing that a foreign statute is not against the policy of our law. Same cases.

The contention of defendant that changing the party plaintiff from the administrator of the decedent to his widow, in order to conform to the Pennsylvania statute, works a discontinuance of the suit, is not sustained by the authorities. The suit of the administrator was for the benefit of the widow and children of decedent. It cannot be said that the change set up a new cause of action. She was a real party in interest, and federal courts look rather to real than to nominal parties. *Stewart v. B. & O.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, and cases cited. The Supreme Court of Illinois has held the contrary to defendant's contention in *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22, and *Litchfield Coal Co. v. Taylor*, 81 Ill. 590. In the former case the court permitted the heirs to be substituted for an administrator in a suit upon an insurance policy; and in the latter, a widow, who had sued, in the capacity of administratrix, for the death of her husband, under the statute entitled "Miners," was permitted to amend by substituting herself as widow in place of administratrix. In the case of *Zukowski v. Armour*, supra, the amendment created a new cause of action. It

became a case against new defendants; otherwise it would be in conflict with the above-quoted decisions of the Illinois Supreme Court. Here there was no new cause of action, and the reasoning cannot apply.

The claim that it is the administrator who is attempting to substitute, and not the party to be substituted, might, perhaps, be raised on demurrer, but would not furnish a basis for the motion now made.

The motion to declare the cause discontinued as of the date of the amendment is denied.

CROSBY v. LEHIGH VALLEY R. CO.

(Circuit Court, W. D. New York. December 30, 1903.)

No. 54.

1. MASTER AND SERVANT—EMPLOYERS' LIABILITY LAW—STATE COURTS—CONSTRUCTION—FEDERAL COURTS—CONCLUSIVENESS.

New York Employers' Liability Law (Laws 1902, p. 1748, c. 600), extending and regulating the liability of employers to make compensation for personal injuries suffered by employes, having been construed by the state courts to repeal all other remedies previously available for injuries to employes within the state, and to require as a condition precedent to an action thereunder that notice of the time, place, and cause of injury shall be given within 120 days, such construction is binding on the federal courts sitting in New York in an action for injuries to an employe occurring therein.

2. SAME—PLEADING—CONSTRUCTION.

New York Employers' Liability Act (Laws 1902, p. 1748, c. 600) authorizes the maintenance of an action for injuries to a servant, and requires as a condition precedent thereto that a notice of the time, place, and cause of injury shall be served within 120 days after it occurred, and Code Civ. Proc. N. Y. § 1902, authorizes the maintenance of an action to recover for death caused by negligence. *Held*, that where a complaint for injuries to a servant resulting in his death alleged two causes of action, the first conforming in all respects to the employers' liability act, and the second, which attempted to plead an action for ordinary negligence vesting in the servant's administrator, alleged that plaintiff's intestate was in the employ of defendant when the injuries complained of were sustained and facts bringing the cause of action within the scope of the employers' liability act, but failed to allege the service of the notice, it was insufficient.

3. SAME—CAUSES OF ACTION—JOINDER—DEMURRER.

Where a complaint, attempting to set up two causes of action, was demurred to, and one of such causes of action was sufficiently alleged, but the other was insufficient on its face, the demurrer would be overruled, the second cause of action stricken, and defendant be permitted to answer.

Gibbons, Pottle & Talbot (Frank Gibbons, of counsel), for plaintiff.
Bissell, Carey & Cooke (James McC. Mitchell, of counsel), for defendant.

HAZEL, District Judge. The defendant has demurred to the complaint upon the ground that a cause of action under chapter 600, p. 1748, Laws 1902, entitled "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by

† 3. See Pleading, vol. 39, Cent. Dig. § 486,
128 F.—13

employés," has been improperly united with a cause of action under the provisions of another statute, to wit, section 1902 of the New York Code of Civil Procedure, which gives a right of recovery for causing death by negligence. This is a civil action at law, and the remedy is founded upon the statutes of the state of New York. The action was brought to establish a statutory right to recover on account of the negligence of the defendant, as a result of which plaintiff's intestate, while in defendant's employ, sustained injuries from which he died. The first cause of action, conforming in all respects to the employers' liability act (chapter 600, p. 1748, Laws, 1902), sets forth the service of a notice upon defendant of the time and place of the injury to the decedent, as required by section 2 of the act. The second cause of action, as alleged, does not show conformity to that requirement, but is pleaded as an ordinary negligence action, vesting in decedent's administrator under section 1902 of the Code of Civil Procedure. It nevertheless alleges that plaintiff's intestate was in the employ of the defendant when the injuries complained of were sustained, and the facts bring the cause of action within the purview of the statute of 1902. I am of the opinion that the cause of action under the Code of Civil Procedure, in view of the later statute, is insufficient in law, and therefore must be stricken out on the ground that the plaintiff has failed to allege service of the notice required by the statute as a condition precedent to the enforcement of the remedy. The decisions of the Appellate Division, First Department, Supreme Court of the state of New York, in the following cases: *Gmaehle v. Rosenberg*, 80 App. Div. 541, 80 N. Y. Supp. 705, same case (reargument) 83 App. Div. 339, 82 N. Y. Supp. 366; *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. Supp. 203—construing Laws 1902, c. 600, p. 1748—are decisive, and must be followed by this court. These cases hold that the failure to give the statutory notice, within 120 days, of the time, place, and cause of the injury, is a bar to recovery. It is further held that the provisions of the employers' liability law are general and exclusive in their scope, and apply to all actions where the complaint is based upon the negligence of the employer, as a result of which injury was sustained by an employé under the circumstances set forth in the statute; that no remedy remains except that provided by the statute itself. This enunciated principle of construction, which has been three times exhaustively considered by the same tribunal, has not been qualified or disturbed, and is generally sanctioned and acquiesced in by the courts of record of this state. The effect of these decisions is that the plaintiff would have no cause of action upon the facts stated in his complaint except that provided by the employers' liability act. This being his sole remedy, the complaint must allege conformity with its provisions in order to state a cause of action. The courts of the United States within this state are governed and controlled by the course of procedure of civil causes adopted by the courts of the state unless such procedure is in conflict with the statutes of the United States. Section 912, Rev. St. [U. S. Comp. St. 1901, p. 683]. Furthermore, it is well-settled law that the construction given a state statute, not affected by any provision of the Constitution or laws of the United

States, is binding upon United States courts which may be called upon to interpret it. *Ex parte Fisk*, 113 U. S. 719, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Kowalski v. Chicago G. W. Ry. Co.* (C. C.) 84 Fed. 587. Upon the argument it was contended by the defendant that, if the complaint states facts sufficient to constitute both causes of action, such causes of action are improperly united, and accordingly the demurrer should be sustained; or, in the alternative, if the second cause of action is insufficient upon its face, it should be stricken out, with leave to the defendant to answer to the first cause of action. As the first cause of action is well pleaded, the suggested method of procedure is sanctioned by authority. *Sullivan v. N. Y., N. H. & H. R. R. Co.* (C. C.) 11 Fed. 848. Following the procedure of that case, the demurrer is overruled. The second cause of action being deemed insufficient for the reasons stated, it may be stricken from the complaint, with leave to the defendant to answer the first within 20 days, without costs to either party.

ARKWRIGHT MILLS V. AULTMAN & TAYLOR MACHINERY CO.

(Circuit Court, D. Massachusetts. January 25, 1904.)

No. 1,410.

1. NONRESIDENCE—ACTION—PROCESS SERVICE—STATE STATUTES—VALIDITY.

Rev. Laws Mass. c. 170, §§ 2, 3, providing that, if an action is brought by a nonresident, or one who cannot be found or served in the state, he shall be held to answer in any action brought against him therein by the defendant in the former action if the demands are such that the judgments may be set off, and authorizing service of the writ in the cross-action on the attorney who appeared for the plaintiff in the original action, does not contravene the rule that no one shall be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction except on fair and reasonable notice.

2. SAME—SET-OFF—FEDERAL COURTS—APPLICATION OF STATE LAWS.

Such act, being treated as an enlargement of the right to set off, was applicable to a suit in the federal courts sitting in Massachusetts against a foreign corporation which had previously brought suit in such court against the plaintiff in the second action.

James M. Morton, for plaintiff.

Dickinson, Farr & Dickinson, for defendant.

LOWELL, District Judge. The Aultman Company, a corporation of Ohio, brought in this court an action of contract against the Arkwright Mills, a corporation of Massachusetts, for the price of certain boilers. Thereupon the Arkwright Mills brought this suit against the Aultman Company for breach of a contract to furnish certain other boilers. Service in the case at bar was made upon the attorney for the Aultman Company appearing in the first-mentioned suit. The Ault-

¶ 2. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

man Company has moved to dismiss the action for want of sufficient service.

That the court would have jurisdiction, and that the service would be sufficient, provided this action had been brought in a court of the state, is admitted. Rev. Laws Mass. c. 170, §§ 2, 3:

"Sec. 2. If an action is brought by a person who is not an inhabitant of this commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant, in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against himself and his co-defendants in like manner as if the latter judgment had been against himself alone.

"Sec. 3. The writ in such cross action may be served on the person who appears as the attorney of the plaintiff in the original action, and such service shall be held valid and effectual as if made on the party himself to this commonwealth."

It remains to determine the applicability of the statute just quoted to an action brought in a federal court. Of this suit, as a controversy between the parties, this court has jurisdiction. It is brought by a corporation of one state against a corporation of another in the district of the plaintiff's incorporation. The statute does not contravene "the fundamental principle that no one shall be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction, except upon such notice of the proceeding as is fair and reasonable." *McCord Lumber Co. v. Doyle*, 97 Fed. 22, 23, 38 C. C. A. 34. The intent of the statute was discussed in *Aldrich v. Blatchford*, 175 Mass. 369, 56 N. E. 700, in which case the Supreme Court of Massachusetts held it constitutional. The decision was rested upon two grounds: First. That the statute is a restriction upon foreign corporations doing business in the state, and is therefore valid under *Hooper v. California*, 155 U. S. 648, 652, 15 Sup. Ct. 207, 39 L. Ed. 297; *Lafayette Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451. But the statute makes no mention of foreign corporations, and it can hardly be held valid as to them, by reason of their peculiar status, while its terms apply without distinction to all persons, natural and artificial. Second. The statute is an extension of the right of set-off. This appears plainly both from the language and the history of the law. See St. Mass. 1823, c. 118; Report of the Commissioners on the General Statutes of the Commonwealth (1832), part 3, p. 82. In matters of set-off the federal courts follow the laws of the state, provided the distinction between law and equity is not lost sight of. *Partridge v. Insurance Co.*, 15 Wall. 573, 21 L. Ed. 229; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; *Charnley v. Sibley*, 73 Fed. 980, 20 C. C. A. 157; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059. If the statute be treated as an enlargement of the right of set-off, the method of service provided is unobjectionable. The dictum in *Dewey v. Des Moines*, 173 U. S. 193, 202, 203, 19 Sup. Ct. 379, 43 L. Ed. 665 (see, also, *Bristol v. Washington County*, 177 U. S. 133, 146, 20 Sup. Ct. 585, 44 L. Ed. 701), is explained in *Aldrich v. Blatchford*, 175 Mass. 369,

370, 56 N. E. 700. The decision in the first-mentioned case could not have been different had Dewey been served with process while passing through Iowa.

Motion to dismiss denied.

MONTGOMERY WATER POWER CO. v. CHAPMAN et al.

(Circuit Court, D. Rhode Island. February 9, 1904.)

No. 2,650.

1. INJUNCTION—AGAINST ENFORCEMENT OF JUDGMENT.

Enforcement of defendants' judgment against complainant will not be enjoined on the ground that complainant has begun an action against defendants for damages for breach of contract, and that they are insolvent, and have not sufficient property to satisfy such judgment as complainant expects to recover; it appearing that complainant has a valid lien by attachment on land of defendants, and has a bond with good surety for defendants' performance of the contract, and that the amount of the bond and the value of the land exceed the damages claimed in the action.

2. SAME—AFFIDAVITS.

It is not a sufficient justification for an injunction asked against enforcement of a judgment, on the ground that complainant has begun an action for damages against defendants, and that he has not sufficient security for the judgment he expects to recover, that it is alleged in an affidavit that it is proposed to apply for a certain increase of the ad damnum in the action at law; the office of an affidavit being to support the allegations of the bill and petition, and not to amend them, or to introduce new grounds of relief.

In Equity. Petition for a preliminary injunction.

Edwards & Angell, for complainant.

Van Slyck & Munford, for defendants.

BROWN, District Judge. The complainant seeks a preliminary injunction to restrain the defendants from enforcing their judgment of \$53,000 and interest against the complainant. The validity of this judgment is not disputed; but the complainant in its bill alleges that it has begun an action at law against the defendants for breach of contract, upon which it expects to recover upwards of \$117,000 damages for breach of contract, with interest. The ad damnum in the action at law is \$150,000. The bill in equity alleges insolvency of the defendants, and that the amount of their property is insufficient to satisfy such judgment as the complainant expects to recover against them.

It appears, however, that the complainant has a valid lien by attachment of real estate, valued by the assessors of taxes at \$92,250, unincumbered except by a mortgage of \$1,500. This real estate is valued by an expert at \$151,291. The complainant has also the defendants' bond for \$50,000, with the Fidelity & Deposit Company of Maryland as surety, as security for the performance of their contract with the complainant. Upon a conservative view of the value of the real es-

¶ 1. Restraining enforcement of judgment pending establishment of set-off or counterclaim, see note to Fryne-Bruhn Co. v. Meyer, 58 C. C. A. 532.

tate attached, it appears that, by its attachment liens together with the bond, the complainant has security to the full amount of the ad damnum in its writ. Therefore, if we disregard the defendants' affidavits as to the complainant's exaggeration of its claims for damages, and assume that the damages are as set forth in the bill, there is still no ground for equitable interference.

It remains to consider what effect should be given to the affidavit of complainant's counsel that it is proposed to apply for an increase of the ad damnum in its action at law, and to claim the amount of the defendants' judgment as additional damages for breach of contract. It is contended that, in such event, the complainant would expect to recover upwards of \$170,000, and that the defendants' property would be insufficient to satisfy an execution for this amount. But this ground, informally presented in an affidavit, cannot be regarded as a sufficient justification for an injunction. The statement of the point raises grave doubts of its merit in fact and in law, and these doubts are increased by the facts set forth in the defendants' affidavits. The petition for a preliminary injunction must, however, be regarded as pursuant to and in aid of the case made by the bill; and the office of an affidavit is to support the allegations of the bill and petition, and not to amend the bill, or to introduce new grounds of relief.

Petition denied.

WINES v. COBB REAL ESTATE CO.

(Circuit Court, D. Oregon. February 9, 1904.)

No. 2,787

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE—ACTION FOR DAMAGES.

A complaint alleging that plaintiff employed defendant to locate him on a half section of government land, which he entered under the homestead and timber acts, for which service he paid defendant \$200, and seeking to recover damages for false and fraudulent representations as to the quantity and quality of timber on such land, does not state a cause of action for the recovery of damages beyond the amount paid defendant, if there can be any recovery, and the action is not within the jurisdiction of a federal court, although the damages are laid in a sum exceeding the jurisdictional amount.

Action at Law for Damages. On demurrer to complaint.

Albert Abraham, for plaintiff.

Dexter Rice, for defendant.

BELLINGER, District Judge. The defendant is a corporation engaged in the business of locating applicants for timber and homestead claims upon the public lands of the United States. It is alleged that in 1903 the defendant agreed to locate plaintiff upon a half section of public land, 160 acres of which was to be entered as a timber claim, and the residue as a homestead. The consideration of the defendant's

¶ 1. Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 9 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

services was to be \$200, which sum was paid by plaintiff. The action is to recover damages in the sum of \$3,000, because of the alleged false and fraudulent representation of the defendant that the south half of the section so to be located as aforesaid would cruise 7,500,000 feet of good first-class, merchantable timber. It is alleged that by reason of such representations the plaintiff was induced to enter the said land, 160 acres as a homestead and the remainder as a timber claim. It is alleged that the representations made by the defendant were false and fraudulently made; that said land will not cruise more than 2,000,000 feet, but a small percentage of which is merchantable—all of which facts the defendant at the time well knew. It is alleged that by the location made by plaintiff he has exhausted his homestead and timber rights; the presumption being, from the allegation, that the damages claimed are because of the loss of these rights.

The defendant demurs to the complaint upon the ground that the amount in controversy is not sufficient to give this court jurisdiction.

It does not appear that other lands of better quality were available to the plaintiff for location as homestead and timber lands, nor is there any other way of determining the value of the homestead and timber rights which plaintiff claims have been sacrificed by the alleged false and fraudulent representations. I am of the opinion that there cannot legally be a judgment in this case for an amount necessary to the jurisdiction of the court, notwithstanding the allegation of the plaintiff as to the amount of damages sustained. It is doubtful, in view of the fact that the rules of the land department require a personal examination of the land taken for timber or agricultural purposes by the applicant, whether there can be any recovery upon the ground of misrepresentation by an agent as to the character of the land—whether in such a case a party can be allowed to say that he relied upon the representations of another as to the character of the land located. No opinion, however, is expressed upon this point. The amount for which recovery can be had, if there can be recovery at all, is the amount paid by the plaintiff to the defendant for the purpose of securing the locations in question.

The demurrer to the complaint is sustained.

UNITED STATES v. COE.

(At Chambers, N. D. Ohio, E. D.)

1. CHINESE EXCLUSION ACT—CONSTITUTIONALITY.

Chinese Exclusion Act (Act Cong. Sept. 13, 1888, § 13, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]), providing that on the filing of an affidavit which charges that a person is a Chinese person, or a person of Chinese descent, and that he is unlawfully in the country, a warrant may issue for his arrest, and after hearing before a United States commissioner, and on appeal to a United States District Judge, he may be deported, is unconstitutional, in that it authorizes the arrest and trial of persons who may not be Chinese persons, within the United States, without compliance with the protections guaranteed by the federal Constitution.

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

On Motion for Discharge.

The defendant was arrested on the 3d day of October, 1903, upon a warrant issued by John H. Simpson, United States commissioner for this district, such warrant being based upon a complaint duly sworn to and verified by one Thomas P. H. O'Neill, Chinese inspector, alleging that said defendant was a Chinese person, and did on said 3d day of October, 1903, come into the United States from a foreign place, and was unlawfully within the United States, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States. On the 26th day of October, 1903, a hearing was had upon said complaint before said commissioner, at which hearing witnesses were sworn and testified on behalf of the United States; and at the conclusion of said hearing the said commissioner gave, made, and filed, in writing, his findings, order, and judgment in said proceeding, wherein and whereby said commissioner did expressly find that at the time of the filing of said complaint and of the rendition of said judgment the said defendant was, by race, language, color, and dress, a Chinese person, and that said defendant had failed to establish, by affirmative proof, his lawful right to remain in the United States; and said commissioner did find and adjudge said defendant to be unlawfully within the United States, and did order that he be removed from the United States to China, it not appearing that he was a subject or a citizen of any other country than China; and said defendant was committed to the custody of the United States marshal for said district. On the 31st day of October, 1903, the defendant duly appealed from said findings, order, and judgment of said commissioner to the judge of the District Court for said district. On the 27th day of November, 1903, the said appeal came on regularly for hearing before Francis J. Wing, sitting as said judge; whereupon the defendant, by his counsel, objected and demurred to the introduction of any testimony under the charge, on the ground that the act on which the prosecution was based is unconstitutional and void, being in contravention of article 3, § 2, of the Constitution of the United States, and of section 7 of the amendments to the same; and moved that, on the ground of such unconstitutionality, he be discharged.

John J. Sullivan, U. S. Atty.
Vessey, Davis & Manak, for defendant.

WING, District Judge (after stating the facts as above). Section 13 of the act of September 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317], upon which this prosecution is based, provides that, upon the filing of an affidavit which charges that a person is a Chinese person, or person of Chinese descent, and that he is unlawfully in the country, a warrant may issue for the arrest of such person. Such process is operative not alone against Chinese persons, but against any person in the community, within the meaning of that word as used in the Constitution. Such person, under the provisions of the act, is then brought before a commissioner, and tried upon the issues raised by the allegations of the affidavit. If found guilty, the commissioner is empowered to make an order of deportation, the effect of which will be to remove such person to China.

In each of the causes which have been decided by the Supreme Court of the United States under this act the record has shown that the person objecting to the constitutionality of the act was admittedly a person of Chinese descent. The consideration which I have given to the act is from the standpoint of those other than Chinese persons who are entitled to the protections guaranteed by the Constitution, and who are the real objects of the inherent menace of prosecutions of this character.

While it may be readily understood that it rests within the sovereign power of the government to exclude aliens, and prevent their entry into the country, and that such exclusion of an ascertained or admitted alien in no way violates any of the provisions of the Constitution, it is also easy to be recognized that to arrest and put upon trial any person within the body of the country, by the process of affidavit and warrant, in the manner provided by the statute, upon the charge that such person is a prohibited alien, and therefore subject to the penalty of deportation—which would be banishment if the person is a citizen—is an encroachment upon such person's constitutional rights, unless it be assumed that the mere fact of arrest is conclusive proof that the person arrested is such prohibited alien.

I therefore hold that so much of the act of September 13, 1888, as provides for arrest and trial before a commissioner, or on appeal to a federal judge, upon the filing of an affidavit, is unconstitutional, because the act in no wise provides for those protections guarantied by the Constitution to persons within the United States.

The defendant is discharged.

THE WATSON.

(District Court, E. D. Pennsylvania. February 16, 1904.)

No. 48.

1. SHIPPING—INJURY OF SEAMEN—CONTRIBUTORY NEGLIGENCE.

Libelant, employed as fireman on a steamship, on the second day out had his finger crushed by a furnace door, which swung shut while he was attending to the furnace in the line of his duty. The weight of evidence was to the effect that the catch which should have held the door secure when open was defective, and that the officers of the ship had been notified of the fact some time before. It further appeared that libelant had worked at the furnace for two days, and must have known the condition of the catch. *Held*, that both were negligent, and libelant was entitled to recover half his damages.

In Admiralty. Action for personal injury.

Joseph Hill Brinton, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. The libelant was hired to serve as a fireman upon the steamship Watson during a voyage from Philadelphia to the Island of Jamaica and return, and began the voyage on the 13th day of May, 1903. Two days afterwards, while the vessel was at sea, the libelant was performing his duty in the watch beginning at 12 o'clock noon and ending four hours thereafter. Shortly before the end of the watch he was breaking up the fire under one of the boilers in his charge with an iron rod called a "slicing bar," when the heavy iron door of the furnace swung to and struck

¶ 1. Negligence of both master and servant, division of damages in admiralty, see note to *Wm. Johnson & Co. v. Johansen*, 30 C. C. A. 678.

See *Seamen*, vol. 43, Cent. Dig. §§ 189, 190.

the right hand that was upon the slicing bar, injuring the little finger so badly that about half of it had to be cut off when the ship arrived at Port Antonio. The libellant avers that the catch which is intended to hold the door open was defective, and that this defect was known to the proper officers of the ship. Evidence was offered to show that this catch had been out of order for three trips, and was known to be defective, one of the witnesses testifying that he had reported the matter to the third assistant engineer two or three times. It was also testified that during the voyage immediately following one of the furnace doors was found to have a defective catch, although this particular door was not specified by the witness. It is not only customary, but is necessary, that these furnace doors shall be kept open by reliable catches; otherwise they swing with the motion of the vessel, and the firemen cannot work with either convenience or safety. It was therefore the duty of the ship to see that these appliances were properly attached, and were maintained in good order. The testimony concerning the notice to the ship, and also concerning the existence of a defective catch at the time the injury occurred, is conflicting. The chief engineer and the third assistant contradicted the libellant and his witnesses upon both points, and in this condition of the proof I have had some difficulty in coming to a conclusion. Upon the one hand it is clear that the libellant did suffer the injury complained of, and I think it is also clear that the injury was inflicted by the furnace door swinging to with violence and striking him upon the hand. But I think it can hardly be questioned that the libellant himself knew that the catch was defective. He had been working for two days close to this door, and during most of that time the vessel was at sea, and was subjected to the ordinary and inevitable motion of a ship upon the waters of the North Atlantic Ocean. If the catch was defective, I can entertain no doubt that the libellant must have been aware of it; and when he said that he did not know it was out of order until he was injured I cannot accept that statement as true. There is no evidence to indicate how the injury could have happened if the catch had been in order, and I have therefore come to the conclusion that the testimony of the libellant and his witnesses upon this point is to be accepted. There is perhaps some significance, also, in the fact that the steamship did not call other witnesses who presumably would have had some knowledge of the condition of the catch at the time of the injury. I think, therefore, that the steamship was negligent in failing to keep this catch in order after having been notified of its unsafe condition, and I am also forced to the conclusion that the libellant knew of its unsafe condition, and yet continued to work exposed to this obvious danger. Both parties being negligent, therefore, the damages must be divided.

If the parties desire a reference to a commissioner in order that other testimony may be taken concerning the amount to be recovered, an appointment will be made; otherwise I will fix the amount of the damages upon being notified that a commissioner is not desired.

GUINAN v. WEAVER COAL & COKE CO.

(District Court, S. D. New York. February 25, 1904.)

1. SHIPPING—DEMURRAGE—DELAY IN ARRIVAL OF CARGO.

Where respondent, the owner of a cargo of coal to arrive, contracted with libellant to receive the same alongside and transport it to another port, and also notified libellant to have his barges ready on a certain date when the cargo was expected, libellant was entitled to compute lay days from that date, and to demurrage for the excess after the lay days expired before the cargo arrived and his barges were loaded.

2. SAME—WRONGFUL REFUSAL TO LOAD TENDERED BARGES.

Evidence held to show that barges tendered under a contract to receive a cargo of coal were suitable for the purpose, and that the refusal to load them entitled the contractor to damages.

In Admiralty. Suit for demurrage and damages for breach of contract.

James J. Macklin, for libellant.

Joseph A. Arnold, for respondent.

ADAMS, District Judge. This action was brought by Daniel J. Guinan against the Weaver Coal & Coke Company, to recover damages for breach of a written agreement, entered into between the parties on the 2nd day of February, 1903, as follows:

"The Weaver Coal & Coke Co. agrees to pay \$1. per ton alongside on 3,400 tons of coal from ship St. Irene at Erie Basin or thereabouts to New London Conn. 4 days to load and 4 days to discharge on each end \$12.00 per day thereafter also 1,000 tons for harbor freights 30c. per ton alongside demurrage \$10 per day after 4 days loading and 4 days discharging."

The libellant, having provided some barges the 4th of February, claims with respect to the New London coal: (1) \$300 for demurrage on two barges which were held to the 12th awaiting the St. Irene's arrival; (2) \$225.24 for an alleged excess of coal carried above the quantities specified in the bills of lading; (3) \$36 for three days' demurrage on the barge Robert McCracken, i. e., from February 14th to 21st, 7 days, less 4 days to which the respondent was entitled; (4) \$490.37 for wrongful refusal of the respondent to use the barges Therese and Experiment, tendered by the libellant under the contract; (5) \$37, which is claimed with respect to the harbor freights, it being alleged that in consequence of the respondent having failed to furnish more than 630 tons, when 1,000 tons were called for by the contract, the libellant suffered the loss of his profit in transporting 370 tons.

The respondent denies: (1) any liability for demurrage, alleging that there was no detention of the barges before loading, as they were not required before the actual arrival of the steamship and that there was no agreement to employ them before that time; (2) any excess of coal over the quantities specified in the bills of lading; (3) any detention of the McCracken; (4) that there was wrongful refusal to load the Therese and Experiment, it being alleged that they were unsuitable for the business, by reason of their height and length; (5) any loss

¶ 1. Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

to the libellant as he consented to the substitution of an equal amount of coal for New London.

1. When the contract was made the *St. Irene* was not in port, but she was expected to arrive on the 4th of February, and I find that the libellant was requested to have his discharging barges in readiness at that time. He consequently provided the barges *Peter Stultz* and *James Anderson*. The *Stultz* was subsequently withdrawn and the *William Guinan Howard* substituted and held subject to the respondent's use. The steamship, however, did not arrive until the 12th. In the meantime, the *Robert McCracken* was substituted for the *Howard*. I conclude that the libellant is entitled to some recovery for detention, after allowing for the lay days stipulated for in receiving and discharging, but the extent I shall leave to the commissioner.

2. With respect to the excess of coal over the quantities mentioned in the bills of lading, which were estimated, the evidence is not sufficient to enable me to arrive at a conclusion. The libellant, in this respect, has not sustained the burden of proof, and the claim is disallowed.

3. Whether there was any detention of this boat is a matter of computation, which the commissioner can determine.

4. The testimony satisfies me that the *Therese* and *Experiment* were suitable barges, both with respect to height and length, to discharge the steamship in and that they should have been used. There is, therefore, a liability for such damages in this respect, as the libellant suffered by reason of respondent's refusal to load them. The amount is a question for the commissioner.

5. I have been referred to no evidence to sustain the respondent's contention in this respect and find none. The libellant is, therefore, entitled to recover his damages, the amount to be determined by the commissioner.

Decree for the libellant, with an order of reference.

SHERIDAN v. PENN COLLIERIES CO.

(District Court, S. D. New York. February 19, 1904.)

1. SHIPPING—DEMURRAGE—LIABILITY OF CONSIGNOR.

Where the consignor of cargo hires the vessel for its carriage, he is liable for demurrage on account of delay in discharging caused by the refusal of the consignee to receive the cargo, and cannot require the vessel owner, without his consent, to look to a new consignee for any part of it.

In Admiralty. Suit for demurrage.

James J. Macklin, for libellant.

William Greenough, Jr., for respondent.

ADAMS, District Judge. This action was brought by Robert Sheridan against the Penn Collieries Company to recover for detention in

¶ 1. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

See Shipping, vol. 44, Cent. Dig. §§ 570, 576.

discharging his boat, Thomas Sheridan. On the 12th of December, 1902, the libellant received on board of the Sheridan, about 490 tons of coal for account of the respondent and was directed to deliver it to Nelson Brothers, at Gowanus Canal, Brooklyn. The boat duly reported on the 15th of December, but Nelson Brothers refused to receive the coal and it was not discharged by the party to whom it was afterwards sold, until the 26th of January, 1903.

There were some payments by the respondent on account of freight and demurrage and, after allowing a reasonable time for discharge, there remained a claim for \$139.50, made up of 10 days' demurrage at \$10 per day and \$39.50, balance of freight. The respondent tendered \$39.50, in full satisfaction of the claim, as its agent says. This tender was in a check, which the libellant received on the 28th of May, 1903, and used. Some weeks afterwards, June 17th, 1903, the claim being then in the hands of attorneys for collection, an offer was made to return the amount of the check. No reply was made by the respondent to the offer. There is no dispute as to the amount due for demurrage, the controversy being whether it should be paid by the libellant or the last consignee. The consignor was originally liable for the detention and there is nothing in the case to show any assumption of liability by the consignee, which the libellant accepted, in lieu of that of the consignor. Under the circumstances, the consignor remained liable, notwithstanding the payment of \$39.50, which was not received in accord and satisfaction as claimed, and should be required to pay the balance of demurrage.

Decree for the libellant.

IN RE WEST.

(District Court, D. Oregon. February 9, 1904.)

No. 746.

1. BANKRUPTCY—LIEN—ASSIGNEE OF WAGES EARNED AFTER ADJUDICATION.

An assignment to secure a debt of wages to be earned by the debtor, either under a general or specific employment, creates no lien until the wages have been earned, and where, prior to that time, the debtor is adjudged a bankrupt, and is subsequently discharged, the debt is extinguished from the date of the adjudication, and no lien arises as to wages earned thereafter, which become the property of the bankrupt free from the claims of all creditors, including the assignee.

In Bankruptcy.

Claud Strahan, for petitioner Star Loan Co.

O. P. M. Jamison, for petitioner F. N. Jamison.

Paul R. Deady, for bankrupt.

BELLINGER, District Judge. The controversy in this case involves wages earned by the bankrupt after the adjudication in bankruptcy and before the discharge.

The bankrupt was an employé of a railroad company under a general employment. On May 20, 1903, he assigned to the Star Loan

Company his wages to be earned up to the last day of December of that year, for a valuable consideration. On August 3d of the same year, for the purpose of securing \$33 borrowed money, he assigned to F. N. Jamison wages to become due him from the railroad company for the months of August, September, and October. West was adjudged a bankrupt on September 4th, and a final discharge was entered November 6th. During the month of October he earned wages in the sum of \$49, which sum the loan company and Jamison petition to have applied in satisfaction of their claims under the assignments referred to.

The theory of a lien upon the earnings of future labor is not that it attaches to such earnings from the moment of contract of pledge or assignment, but from the moment of their existence. It is needless to say that there can be no lien upon what does not exist. A pledge or assignment of future wages under an existing employment is said to create an equitable interest in such wages. *Stott v. Franey*, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 132. This is true of wages earned upon a general employment, as well as those earned upon a definite contract. In this case the railroad company was under no obligation to employ the bankrupt, nor he to work for the company. If future earnings in such a case can be said to have a potential existence, they are the subject of an agreement for a lien; but the lien, or the so-called equitable interest, does not attach until the wages come into existence, and until the lien does attach there is no lien. The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors. *Collyer on Bankruptcy*, 509. These debts cannot escape the operation of the bankruptcy law by an agreement for a lien upon what the debtor expected to earn, but did not earn until after the adjudication of bankruptcy.

The petition in each of these cases is dismissed.

THE CITY OF GENOA.

(District Court, W. D. New York. February 11, 1904.)

No. 97.

1. SALVAGE—NATURE OF SERVICE—TOWAGE OF BURNING STEAMER.

Where a steamer on fire, after the fire was under control, but not entirely extinguished, hailed a passing vessel, and requested towage toward her port of destination, the service so rendered was entitled to be considered a salvage service, and compensated as such, in the absence of any agreement that it should be paid for only as a towage service.

In Admiralty. Suit to recover for salvage services.

Harvey L. Brown, for libelants.
Potter & Wright, for defendant.

HAZEL, J. Examination of the evidence leads to the conclusion that no arrangement was made between the master of the Uganda and the master of the Genoa that the compensation should be on a basis of mere towage. In the absence of such an agreement, I am of the opinion that the libelants performed salvage service, and hence are entitled to a salvage remuneration. It is shown by the record that the towage services were sought by the Genoa and were rendered by the salving vessel at a time when the fire on the Genoa, though under control, was not entirely extinguished. The Uganda, when hailed at 5 o'clock a. m., September 30, 1901, rounded to, came alongside, took the Genoa in tow, and proceeded with her towards the port of Buffalo, her place of destination. She left her about 20 miles west of Buffalo. It is clear that the master of the Genoa solicited the assistance of the salving vessel owing to an apprehension of danger from a recurrence of the fire. This would seem (in the absence of a contract to tow the vessel) to warrant regarding the service as one of salvage. *McConnochie v. Kerr* (D. C.) 9 Fed. 50; *The J. C. Pfluger* (D. C.) 109 Fed. 95. The proofs preclude the possibility of a claim that the services rendered were fraught with danger or risk to the Uganda or crew; nevertheless she promptly assented to the request for assistance, which diverted her course and occasioned her owners some loss and expense. I think \$600 will sufficiently remunerate the libelants for the salvage services rendered.

So ordered, with costs.

UNITED STATES v. ONE BAY HORSE AND ONE BUGGY.

(District Court, N. D. Illinois, N. D. February 8, 1904.)

No. 9,573.

I. OLEOMARGARINE LAW—PENALTIES FOR VIOLATION—REPEAL.

Rev. St. §§ 3450, 3453 [U. S. Comp. St. 1901, pp. 2277, 2278], providing forfeitures for acts done with intent to defraud the United States of an internal revenue tax, is repealed, so far as concerns the tax on oleomargarine, by Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2234], providing a more limited forfeiture for attempts to defraud the government of the oleomargarine tax.

S. H. Bethea, U. S. Atty.
Benjamin M. Schaffner, for defendant.

KOHLSAAT, District Judge. Lottie Chaney makes application to the court for the return to her of her horse and buggy seized and claimed as forfeited by the government as property found and used on the premises of her husband, Morris Chaney, and other parties, who

¶ 1. Repeal of statutes by implication, see note to *First Nat. Bank v. Wetdenbeck*, 38 C. C. A. 136.

have pleaded guilty to the violation of the statutes in regard to the sale and manufacture of oleomargarine. The proceeding was instituted under section 17 of the act of August 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2234], which provides "that whenever any person engaged in carrying on the business of manufacturing oleomargarine, defrauds or attempts to defraud the United States of the tax on the oleomargarine produced by him or any part thereof he shall forfeit the factory and all raw material for the production of oleomargarine found in the factory and on the factory premises and shall be fined not less than \$500 nor more than \$5,000, and shall be imprisoned not less than six months nor more than three years." Claimant owned the said horse, which she had kept in the premises several days. She was accustomed herself to drive the horse, and the evidence establishes her title thereto. The buggy belonged to her also, but had been on the premises a considerable time. The government seeks to apply sections 3450 and 3453 of the Revised Statutes [U. S. Comp. St. 1901, pp. 2277, 2278], passed prior to the oleomargarine act, and construed in *U. S. v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555; *U. S. v. 2 Bay Mules* (D. C.) 36 Fed. 84; *Pilcher v. Faircloth*, 135 Ala. 311, 33 South. 545; *U. S. v. 246½ Lbs. Tobacco* (D. C.) 103 Fed. 791; *Dobbins Distillery v. U. S.*, 96 U. S. 395, 24 L. Ed. 637; *U. S. v. 220 Machines* (D. C.) 99 Fed. 559. Such would be the case had not Congress provided a special penalty in section 17, which limits the forfeiture to the "factory and manufacturing apparatus used by the manufacturer and all oleomargarine and raw material for its production, found in the premises." It must be assumed that by the omission of the more drastic measures of the prior act Congress intended to distinguish between the violations of law in regard to which the penalties are imposed, respectively. *Roche v. Mayor, etc., of Jersey City*, 40 N. J. Law, 257; *Ellis v. Paige*, 1 Pick. 43; *Daviess v. Fairbairn*, 44 U. S. 636, 11 L. Ed. 760. A statute imposing a penalty for an offense is pro tanto repealed by a subsequent statute fixing a lighter penalty. *Smith v. State*, 1 Stew. (Ala.) 506; *State v. Whitworth*, 8 Port. 434.

The application of the petitioner is granted.

ATLANTIC TRUST CO. et al. v. DANA et al.

DANA et al. v. ATLANTIC TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 21, 1908.)

Nos. 1,896, 1,899.

1. CREDITORS' SUITS—EFFECT OF DISSOLUTION OF CORPORATION DEFENDANT—KANSAS STATUTE.

The equitable lien acquired by judgment creditors of a corporation by joining or intervening in a creditors' suit is not affected by the subsequent dissolution of the defendant corporation, nor by their failure to revive their judgments within a year thereafter, as provided for by the statute of Kansas (Gen. St. 1901, §§ 4883, 4889), in case of the death of either party after judgment and before satisfaction thereof; the only effect being to render the judgments dormant so far as the issuance of execution or the enforcement of a statutory judgment lien is concerned.

2. CORPORATIONS—DEBTS ENTITLED TO PRIORITY OVER MORTGAGE—JUDGMENTS FOR TORTS.

Judgments obtained against a corporation for personal injuries to third persons not in the employ of the corporation, resulting from the negligence of its employes, are not to be classed as liabilities for operating expenses, and are not entitled to priority of payment over the mortgage debts of the corporation from the earnings of a receivership initiated at suit of other creditors subsequent to the date of the injuries, or from the proceeds of the mortgaged property.

3. SAME—EQUITABLE LIENS—INTERVENTION IN CREDITORS' SUIT.

Intervening petitions filed by judgment creditors of a corporation in a pending creditors' suit, in which a receiver has been appointed, operate as equitable levies, and create equitable liens for the satisfaction of such judgments on the property and income of the corporation from the date of their filing, subject to prior liens and superior equities.

4. SAME—RIGHTS OF MORTGAGEE—IMPOUNDING INCOME BY INTERVENTION IN RECEIVERSHIP SUIT.

Where, at the time of the commencement of a suit to foreclose a mortgage given by a corporation, which covered all its property and its income as expressly authorized by statute, and authorized the mortgagee to take possession in case of default, the property was in the possession of a receiver previously appointed in a creditors' suit, the mortgagee properly asserted its right to possession of the property in the only effective way by obtaining leave to intervene in the receivership suit and setting up therein its rights under the mortgage and its pending suit, and such intervention gave it a prior right to the income earned by the receiver thereafter as against ordinary judgment creditors intervening subsequently, whose judgments were obtained during the receivership. It was not essential to such priority of its lien that a new receiver should have been appointed or the existing receivership formally extended to its suit prior to the intervention by the judgment creditors.

5. JUDGMENT—PERSONS CONCLUDED—REPRESENTATION BY RECEIVER.

Where a receiver for a corporation, required by the order appointing him to defend any suit seeking to establish a lien against the corporation's property, intervened in a foreclosure suit against the corporation brought in the same court, and litigated the claim of the complainant therein under his mortgage to a fund due the corporation, a decree awarding the fund to the mortgagee is binding not only on the receiver, but also on all parties to the suit in which he was appointed, including interveners therein, such parties being represented by him, and neither necessary nor proper parties to the foreclosure suit.

6. CORPORATIONS—MORTGAGE OF INCOME—VESTED RIGHTS OF MORTGAGEE.

A mortgage given by a corporation, which covers its property and also pledges its income, gives the mortgagee a lien on the corpus of the prop-

erty, which may be enforced on a default, but as to the income the lien may be enforced only as to future income after it has been impounded by the mortgagee by the assertion of his right in appropriate proceedings; but a mortgage of the income, even before it has been made effective by such impounding, gives the mortgagee a vested right to so impound it, which cannot be displaced, postponed, or impaired in the interest or at the instance of an unsecured creditor, any more than can the mortgage lien upon the corpus of the property.

7. SAME—PERMANENT IMPROVEMENTS BY RECEIVER.

Where a receiver for the property of a corporation, appointed in a suit by judgment creditors, to which mortgagees are not parties, is directed by the court to make permanent improvements on the property, the cost of such improvements cannot be charged against income accruing after a mortgagee, to whom the income was pledged as security, has asserted his right thereto by an intervening petition filed in aid of a suit to foreclose his mortgage. The court, through the medium of a receivership, can no more displace or postpone the prior mortgage lien than could the mortgagor.

8. SAME—TAXES.

Taxes payable from the income of a receivership for a year, which for a part of the year belongs to one creditor and for the remainder to another, should be charged upon both funds in proportion to the time during which they were earned, respectively, without reference to the date when the taxes are payable.

Appeal from the Circuit Court of the United States for the District of Kansas.

Primarily, these appeals present a controversy between a second mortgagee and two judgment creditors over the income of mortgaged property, a waterworks plant in Topeka, Kan. The Topeka Water Supply Company, through an ordinance of the city of Topeka, obtained the privilege of constructing and maintaining a waterworks plant in that city, upon condition that it would supply the city and its inhabitants with water upon terms prescribed in the ordinance. By the terms of the ordinance the city rented from the water supply company 150 hydrants at an annual rental of \$7,000, and that company agreed to erect and maintain, when directed by the city, additional hydrants for a stated additional rental. The ordinance contained this stipulation: "Sec. 8. Should the said Topeka Water Supply Company, in the construction of its works, deem it expedient to issue the first mortgage bonds of said company, and said bonds to bear interest at a rate not exceeding seven per cent. per annum, then the said Topeka Water Supply Company agrees that the seven thousand dollars to become due from said city for the aforesaid hydrants' rental from year to year as aforesaid, shall be considered and set aside as net earnings of said Topeka Water Supply Company, and the same shall be paid over semi-annually as aforesaid by said city to the fiscal agent of the state of Kansas, in the city of New York, for the payment exclusively of the interest coupons of said bonds as the same may, from time to time, become due and payable, and to provide a sinking fund for the payment of said bonds. Deferred or delayed payments shall bear seven per cent. interest per annum from the time they become due."

January 2, 1882, the water supply company, for the purposes of raising money to pay for the labor and material then being expended in constructing its water plant, issued a series of first mortgage bonds, bearing interest at 6 per cent. per annum. Both principal and interest were made payable at the fiscal agency of the state of Kansas in the city of New York. To secure the payment of these bonds, the water supply company executed to William B. Strong, as trustee for the holders of the bonds, a mortgage upon all its property and franchises then possessed or to be acquired, including "all the privileges and franchises heretofore or hereafter acquired by the said first party under and by virtue of the several ordinances of the city of Topeka, and the contracts between the said city and said first party." The mortgage stipulated that upon the occurrence, and continuance for a time stated, of default

in the payment of interest, all the bonds could be declared at once due and payable, and the trustee could take possession of the mortgaged property and operate the same, and could institute proper judicial proceedings to foreclose the mortgage, but that until default the mortgagor would be permitted to possess, manage, and enjoy the mortgaged property.

In 1880 the Topeka Water Company, with the consent of the city of Topeka, purchased all the property, privileges, and franchises of the water supply company, and thereby became its successor. Both water companies were Kansas corporations.

February 1, 1890, to secure the payment of a series of bonds issued by it on that date, the Topeka Water Company executed to the Atlantic Trust Company, as trustee for the holders of such bonds, a mortgage upon all its property and franchises then possessed or to be acquired, specifically including "all the income, rents, profits, emoluments, and moneys derived from said waterworks, and including any revenues from any other sources whatever." This mortgage stipulated that until default the mortgagor would be permitted to possess, manage, operate, use, and enjoy the mortgaged property, and that, in the event of the occurrence, and continuance for a stated time of a default in the payment of interest all the bonds could be declared at once due and payable, and the trustee, upon demand, could take and maintain possession of the mortgaged property, and receive all tolls, income, and revenues thereof, and could institute proper judicial proceedings to foreclose the mortgage. It contained a further provision that: "Upon the filing of a bill of equity, or other commencement of judicial proceedings to enforce the rights of the trustee and of the bondholders under these presents, or to protect any of the property hereby conveyed from sale upon any execution or decree of any court within the state of Kansas for the payment of money, the said trustee shall be entitled to exercise the right of entry herein conveyed, or to the appointment by any court of competent jurisdiction of a receiver or receivers of the property hereby mortgaged, and of the earnings, income, revenue, rents, issues, and profits thereof, pending such proceedings with such powers as the court making such appointment shall confer."

February 10, 1894, John O'Halloran, who had recovered a judgment at law against the water company for \$3,900 and costs, filed in the court below a judgment creditor's bill against the water company as sole defendant, and obtained the appointment of Elias Summerfield as receiver of the company's entire property and income. The order appointing Summerfield as receiver directed him "to defend any action * * * seeking to establish claims, liens, or demands against the said defendant, or its property," and to "prosecute any action necessary * * * for the collection of any sum due said defendant, or for the protection and preservation of said property." Summerfield qualified as receiver, took possession of the company's property, and operated its waterworks plant.

May 27, 1894, Strong filed in the court below an independent bill against both water companies, the Atlantic Trust Company, O'Halloran, and the city of Topeka to foreclose the mortgage given to him as trustee. In addition to otherwise stating a case for foreclosure, this bill made specific reference to the ordinance of the city granting the water supply company the privilege of constructing and maintaining the waterworks plant; set forth the contract contained in that ordinance respecting the renting of hydrants by the city and respecting the payment by the city of certain hydrants' rental to the fiscal agency of the state of Kansas in the city of New York for the exclusive benefit of the bondholders in the event of the issuance of first mortgage bonds of the company; set forth the issuance of such bonds as before stated, and alleged: " * * * Nor did the city of Topeka pay over semiannually said hydrants' rental to the fiscal agency of the state of Kansas in the city of New York for the payment exclusively of the interest coupons as the same might from time to time become due and payable, or to provide a sinking fund for the payment of said interest and bonds, as required by the ordinance and agreement therein contained between the Topeka Water Supply Company and the City of Topeka, which ordinance and agreement and rights and privileges therein contained are covered by the trust deed to your orator aforesaid. But to reserve the said net rental and to pay the same to the said

fiscal agency of the state of Kansas in the city of New York, as required by said ordinance and agreement therein contained, the said Topeka Water Supply Company, its successors and assigns, and said City of Topeka have neglected and failed." In addition to a prayer for foreclosure and for general relief, this bill asked that the mortgage be declared a first lien upon all the property of the water company and upon the "contracts described in said mortgage," "and that the said Topeka Water Supply Company, said Topeka Water Company, or some of the other defendants, and such of the defendants as may be liable therefor, may be decreed to pay unto your orator, in trust for the holders of said bonds and coupons, whatever may be found to be due." No receiver was appointed in this suit, nor was any effort made by Strong to impound the income of the mortgaged property for the benefit of his mortgage, through an intervention in the O'Halloran receivership suit.

In original and amended answers to this bill the city denied "that it at any time assumed or agreed to pay the interest on the bonded debt, or the principal of the bonded debt, of the Topeka Water Supply Company, or of the Topeka Water Company," and alleged that it was never notified of the mortgage to Strong, trustee; that it was never requested to pay any hydrants' rental to the fiscal agency of the state of Kansas in the city of New York for the purpose of paying the interest or principal of said bonds, and that it had from the beginning paid said rental to the original and succeeding water companies, with the consent of Strong, as trustee.

December 9, 1896, Summerfield, the receiver appointed in the O'Halloran suit, intervened in the Strong foreclosure suit, alleging that the city of Topeka was then indebted to the water company for specified hydrants' rental and interest, and on December 31st next would be indebted to the water company for further hydrants' rental, and prayed that the court order the city to pay this rental to him as receiver. The rental so sought by the receiver was for hydrants covered by the stipulated annual rental of \$7,000, and for additional hydrants erected and maintained at the direction of the city, pursuant to the terms of the ordinance, and included all the rental subsequently awarded to Strong. This intervention in the Strong suit was long subsequent to the respective interventions in the O'Halloran suit of the trust company, Kate J. Dana, and Grace Whiting, administratrix, hereinafter stated.

January 25, 1897, a decree of foreclosure was entered in the Strong suit, in which Summerfield, as receiver, was designated as an intervening petitioner, and in which, after reciting notice to and the presence of all the parties to that suit, including the receiver, the matter of the hydrants' rental there in controversy was dealt with as follows: "And the court doth further find that in and by said ordinance of the city of Topeka, known as 'Ordinance No. 400,' the defendants the city of Topeka and the Topeka Water Supply Company undertook and agreed that, should the Topeka Water Supply Company, in the construction of its works, deem it expedient to issue its first mortgage bonds to bear interest at a rate not exceeding seven per centum per annum, that the hydrant rentals to become due from year to year from said city of Topeka for the use of the hydrants in said ordinance described, and which the said defendant the Topeka Water Supply Company thereby agreed to furnish to the said city, should be considered and set aside as net earnings of said Topeka Water Supply Company, and the same should be paid over semiannually by said city of Topeka to the fiscal agent of the state of Kansas in the city of New York for the payment exclusively of the interest coupons of said bonds as the same should from time to time become due and payable, and to provide a sinking fund for the payment of said bonds; and the court doth further find that the said Topeka Water Supply Company did deem it expedient to and did issue its first mortgage bonds as contemplated and provided in said ordinance, to wit, the bonds heretofore mentioned, and secured by said mortgage or trust deed to the complainant William B. Strong, as trustee, and that it became and was the duty of the defendant the city of Topeka to pay said hydrant rentals semiannually on the 1st day of January, A. D. 1894 [1895], and on the 1st day of July, A. D. 1895, and on the 1st day of January, A. D. 1896, and on the 1st day of July, A. D. 1896, and on the 1st day of January, 1897, to the fiscal agency of the state of Kansas in the city of New York, for the payment exclusively of the interest coupons of said

bonds secured by the mortgage or deed of trust aforesaid to William B. Strong, as trustee, and to provide a sinking fund as aforesaid; but that the said defendant the city of Topeka was in doubt as to its duty in the premises, and did not pay over the same to the fiscal agency of the state of Kansas in the city of New York for the payment of the interest coupons on said bonds secured by the mortgage to the complainant William B. Strong, as trustee, but retained the same in its possession, and that it now has in its possession the said hydrant rentals amounting to the sum of \$36,975. And the court doth order, adjudge, and decree that the said sum of \$36,975, be paid by defendant the city of Topeka to the solicitors of the complainant William B. Strong, as trustee, within twenty days from the entry of this decree, and that the said sum, when paid in hand to the said solicitors of the complainant as aforesaid, shall be credited and applied upon the amount herein found to be due and payable for principal and interest upon the said bonds and coupons secured by said mortgage or deed of trust to the complainant William B. Strong, trustee, and that the sum of money for which this decree shall be a lien shall thereupon be reduced by the amount so paid. And upon the payment of said sum of \$36,975 by the city of Topeka as aforesaid the city of Topeka shall be and is hereby fully and wholly discharged and protected from any claim to said sum, or any part thereof, by either the said Topeka Water Supply Company, the Topeka Water Company, Elias Summerfield, as receiver of the Topeka Water Company, or William B. Strong, trustee, for any claim for any hydrant rentals from the city of Topeka from July 1, 1894, to and including January 1st, 1897."

No appeal was prosecuted from this decree, and no proceeding was begun or prosecuted to vacate or modify it in any respect, save as the intervention of Dana and Whiting, administratrix, in the trust company's suit, herein-after stated, is asserted to be such a proceeding. In compliance with this decree the city paid the \$36,975 of hydrants' rental to Strong, trustee, and the same was credited upon the amount which was by the decree found due under his mortgage.

February 26, 1895, long before the foreclosure decree in the Strong suit, the trust company filed in the court below an independent bill against the Topeka Water Company, O'Halloran, and Summerfield, as receiver, to foreclose the mortgage given to the trust company as trustee. In addition to otherwise stating a case for foreclosure, this bill alleged that the water company was altogether insolvent and unable to meet the claims and debts against it, and that there was grave danger that the complainant would lose a great part of its security for the payment of the bonds secured by its mortgage. The bill prayed that the complainant be placed in possession of the mortgaged premises personally, or that a receiver be appointed to carry on the business of the water company and receive the income pending foreclosure. Process in this suit is stated by the master to have been served the same day upon which the bill was filed.

March 18, 1895, the trust company, by leave of the court, and in furtherance of the purpose of its foreclosure suit, filed, in the O'Halloran suit, an intervening petition referring to such foreclosure suit, setting forth the substance of the bill therein, and praying for the surrender of the mortgaged property to a receiver to be appointed in the trust company's suit, and for general relief. No action was taken by the court upon this intervening petition before September 27, 1895, when an order was entered extending the existing receivership in the O'Halloran suit over the foreclosure suit of the trust company. The O'Halloran and Trust Company suits seem to have been treated thereafter as in some respects consolidated.

August 31, 1895, Kate J. Dana and Grace Whiting, administratrix, by leave of the court, filed in the O'Halloran suit separate intervening petitions in the nature of creditors' bills. The purpose of these petitions was to obtain satisfaction of two judgments obtained against the water company by Dana and Whiting, administratrix, respectively, on May 5, 1894, and October 23, 1894, in the district court of Shawnee county, Kan., in actions prosecuted against the water company to recover for personal injuries occurring in December, 1891, through the negligent operation of one of the water company's hydrants in one of the streets of Topeka. No action was taken by the court upon these

petitions before October 11, 1895, when an order was entered in the O'Halloran suit to the effect that "all rights, priority, or claims" which Dana and Whiting, administratrix, or either of them, "can in law or equity assert against any of the past, present, or future income or property in the hands of the receiver, will be preserved and protected upon the final hearing and decree."

December 6, 1895, a decree of foreclosure was entered in the trust company's suit, fixing the amount of the debt due under its mortgage at \$1,080,000, with interest from August 1, 1893, declaring that the mortgage covered "the income, rents, profits, emoluments, and moneys derived from said waterworks, and including any revenues from any source whatever," and embracing other findings which show that under the terms of the mortgage the trust company was entitled to enforce the pledge of income as an incident to its foreclosure proceedings. Under this decree the mortgaged property was sold for \$525,000 to a representative of a reorganization committee of bondholders, the sale being confirmed August 3, 1896.

April 22, 1897, the balance of the decree in the Strong suit, after deducting the hydrants' rental paid to Strong by the city thereunder, was sold and transferred to the trust company.

March 30, 1898, the receiver, under the court's direction, paid from the income in his hands the balance of O'Halloran's judgment, upon which the receivership was originally based; and in May, 1898, the Topeka Water Company was dissolved by a judgment in quo warranto proceedings, prosecuted by the state of Kansas in one of the courts of that state. No steps were taken by Dana or Whiting to revive against the receiver their judgments against the water company. A receiver still continues in charge of the property.

January 9, 1895, before any of the interventions in the O'Halloran suit, and while the only parties thereto were O'Halloran and the water company, the court, by an order entered in that suit, without notice to either of the mortgagees, authorized the receiver to improve the waterworks plant in his charge by purchasing a new and improved pumping engine with enlarged capacity, and by sinking two new wells, all to be paid for with any moneys coming into the hands of the receiver, and not to exceed \$25,000 in cost. The master's report finds that \$19,972.76 was expended under this authorization; that this expenditure began soon after the order was made; that "the entire sum * * * had either been expended or obligations for its expenditure created by the receiver before the date of the filing of the petitions of intervention on the 31st day of August, 1895, by Kate J. Dana and Grace Whiting, administratrix," and that this expenditure was "not for repairs or for ordinary construction," but was "for the permanent improvement and betterment of the property." These findings of the master are acquiesced in by all of the parties.

Certain earnings of the water company, spoken of as "South Topeka hydrants' rental," earned prior to March 18, 1895, are involved in an action at law for their recovery now being prosecuted by the receiver against the city.

Protracted litigation affecting the franchise obtained by the water company from the city was had between the city and the receiver, in which the receiver was represented by A. L. Williams as attorney. The compensation allowed to Williams by the court and paid by the receiver was \$7,500, but there had been no express agreement respecting this compensation. The service rendered before August 31, 1895, bears such relation to the entire service as to make that rendered prior to that date worth \$6,000; but what portion of the service was rendered prior to March 18, 1895, is not shown.

The taxes for the year 1895, upon the property in the charge of the receiver were not due or payable under the laws of Kansas until November 1, 1895, and were not paid by the receiver until a still later date.

Prior to the rendition of the decree from which these appeals are prosecuted, no order was made determining what receivership burdens or obligations should be borne by the income earned subsequently to the intervention of the trust company in the O'Halloran suit, or otherwise charging any portion of such burdens or obligations upon or against any designated part of the income or property under the court's control. The present appeals question portions of the decree entered in the court below January 5, 1903, upon the intervening petitions of Dana and Whiting, administratrix, in the trust company suit.

That decree is to the effect that: (1) The judgments of Dana and Whiting, administratrix, are in full force and effect for all the purposes of these proceedings. (2) The intervention of Dana and Whiting, administratrix, in the O'Halloran suit on August 31, 1895, operated from that date as an equitable levy, and gave them for the satisfaction of their judgments a lien upon all the free assets and income of the water company, their judgment debtor. (3) Upon the extension of the receivership to the trust company suit on September 27, 1895, and not before, the future income of the water company became impounded or sequestered for the benefit of the trust company under its mortgage. (4) Strong did not, by the ordinance of the city, his mortgage, or the decree in his foreclosure suit, become entitled to any of the hydrants' rental awarded to him by that decree, and, notwithstanding the decree, Dana and Whiting have a first and superior lien upon such of this rental as was earned prior to September 27, 1895. (5) Dana and Whiting, administratrix, have a first and superior lien upon the South Topeka rental involved in the pending action by the receiver against the city, subject to a reasonable deduction for the expenses of recovery. (6) The disbursements for an engine and wells under the order of January 9, 1895, made prior to the extension of the receivership to the trust company's suit, on September 27, 1895, should be charged upon the income prior to that extension, and the later disbursements under that order should be charged upon the subsequent income. (7) Of the \$7,500 paid to Williams, \$6,000 should be charged upon the income prior to such extension of the receivership, and \$1,500 upon the subsequent income. And (8) the taxes for 1895 should be charged upon the income subsequent to the extension of the receivership. Other portions of the decree become immaterial in the view here taken.

Certain statutes of Kansas bearing upon the controversy are printed in the General Statutes of 1901, and are as follows:

"Sec. 1274. Corporations shall have power to borrow money on the credit of the corporation not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

"Sec. 4216. In the absence of stipulations to the contrary, the mortgagor of real property may retain the possession thereof."

"Sec. 4848. * * * No real estate shall be sold for the payment of any money, or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale."

Charles Blood Smith (W. H. Rossington and Clifford Histed, on the brief), for Atlantic Trust Company and others.

G. C. Clemens and A. W. Dana (J. G. Waters and E. F. Hilton, on the brief), for Kate J. Dana and others.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

1. The statutes of Kansas (sections 4883, 4889, Gen. St. 1901) restrict to a period of one year the time for reviving judgments "where either or both parties die after judgment and before satisfaction thereof." The water company was dissolved in May, 1898, by a judgment in quo warranto, and the interveners, Dana and Whiting, have taken no steps in the state court wherein their judgments were obtained to revive them against the receiver. Upon these facts the trust company strongly urges that these judgments have become mere nullities, and form no basis for the relief sought. Such a result does not flow from the situation stated. Neither at common law nor under the statutes of Kansas does a judgment for the payment of money become a mere

nullity upon the death of the judgment debtor. It still stands as an adjudication of the merits and amount of the creditor's demand. No defense can be interposed against it which existed before the judgment was entered and could have been asserted in the original action. The judgment debtor's death at most makes the judgment dormant—inoperative, unless revived, so far as the issuance of an execution and the enforcement of any statutory judgment lien are concerned. 2 Freeman on Judgments, §§ 442, 446; Scroggs v. Tutt, 23 Kan. 181, 189. But the interveners do not seek the issuance of an execution or the enforcement of any statutory lien. They seek satisfaction of their judgments out of personal assets of the water company in the custody of the receiver, upon which they claim to have effected an equitable levy, and to have acquired an equitable lien by their intervention in the receivership suit before the water company was dissolved. The rights, if any, obtained by these interventions rest upon recognized principles of equity. They attached while the judgments were fully operative, and neither a levy under an execution at law nor the preservation of a judgment lien under the statutes of Kansas is essential to their continued existence or enforcement. The dissolution of the water company and the absence of proceedings to revive the judgments do not affect interveners' rights. Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C.) 44 Fed. 539; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; Young v. Kelly, 3 App. D. C. 296, 305; Bacon v. Robertson, 18 How. 480, 486, 15 L. Ed. 499; 2 Morawetz, Priv. Corp. §§ 1033, 1035.

2. The original intervening petitions of Dana and Whiting are partly framed upon the theory that the liability of the water company to them, established by their judgments, was produced by the ordinary operation of its waterworks plant, and should be classed as ordinary operating expenses, and be accorded priority over the mortgage debts in payment out of the earnings during the receivership and out of the proceeds of the sale of the mortgaged property. This theory cannot be sustained. The liability was not incurred in the course of the receivership, but was incurred at a time when the waterworks was being operated by the water company. It is not based upon anything which tended to preserve or enhance the value of the mortgage security, but is based upon personal injuries to persons not in the employ of the water company, caused by the negligence of the company, and occurring more than two years before the receivership. It is well settled by the decisions of this and other courts that such claims are not preferential debts. St. Louis Trust Co. v. Riley, 16 C. C. A. 610, 70 Fed. 32, 30 L. R. A. 456; Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 24 C. C. A. 511, 79 Fed. 227; Veatch v. American Loan & Trust Co., 25 C. C. A. 39, 79 Fed. 471; Farmers' Loan & Trust Co. v. Nestle, 25 C. C. A. 194, 79 Fed. 748; Farmers' Loan & Trust Co. v. Longworth, 27 C. C. A. 541, 83 Fed. 336; Veatch v. American Loan & Trust Co., 28 C. C. A. 384, 387, 84 Fed. 274, 277. Any preference or priority to which these interveners may be entitled was obtained solely by their intervention in the receivership suit.

3. When the judgments in favor of Dana and Whiting were rendered the entire property of the water company was in the possession

of a receiver, appointed in a judgment creditor's suit, who was carrying on the business of the company and collecting its income. This property was also covered by two mortgages soon after in process of foreclosure. Being unable to employ an execution or other proceeding at law in obtaining satisfaction of their judgments, Dana and Whiting secured the leave of the court and intervened in the receivership suit through petitions in the nature of creditors' bills. These operated as equitable levies, and fastened upon the property and income of the water company in the receiver's hands equitable liens for the satisfaction of interveners' judgments, subject to prior liens and superior equities. 2 Barbour's Ch. Pr. 157; *Miller v. Sherry*, 2 Wall. 249, 17 L. Ed. 827; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 800, 24 L. Ed. 144; *Young v. Kelly*, 3 App. D. C. 296, 305; *High on Receivers* (3d Ed.) § 254c. As the tangible property was insufficient to pay the mortgage indebtedness, the intervention was effective, if at all, only against the income, and the principal controversy here is as to how far this income is subject to prior liens and superior equities. The interveners concede that the trust company's mortgage pledged the income of the water company, as well as the corpus of its property, and that by the order extending the receivership to the trust company's suit this pledge became effective against the income subsequently earned, so as to charge it with a lien in favor of the trust company prior and superior to that obtained by their intervention.

4. Did the pledge of income in the trust company's mortgage become effective against income earned prior to the extension of the receivership, September 27, 1895? If not, the intention of the parties to that instrument, declared in unambiguous terms, has miscarried, and creditors who were less diligent than the trust company, and who had no mortgage or other lien upon the water company's property, and no pledge of its income, have secured a substantial part of the income, earned after the time when the trust company asserted its right under the pledge. O'Halloran, a judgment creditor, was the first to move against the water company's income, and in his suit the receiver was originally appointed. O'Halloran has been paid, and is no longer a party to the controversy, which now really concerns only the trust company as second mortgagee, or the bondholders whom it represents, and the intervening judgment creditors, Dana and Whiting. The trust company was the next to move. It commenced a suit to foreclose its mortgage and to obtain the income therein pledged. The water company was then insolvent, and its entire property was in the possession of the receiver. In its bill the trust company distinctly claimed the income, and prayed that it be placed in possession of the mortgaged property under the terms of the mortgage, or that a receiver be appointed to take possession and collect the income for its benefit. The water company, not being in possession, could not perform its undertaking to deliver possession of the property to the trust company, and thus place it in a position to receive the income. Nor could the receiver surrender the possession without the direction of the court. Under the court's appointment, the receiver was exercising the water company's right to collect and disburse the income until the trust company could and should lawfully claim it under the pledge in its mort-

gage. As against the trust company, he had no better right to the income than the water company, and the court could give him none at the instance of a creditor, like O'Halloran, who had no prior or superior pledge or lien. The contingency had happened when, under the terms of the mortgage, the trust company was entitled to claim the income, and when, for the protection of the bondholders, it was essential that the pledge should be enforced. The existing receivership did not impair the pledge, or render the property or its income less subject to the mortgage to the trust company than if the property was still in the possession of the water company. *Freedman's Savings Co. v. Shepherd*, 127 U. S. 494, 507, 8 Sup. Ct. 1250, 32 L. Ed. 163; *Kneeland v. Trust Co.*, 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. Ed. 379. It altered the situation only to the extent that it affected the manner in which the pledge should be asserted to make it effective. The situation and the course to be pursued could not well be better stated than is done in *Seibert v. Minneapolis & St. Louis Ry. Co.*, 52 Minn. 246, 256, 53 N. W. 1151, 1154, where the court says:

"If, however, the receiver is appointed solely for the benefit of the plaintiff, in an action to which the senior mortgagees of income are not parties, and they do not choose to acquiesce, what are they to do? They cannot take possession from the mortgagor; the action of the court has disabled them to do that. Shall they sue the receiver for the possession? The court would hardly permit that. Shall they petition the court to discharge him, or direct him to turn the property over to them? There might be reasons—there were in this case—growing out of questions of priority as to part of the property, and to the earnings properly attributable to that part, why the court could not properly grant such a petition. Being unable to take the possession from the mortgagor or from the receiver, what, then, can they do, except, if they are not parties to the action, to come in by intervention, or, if they are parties, to petition the court that there be paid to them by the receiver, out of the earnings which shall come into his hands, such part as, but for his appointment, they would have had the right to receive and apply on their mortgages. * * * When such mortgagees are in the action, and so in position to make their demand upon the court, it is entirely immaterial in what form it is made, so that it is clearly made, and presents to the court the ground of their claim, if it be not already before it. And at whose instance the receiver was appointed, and on what ground he was appointed, are wholly immaterial. Their right to demand that the earnings which shall come into the hands of the receiver shall be held for and paid to them does not depend on those things, but on the facts that, by taking the property through its receiver, the court has placed itself, so far as such senior mortgagees are concerned, in the position of the mortgagor, and that their only remedy is by application to the court."

By placing the property of the water company in the custody of a receiver, and carrying on the business of the company through him, the court assumed the burden, during the continuance of the receivership, of administering the property and collecting the income for the benefit of whomsoever was entitled thereto, giving due effect to such priorities of right as were or should be acquired under equitable levies of judgment creditors or pledges made by the debtor company. *Hitz v. Jenks*, 123 U. S. 297, 306, 8 Sup. Ct. 143, 31 L. Ed. 156; *Dow v. Memphis & Little Rock R. R. Co.*, 124 U. S. 652, 655, 8 Sup. Ct. 673, 31 L. Ed. 565; *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, 34 L. Ed. 341; *Porter v. Sabin*, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Ames v. U. P. Ry. Co.*

(C. C.) 60 Fed. 966, 969. A pledge of income does not become effective so long as the mortgagor is permitted to remain in possession of the property and to receive and disburse the earnings. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 482, 483, 20 L. Ed. 199; *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603, 616, 617, 23 L. Ed. 405; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. Ed. 144; *Freedman's Savings Co. v. Shepherd*, 127 U. S. 502, 503, 8 Sup. Ct. 1250, 32 L. Ed. 163; *United States Trust Co. v. Wabash Ry. Co.*, 150 U. S. 287, 308, 14 Sup. Ct. 86, 37 L. Ed. 1085. For the same reason the pledge is not operative so long as the mortgagee, by remaining silent, acquiesces in the possession of the property and the collection of the income by a receiver for purposes other than the satisfaction of the mortgage debt. *Sage v. Memphis & Little Rock R. R. Co.*, 125 U. S. 361, 378, 8 Sup. Ct. 887, 31 L. Ed. 694; *Seibert v. Minneapolis & St. Louis Ry. Co.*, 52 Minn. 255, 53 N. W. 1151. The mortgagor was not in possession, but a receiver was, and he was not collecting the income for the benefit of the trust company. To be effectual, a demand should generally be addressed to one who possesses the authority to determine whether it shall be granted or refused. Here the demand for the income could not be acted upon by others than the court, and it so vitally affected the existing receivership that, to be effectual, it was essential it should be presented to the court in the receivership suit. The trust company, therefore, in pursuance of the only course open to it—clearly the correct one—obtained the leave of the court, and, intervening in the receivership suit, filed therein a petition setting forth the facts showing its right to the income, and containing ample prayers to entitle its claim to recognition. This intervention in aid of its pending suit for a foreclosure was an effective assertion of the trust company's claim, and operated to charge with the lien of its mortgage all the income subsequently earned. *Dow v. Memphis & Little Rock R. R. Co.*, supra; *Sage v. Memphis & Little Rock R. R. Co.*, 125 U. S. 378, 379, 8 Sup. Ct. 887, 31 L. Ed. 694; *Seibert v. Minneapolis & St. Louis Ry. Co.*, 52 Minn. 256, 53 N. W. 1151; *Hook v. Bosworth*, 12 C. C. A. 208, 214, 64 Fed. 443, 448, 24 U. S. App. 341, 349; *Central Trust Co. v. Wabash, etc., Ry. Co.* (C. C.) 46 Fed. 26, 34; *High on Receivers*, § 254c. It was not necessary that a new receiver be appointed under its bill, or that the existing receivership be formally extended to its suit. These were matters beyond its control. It is sufficient that after this assertion of its claim the existing receivership was continued, and the subsequent income brought within the court's control, that in the decree subsequently entered in the foreclosure suit, to which the water company and the receiver were parties, all questions going to the existence of the pledge and the right to enforce it at the time of the trust company's intervention in the receivership suit were settled and determined favorably to the trust company, and that this income is needed to satisfy the mortgage debt. The income was not something which could be dealt with or sold under the foreclosure decree, like the real and personal property covered by the mortgage, but, being money, or rights in action which were being converted into money, had to be impounded and preserved so that upon foreclosure of the mortgage it might be forthcoming under the pledge, and be capable of application upon the

mortgage debt. It requires no further statement or discussion to show that the means employed for the enforcement of this pledge of income have been by a suit for foreclosure in a court of equity and other proceedings in that court consistent with the theory that the mortgage gave a lien upon the income and did not convey the title. As to the income earned subsequently to the trust company's intervention in the receivership suit, possession thereof was obtained through a receiver in a suit where the mortgagee was asserting a right to the income under its mortgage. The course pursued is in entire harmony with the views expressed by the Supreme Court of Kansas in *Seckler v. Delfs*, 25 Kan. 159, and with those of Mr. Justice Brewer in *Mercantile Trust Co. of New York v. Missouri, Kansas & Texas Ry. Co. (C. C.)* 36 Fed. 221, 225, 1 L. R. A. 397. It is not material that the mortgagee may have also claimed, under the terms of the mortgage, a right to have the possession of the mortgaged property surrendered to it, and to be permitted to collect the income without the aid of a receiver. The income could be subjected to the lien of the mortgage without sustaining this claim, and a suitor does not, by making his claim too broad, lose his right to relief to which he is otherwise entitled. *Wallace v. Loomis*, 97 U. S. 146, 160, 161, 24 L. Ed. 895. It may be that, under the authority to pledge income specially and expressly given to corporations in Kansas (Gen. St. 1901, § 1274), the trust company's mortgage is excepted from the operation of the statute (sections 4216 and 4848) which controlled the decision in *Seckler v. Delfs*, and that in that state it is competent for mortgagor and mortgagee to stipulate, in a corporate income mortgage like this, that the mortgagee, upon default in payment by the mortgagor, may take possession of the property and collect the income without the aid of a receiver (see *Seibert v. Minneapolis & St. Louis Ry. Co.*, 52 Minn. 146, 253, 254, 53 N. W. 1151); but the facts of this case do not require a decision of this question. The cases of *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415, and *Couper v. Shirley*, 21 C. C. A. 288, 75 Fed. 168, relied upon by counsel for the judgment creditors, presented controversies growing out of mortgages of real property in the states of Oregon and Washington, the statutes of which, without recognition or reservation of any right of the parties to stipulate otherwise, declare, in effect, that the mortgagor of real property shall be entitled to the possession, and in consequence to the rents and profits, until "foreclosure and sale." Unlike this, the Kansas statute declares that, "in the absence of stipulations to the contrary," the mortgagor shall be entitled to retain the possession. The inhibition in Kansas, as construed in *Seckler v. Delfs*, seems to be not against a pledge of the rents and profits accruing prior to foreclosure and sale, or against stipulations affecting the possession and reasonably necessary to make the pledge of income of advantage as a security, but against treating the mortgage as a conveyance of title to the property or rents and profits, and against enforcing the mortgage stipulations, whether relating to the property or the rents and profits, otherwise than through the aid of a court of equity. The difference in the local laws is such that *Teal v. Walker* and *Couper v. Shirley* are not of controlling or persuasive application to an income mortgage, upon property in Kansas, given by a Kansas corporation under the ex-

press authority of the laws of that state. The judgment creditors, Dana and Whiting, did not move against the water company's income until more than five months after the trust company, by reason of its superior diligence in asserting the pledge in its mortgage, had made the same effective against future income. It follows that the equitable levy and lien effected by the intervention of Dana and Whiting in the receivership suit is operative only upon income earned prior to the trust company's intervention, and not required to satisfy the claim of O'Halloran, or to satisfy the obligations of the receivership properly chargeable against such prior income.

5. Does the decree in the Strong suit bar Dana and Whiting from claiming the rental there awarded to Strong under his mortgage? Whether that mortgage covered this rental, and, if it did, whether Strong took the steps necessary to make it effective in that regard, are questions which are determined in his favor by the decree in his suit. If the court had jurisdiction of the subject-matter, and had before it the requisite parties to bind Dana and Whiting, further consideration of these questions is precluded. As shown in the foregoing statement, Strong's bill, the city's answer, and the answer or intervening petition of the receiver make it manifest that it was the intention of the parties to present for the court's decision in that suit a controversy respecting rental then due from the city under its contract with the water company. Strong claimed this contract was covered by his mortgage, and especially claimed that the city and water company were obligated, by the terms of the ordinance, to set apart and pay over to the Kansas fiscal agency in New York for application upon the interest and principal secured by his mortgage the rental for the original 150 hydrants. There was no occasion for making the city a party to Strong's bill, unless it was to secure the payment of the rental to Strong. The receiver claimed all of the rental as part of the income of the water company, which he, as receiver, was directed to collect and reduce to possession. The city, while apparently admitting the rental to be due to the water company, denied Strong's right to it. It was the case of two rival claimants for payment of the same admitted debt, and was a matter growing out of Strong's mortgage, and affecting its extent as a security. Both Strong and the receiver were claiming through and asserting the right of the water company against the city. That the court had jurisdiction of the subject-matter is clear. While the receiver was not made a party to the Strong bill, he might have been, and his subsequent appearance or intervention in that suit was not excepted to. This appearance or intervention was fully justified by the direction, given to the receiver at the time of his appointment, to defend any suit seeking to establish a lien against the water company's property, and to prosecute any action necessary for the collection of any sum due to the company. *Shields v. Coleman*, 157 U. S. 168, 178, 15 Sup. Ct. 570, 39 L. Ed. 660. The receiver was therefore to be treated as though he had originally been made a defendant (*French v. Gapen*, 105 U. S. 509, 525, 26 L. Ed. 951), at least so far as the rental was concerned. Particularly is this true since the Strong suit and the receivership suit were both in the same court. By its decree the court resolved the controversy, with respect to certain of the rental, in favor

of Strong and against the receiver. The decree was rendered January 25, 1897. No appeal therefrom was ever prosecuted. One prayed by the trust company was allowed, but not perfected. The time for an appeal expired July 25, 1897. Act March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]; *United States v. Baxter*, 2 C. C. A. 410, 51 Fed. 624. No effort has been made to have the decree reversed or modified upon a bill of review for error in law apparent upon the face of the decree or record, and it is now too late to do so. *Thomas v. John Harvie's Heirs*, 10 Wheat. 146, 6 L. Ed. 287; *Kennedy v. Georgia State Bank*, 8 How. 586, 609, 12 L. Ed. 1209. Nor is it now sought to have the decree reversed or modified on account of any newly discovered evidence, or to have it vacated on account of fraud or otherwise. The intervening petitions of Dana and Whiting, filed January 20, 1899, almost two years after the decree was rendered, proceed upon the theory that, as matter of law, the decree should have rejected any claim of Strong to hydrants' rental, and that the petitioners are not bound by the decree because not parties to it. No misconduct or bad faith is charged against the receiver, and the only imputation of bad faith is embraced in the charge that the trust company "caused the said decree" to order the city to pay the rental to Strong, "whereby through the cunning" of the trust company and another company, which acquired the waterworks after the foreclosure sale, the rental was put beyond the enforcement of the petitioners' equitable levy. The petitioners do not state the manner in which or the means by which the trust company caused this provision to be inserted in the decree, or what constituted the cunning spoken of. As made, the charge is without effect (*Ambler v. Choteau*, 107 U. S. 586, 591, 1 Sup. Ct. 556, 27 L. Ed. 322; *Fogg v. Blair*, 139 U. S. 118, 127, 11 Sup. Ct. 476, 35 L. Ed. 104; *Ritchie v. McMullen*, 159 U. S. 235, 241, 16 Sup. Ct. 171, 40 L. Ed. 133), and it seems to have been abandoned.

Of course, the Strong decree binds the receiver, and bars any further action or suit by him, or others acting in the same right, against the city for the rental awarded to Strong. The creditors, Dana & Whiting, were not actual parties to the Strong suit, but they were represented by the receiver, and are as much bound by the decree as he is. They were what are sometimes termed quasi parties. Upon the appointment of the receiver the right to enforce the payment of hydrants' rental and other rights in action due to the water company, or becoming due during the continuance of the receivership, vested in the receiver, and he became the proper party to prosecute all necessary suits for that purpose, and to defend such suits as should be commenced for the purpose of establishing claims against or rights to the property of the water company. *Porter v. Sabin*, 149 U. S. 473, 478, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Doggett v. Railroad Co.*, 99 U. S. 72, 78, 25 L. Ed. 301; *Express Co. v. Railroad Co.*, 99 U. S. 191, 199, 25 L. Ed. 319; *Gray v. Davis*, 10 Fed. Cas. 1006, 1009; *Davis v. Gray*, 16 Wall. 203, 217, 219, 21 L. Ed. 447; *High on Receivers* (3d Ed.) § 316. In such suits, whether brought by the receiver or against him, it is not necessary, and generally is not even proper, to join creditors of the debtor company with the receiver as parties. *Doggett v. Railroad Co.*, *Express Co. v. Railroad Co.*, *Gray v. Davis*, *supra*. The

receiver is the representative of the court and of all the parties in interest, and can neither surrender to others nor divide with them the management of the prosecution or defense of such suits or the responsibility therefor. *Doggett v. Railroad Co.*; *Express Co. v. Railroad Co.*; *Porter v. Sabin*, 149 U. S. 479, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Gray v. Davis*, supra; *Ames v. Union Pacific Ry. Co.*, supra; *High on Receivers* (3d Ed.) §§ 134, 135, 650; *Jones on Railroad Securities*, § 495. Where it is necessary to apply for and obtain leave of court to sue a receiver in his official capacity, "it is not essential to the jurisdiction of the court over the receiver, or to the validity of the order, that the application should be based upon notice to the parties in the action wherein the receiver was appointed. It is sufficient that leave be granted by the court having control over the receiver, upon notice to him, against whom alone the cause of action exists, and against whom the proceedings must be brought." *High on Receivers* (3d Ed.) § 265; *Potter v. Bunnell*, 20 Ohio St. 150, 158; *Farwell v. Great Western Railroad Co.*, 161 Ill. 522, 618, 44 N. E. 891. The principle underlying the several cases bearing upon the representative character of a receiver is well shown in *Gray v. Davis*, supra. It was a case wherein a receiver appointed in a railroad foreclosure suit filed a bill against officers of the state of Texas to enjoin them from taking certain action calculated to impair property interests of the railroad company in the charge of the receiver, and held by him for the benefit of the creditors of the company. A demurrer was interposed upon the ground that the creditors to be affected were not made parties to the bill. The demurrer was overruled, the circuit judge saying: "The creditors are neither necessary nor proper parties, because they are represented by the complainant who is a receiver." *Gray v. Davis*, 10 Fed. Cas. 1009. This ruling was affirmed in the Supreme Court, where it was stated:

"A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned." *Davis v. Gray*, 16 Wall. 217, 21 L. Ed. 447.

Mr. Calvert, in his work on Parties in Equity, says (pages 20, 21):

"There are certain persons whose representative character is derived from the law. The most familiar instance is that of executors and administrators in respect of the personal estate of their testator or intestate. Whenever a suit is instituted which affects that personal estate, all the legatees have precisely that kind of interest which has been specified in the general rule; but they are unnecessary parties, inasmuch as by law their interests are protected. They themselves may be said to be represented in the person of the executor or administrator. It would be very inconvenient to bring them all in their own persons before the court, so they are allowed to appear by their representatives. Thus an adequate protection is provided for their interests, and the spirit of the general rule is adopted, although the letter of it is, for the sake of convenience, evaded."

The relation of a receiver to intervening creditors, like these, is much the same as that of a mortgage trustee to the bondholders.

The rights and lien of the bondholders must be worked out and enforced, in greater part, through the trustee, and those of the intervening creditors through the receiver. Being bound by both what is done by and what is done against his representative, the bondholder or intervening creditor, as the case may be, should have some reasonable and timely concern for whatever is done. A receiver is always under the control of the court, and if these creditors believed a wrong was done to them by the Strong decree it was open for them, upon a reasonable showing, to invoke this control for the purpose of effecting the institution of appropriate proceedings, by appeal or otherwise, to remedy that wrong. The court could have directed the receiver to act, or have permitted the creditors to do so in the receiver's name; but application for the institution of any such proceeding does not appear to have ever been made by the creditors either to the receiver or to the court. "It cannot be doubted that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust. (*Shaw v. Norfolk Co. R. R. Co.*, 5 Gray, 171; *Bifield v. Taylor*, 1 Beat. 91; *Campbell v. R. R. Co.*, 1 Woods, 376 [Fed. Cas. No. 2,366]; *Ashton v. Atlantic Bank*, 3 Allen, 220); or to one by a stranger against him to defeat it in whole or in part (*Rogers v. Rogers*, 3 Paige, 379; *Wakeman v. Grover*, 4 Paige, 34; *Winslow v. M. & P. R. R. Co.*, 4 Minn. 317 [Gil. 230, 77 Am. Dec. 519]; *Campbell v. Watson*, 8 Ohio, 500). In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of the bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience. * * *

If the creditors, mindful of their interests, are dissatisfied with the manner in which he represents them in suits that are pending, they may, under proper circumstances, intervene, and ask to be made parties, so as to speak for themselves; but their adversary need not go after them, except under the direction of the court." *Kerrison, Assignee, v. Stewart*, 93 U. S. 155, 160, 162, 23 L. Ed. 843. "The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the

trustee would be entitled to in the same form of proceeding." *Shaw v. Railroad Co.*, 100 U. S. 605, 611, 25 L. Ed. 757. See, also, *Wallace v. Loomis*, 97 U. S. 146, 163, 24 L. Ed. 895; *Richter v. Jerome*, 123 U. S. 233, 246, 8 Sup. Ct. 106, 31 L. Ed. 132; *Vetterlein v. Barnes*, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400; *Elwell v. Fosdick*, 134 U. S. 500, 511, 10 Sup. Ct. 598, 33 L. Ed. 998; *Kneeland v. Luce* (2) 141 U. S. 491, 509, 12 Sup. Ct. 32, 35 L. Ed. 830; *Credit Co. v. Arkansas Central R. R. Co.* (C. C.) 15 Fed. 46, 52; *Farmers' Loan & Trust Co. v. Kansas City, etc., R. R. Co.* (C. C.) 53 Fed. 182, 185; *Clyde v. Richmond, etc., R. R. Co.* (C. C.) 55 Fed. 445, 448. "Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed, which, if presented, would have resulted in a decree of dismissal." *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127, 37 L. Ed. 1113. To the same effect is the decision in *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428. The Strong decree binds Dana and Whiting, and precludes them from claiming any interest in the hydrants' rental awarded to Strong.

6. Should the cost of the new engine and additional wells incurred under the order of January 9, 1895, be charged in whole or in part upon the income earned after the pledge of income in the trust company's mortgage became effective, March 18, 1895? The question is not whether these improvements shall be paid for, but against what funds or income shall the completed payment of their cost be charged? The master found that this expenditure was "not for repairs or for ordinary construction," but was "for the permanent improvement and betterment of the property." The receiver's petition upon which the expenditure was authorized represented that the water company had "two pumping engines—one high-duty Gaskill, of four million gallons capacity, and one Knowles condensing pumping engine of three million gallons capacity. The latter bursted within the past twelve months two cylinders, which it would be very expensive to replace, and said engine has therefore not been used for a long time. Furthermore, this pump is unfitted for the direct pressure system in use at said works, for the reason that it is too light for that work, and is very expensive in the use of fuel. Your petitioner deems it necessary to purchase a new improved high-duty pumping engine of about four million gallons daily capacity." After stating that the supply of water was obtained "through six-inch well points near the bank of the Kansas river," the petition proceeded:

"When these well points were first put down, they furnished a sufficient supply of water, but they have become corroded, and from other causes said well points do not furnish more than half the original quantity of water, and not sufficient to answer the required purposes. Your petitioner, from consultation with capable engineers, and from his own knowledge, has become satisfied that, in order to procure a sufficient quantity of water, it will be necessary to sink near the banks of said river at least two wells fifty feet in diameter."

In his deposition, introduced in evidence by the intervening judgment creditors, the receiver testified:

"Q. Now, were these things you did under order of court in the nature of repairs on the plant as it already stood, or were they, or some of them, additions?—15

ditions to the plant, or renewals of parts of it? A. There was that new pump, and then the connecting therewith, and a new well, fifty feet in diameter, and then the boring out of the other pump, which was in bad shape, making new plungers, and all that sort of thing. Of course, some connections, valves, etc. Q. Make the plant more valuable? A. Well, it may be; yes, in a way. That was necessary to make the plant complete. It was never complete before. I will have to explain to you, perhaps. They had a pumping station down here, and they had two small pumps, and of course it was inadequate for the business entirely. It could not give enough pressure, and the city complained, and notified that they would not pay any more hydrant rental if they did not get more pressure; and it was necessary to make a plant just where it is. Of course, it was more valuable. It was not of any value at all before. The well capacity was insufficient. It became absolutely necessary, to make it a self-sustaining plant, to sink that well. Q. Do you know whether these things were in contemplation by the company itself at the time you were appointed receiver? A. Yes, sir. Q. In other words, you carried out what the city [company] itself would have done? A. I was the manager of the company before the receivership, and I recommended these additions to make it effective; but, of course, the company was in straits, and had no money to do it with, and had to stand off the council and everybody until we could get money after the receivership. Q. What money came in after you became receiver, that would not have come into the company if it had continued in business? A. I got just about the same money; it came just the same as before the receivership. Q. If the company got the same money that you got, why was not the company able to make these improvements which you were able to make as receiver? A. Because they paid interest on the bonds. After I became receiver we used the money to make improvements."

The record discloses no other evidence bearing upon the character of these improvements. This evidence and the master's finding, which is not excepted to, make it clear that the cost of these improvements was not a current expense incurred in the ordinary course of operating the mortgaged property, but was an expense outside of the ordinary course, and incurred, not in operation, which includes repair, but in reconstruction, enlargement, and permanent improvement. *Lackawanna, etc., Co. v. Farmers' Loan, etc., Co.*, 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475.

When the order of January 9, 1895, was made, a receiver appointed under the bill of a judgment creditor (O'Halloran) was in possession of the property of the debtor company, and was operating its water-works plant, and collecting the income thereof with a view to satisfying the claim of the judgment creditor therewith. The entire property was then covered by mortgages to Strong and the trust company, securing the payment of an aggregate indebtedness exceeding the salable value of the property, and this was disclosed in the bill under which the receiver was appointed. The trust company's mortgage, which had been duly recorded, as clearly pledged the income, and made it a part of the bondholders' security, as it did the corpus of the property. The only difference is that the lien of such a mortgage upon the corpus is enforced upon default by foreclosure, while the lien upon the income is enforced upon default by impounding it by a due assertion of the right to it in the manner heretofore shown. It is the income earned thereafter, and not that earned theretofore, that, as against creditors of the mortgagor, is thus secured to the mortgagee. But a mortgage of income, even before it is made effective against future income in the sense just mentioned, gives to the mortgagee a vested right

which cannot be displaced, postponed, or impaired in the interest or at the instance of an unsecured creditor, any more than can the mortgage lien upon the corpus of the property. Until the trust company should be entitled to make the pledge of income in its mortgage effective against the future earnings, and should do so, the way was open for a judgment creditor of the water company, through a creditors' bill and the appointment of a receiver, to impound the income, and subject it to the payment of his claim. The satisfaction of the claim of the complaining creditor from assets of the debtor not otherwise adequately within the creditor's reach and unaffected by any prior lien or superior equity, is the controlling purpose of such a suit and receivership. They cannot, without the consent of the mortgagee, be made the medium of reconstructing, enlarging, or permanently improving mortgaged property, and of making the cost thereof a charge or lien upon the property or its income prior or superior to the mortgage. Nor is such a use of a creditors' suit and receivership rendered permissible because the work of reconstruction, enlargement, or permanent improvement is required to fit the mortgaged property for better, increased, or more economical service (*Lackawanna, etc., Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475), or because it tends to preserve or enhance the value of the mortgage security (*Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 459). The effect of work of this character cannot always be foretold with certainty. It may not accomplish all that is intended or expected, and may not prove beneficial in proportion to its cost, or at all. No risk or element of uncertainty such as this is contemplated when a mortgage lien is contracted, and none can be subsequently fastened upon the mortgage security without the consent of the mortgagee. A court of equity does not, by the appointment of a receiver, acquire absolute control over the property or general authority to displace contract liens. *Kneeland v. Trust Co.*, 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. Ed. 379; *Thomas v. Western Car Co.*, 149 U. S. 95, 111, 13 Sup. Ct. 824, 37 L. Ed. 663; *Union Loan & Trust Co. v. Southern, etc., Co. (C. C.)* 51 Fed. 106; *Savings, etc., Co. v. Bear Valley Irr. Co. (C. C.)* 93 Fed. 339, 341. The order of January 9, 1895, was made, not at the instance of the trust company, or with its acquiescence, but without notice to it, and when it was not a party to the judgment creditors' suit, or in any wise responsible for the receivership. That company's foreclosure suit was commenced February 26, 1895, and its intervening petition, filed in O'Halloran's suit March 18, 1895, asserted its right under the mortgage, and charged that the existing receivership was not in the interest of the secured creditors, but was in the direct interest of the debtor company and of others who were endeavoring to continue their control over its affairs, and that the claim of O'Halloran could be satisfied from the income theretofore collected by the receiver. Among the prayers in this petition was one to the effect that, if O'Halloran had obtained a superior right to payment from the fund then in the possession of the receivers, the court direct immediate payment of the balance due upon his judgment, and terminate the existing receivership. This was not done, but the petition was not the less a protest against the continuance of the O'Halloran receivership, and against its use for purposes other

than the satisfaction of O'Halloran's claim. Disbursements under the order of January 9, 1895, began soon after it was made, and the entire cost of the engine and wells had been paid, or obligations for its expenditure created, by the receiver, before the rights of the trust company under its mortgage received recognition in the court below on September 27, 1895, by the order extending the receivership then existing to the company's foreclosure suit. Of the total expenditure for the engine and wells, \$12,769.85 had been disbursed up to September 27, 1895. Referring to the balance, and to that date, the receiver testified:

"Q. You did not owe at that date for things actually furnished or labor actually done under that order up until that date the sum of \$7,605.64 [?] did you? A. Of course, I do not remember the dates. I am of the impression that I owed nearly that much on that pump. I agreed to pay one-quarter when shipped, one-quarter when delivered, and the rest when turned over to us. The contract will speak for itself. I do not remember. Q. Which had all been furnished? A. Yes, sir."

The master found:

"The entire sum of \$19,972.76 expended under said order of January 9, 1895, had either been expended or obligations for its expenditure created by the receiver before the date of the filing of the petitions of intervention on the 31st day of August, 1895, by Kate J. Dana and Grace Whiting, administratrix of Catherine M. Whiting, deceased, and before the order extending the receivership to the Atlantic Trust Company cause, made the 27th day of September, 1895."

Under such circumstances a specific objection, at the time of the extension of the receivership, to further disbursements under the court's authorization, would have been unavailing. For other reasons it was probably not necessary. The order authorizing the improvements did not express a purpose to make their cost a charge upon the mortgaged property or its income prior or superior to the mortgage lien, and the order extending the receivership did not express such a purpose. As shown by the master's report, there was in the hands of the receiver, March 18, 1895, when the trust company asserted its claim to the future income, a cash balance of \$12,076.87, after paying \$2,194.18 of the cost of said improvements, and after deducting the claim of O'Halloran, and all current operating expenses and obligations of the receivership, excepting the claim of Williams, and the taxes for 1895. The hydrants' rental then due and uncollected included South Topeka rental, \$3,673.49, and city rental, \$10,391.58. Thus the assets of the existing receivership susceptible of use in paying for improvements undertaken by it were approximately sufficient to complete payment therefor without resorting to the property or income covered by the trust company's mortgage lien. That the rental due from the city, other than the South Topeka rental, would eventually be awarded to Strong in his foreclosure decree, was not anticipated, and could not well have been. Considering the entire proceedings and the circumstances surrounding them, it cannot be said therefrom that the trust company is bound by the order of January 9, 1895, or by what was done thereunder, or that it expressly or otherwise assented that its vested mortgage lien be postponed or subordinated to the payment of the cost of these improvements, certainly not beyond any deficiency in the assets available for such payment, but not covered by its lien.

In *Lackawanna, etc., Co. v. Farmers' Loan, etc., Co.*, 176 U. S. 298, 316, 20 Sup. Ct. 363, 370, 44 L. Ed. 475, it is said:

"This court has said that it is the exception, not the rule, that the priority of mortgage liens can be displaced. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 98 [10 Sup. Ct. 950, 34 L. Ed. 379]; *Thomas v. Western Car Co.*, 149 U. S. 85, 111 [13 Sup. Ct. 824, 37 L. Ed. 603]. We have said that priority of unsecured claims is recognized only in a few specified cases, in which equity and good conscience require that the vested liens of mortgage creditors shall be postponed in the application of current earnings to current debts. Sound principle forbids that a court of equity should imply an agreement upon the part of mortgage creditors to subordinate their claims to such debts as those due to the Lackawanna Company."

The debts there under consideration, and held inferior to the prior lien of a recorded mortgage, were for steel rails sold and delivered to the mortgagor, where the requirement for their use in replacing old and worn ones upon the mortgaged railroad was imperative, but "so extensive as to amount to reconstruction."

In *Illinois Trust & Savings Bank v. Doud*, 105 Fed. 123, 148, 44 C. C. A. 389, 414, 415, 52 L. R. A. 481, this court, after careful consideration of the rights of a mortgagee under a mortgage like the one here, said in conclusion:

"A mortgagee of the property, acquired and to be acquired, and of the income of a quasi public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises. * * * The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. * * * The test of a preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. The Supreme Court has refused to apply the principle of the civil and maritime laws of awarding priority to the last creditor who furnished repairs and supplies to a vessel to the distribution of the proceeds of the foreclosure of mortgages of quasi public corporations. *Railroad Co. v. Cowdrey*, 11 Wall. 459, 474, 482, 20 L. Ed. 199; *Thompson v. Railroad Co.*, 132 U. S. 68, 74, 10 Sup. Ct. 29, 33 L. Ed. 256. If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the expense of constructing a permanent addition or improvement to it out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage."

The claim there under consideration and held inferior to the prior lien of a recorded mortgage was for money loaned to the mortgagor to enable it to pay an installment of interest on the mortgage debt, and to construct an addition to the mortgaged electric plant.

These decisions are decisive of the present question. The difference that in each of them the claim denied priority in payment was incurred by the mortgagor, while here the improvements were made by a receiver.

er under the court's authorization, is not material or controlling under the circumstances of this case. Both decisions determine and declare the rights in mortgaged property and its income which vest in a mortgagee. These vested rights are not affected by a proceeding had, without notice to the mortgagee, in a receivership where he is not a party to the suit, and does not subsequently give express or implied assent to what is done. *Kneeland v. Trust Co.*, 136 U. S. 89, 96, 100, 10 Sup. Ct. 950, 34 L. Ed. 379; *Virginia, etc., Coal Co. v. Central Railroad, etc., Co.*, 170 U. S. 355, 371, 18 Sup. Ct. 657, 42 L. Ed. 1068. The reconstruction, enlargement, or permanent improvement of mortgaged property by a court's receiver, under such circumstances, does not any more displace or postpone the prior mortgage lien than would the like act of the mortgagor in the absence of a receivership.

It follows that the cost of the new engine and additional wells incurred under the order of January 9, 1895, should be charged against the income earned prior to March 18, 1895, when the pledge of income in the trust company's mortgage became effective. The judgment creditors, Dana and Whiting, intervened in the receivership suit August 31, 1895, and the cost of these improvements, as an existing obligation of the receivership, was then a charge upon all the income not covered by the mortgage lien of the trust company, and therefore takes precedence over the equitable levy effected by their intervention.

7. The services of Williams, rendered after March 18, 1895, should be charged against the income subsequently earned, and his services prior to that date should be charged against the prior income. The same rule applies to the taxes. They were not payable until November, but, being for the entire calendar year, they could not equitably be charged upon the income for that month, or for a fraction of the year including that month, any more than they could be charged against the income for the particular week or day when they became payable. The nature of these expenses is such that, as between the parties to these appeals, they should be charged against current income. The taxes were, of course, a lien superior to all of the other claims.

Under the rules here announced, the entire property and income will be taken in the satisfaction of receivership obligations and mortgage debts which are superior to the claims of Dana and Whiting. The decree of the court below is therefore reversed, with instructions to dismiss their intervening petitions.

UNION PAC. R. CO. v. MASON CITY & FT. D. R. CO.

(Circuit Court of Appeals, Eighth Circuit. February 29, 1904.)

No. 1,975.

1. OBITER DICTUM—RAILROADS—DECLARATION OF DUTY A CONTROLLING DECISION.

The declaration of the Supreme Court in *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 16 Sup. Ct. 1173, 163 U. S. 564, 586, 41 L. Ed. 265, that the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river imposed upon the Pacific Company the duty of permitting the Rock Island Company to run its engines and trains over the bridge

and tracks of the Pacific Company between Council Bluffs, Omaha, and South Omaha, was a controlling adjudication of the question, and not an obiter dictum.

2. SAME—WHAT CONSTITUTES.

Where a court places its decision of the ultimate legal issue before it upon its decisions of two legal questions which were pertinent to the issue, debated at the bar, considered and determined in the opinion, the decision of either one of which is sufficient to sustain the determination of the ultimate issue, the decision of each of the two questions and of every pertinent legal question decided in reaching either decision has the binding force of an adjudication, and is not a mere obiter dictum.

3. CORPORATION CHARTER—RESERVATION OF POWER TO AMEND.

The reservation of a power to add to, alter, amend, or repeal a charter authorizes the proper legislative body to make any addition, alteration or amendment which does not impair vested rights or substantially interfere with the accomplishment of the main purpose of the charter.

4. RAILROAD CORPORATION CHARTER—RESERVATION OF POWER TO AMEND.

The reservation, in the charter of a railroad company, of the power to add to, alter, amend, or repeal, includes the reservation of power to condition the title to a bridge and to terminal facilities with the provision that the joint use of them shall be allowed to other railroad companies for reasonable compensation, provided that this use does not deprive the holder of the property of the use of it requisite to the handling of its own engines and trains, to the conduct of its own business, and to the discharge of its corporate duty to the government and to the public.

5. SAME—NEITHER MORTGAGEE NOR PURCHASER AT FORECLOSURE SALE ACQUIRE TITLE FREE FROM THE USE IMPOSED UNDER RESERVATION IN CHARTER.

A mortgagee, or the purchaser at a foreclosure sale of the right of the mortgagee to the property of a mortgagor railroad company, which held its title under a charter that reserved the right of addition, alteration, and amendment, take their interests in the property subject to the right of the proper legislative body to exercise, at any time during the possession of the mortgagor and the existence of the mortgage, its reserved power of addition and amendment, and thereby to condition the title and use of the property with the requirement that other railroad companies shall be permitted to use it to the same extent as though the mortgage had never been made. The mortgagee and the purchaser under him get nothing which the mortgagor had not, and acquire no vested rights as against the legislative body and its beneficiaries.

6. SAME—POWER TO EXTEND RAILROAD ON DETERMINATION OF DIRECTORS INCLUDES POWER TO ACQUIRE USE OF TERMINAL FACILITIES OF OTHER COMPANIES IN ANOTHER STATE BY ACTION OF DIRECTORS.

The power to construct or extend a railroad beyond the points designated in the articles of incorporation of the company which owns it, "as the board of directors of said corporation may determine and designate," includes the power to acquire and enjoy the use of a bridge, a station, and the railroad tracks of another company beyond such points, and in another state, upon the determination and designation of the board of directors, and upon compliance with the laws of both states relative to the acquisition and use of property by such a corporation therein.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

For opinion below, see 124 Fed. 409.

This is an appeal from a decree of the Circuit Court for the District of Nebraska to the effect that the Union Pacific Railroad Company shall admit the Mason City & Ft. Dodge Railroad Company to the equal and joint use of its bridge across the Missouri river between Council Bluffs, Iowa, and Omaha, Neb., to its passenger station at Omaha, and to its main and passing railroad tracks between Council Bluffs, Omaha, and South Omaha, upon the terms and

conditions specified in the contract between the Union Pacific Railway Company and the Chicago, Rock Island & Pacific Railway Company which was sustained by the Supreme Court in *Union Pac. Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 504, 16 Sup. Ct. 1173, 41 L. Ed. 265. The controversy which resulted in this decree involves the same property between Council Bluffs, Omaha, and South Omaha that is described in the statement and opinion, and that was the subject of the litigation which was closed by that decision. The appellant in this case is the purchaser of this property at a sale of it made in 1897 under the foreclosure of the first mortgage upon it which was made by the old Union Pacific Railroad Company on March 1, 1865. The Mason City & Ft. Dodge Railroad Company owns a railroad which extends from Council Bluffs, Iowa, to Manley Junction and to Hampton, in the state of Iowa, where it connects with the railroads of the Chicago Great Western Railway Company, and forms with these railways through lines of railroad from Council Bluffs to Chicago, Ill., to St. Paul and Minneapolis, Minn., and to Kansas City, in the state of Missouri. The Mason City Company sought by this suit to secure, and the decree below granted to it, access with its engines and trains to Omaha and South Omaha, and to the railroads entering those cities from the west and south, by means of the joint use of the bridge and railroads of the appellant, on the ground that the duty was imposed upon the latter company to grant to the Mason City Company this right, upon the payment by the appellee of reasonable compensation for the use of the bridge, station, and track, by the acts of Congress of July 1, 1862, c. 120, 12 Stat. 489; July 2, 1864, c. 216, 13 Stat. 356, 362; July 25, 1866, c. 246, 14 Stat. 244; and February 24, 1871, c. 67, 16 Stat. 430. These acts of Congress, and especially those provisions in them that are pertinent to the questions presented in this case, were recited, discussed, and analyzed in the Rock Island Case both in the Supreme Court and in the inferior courts, and it is believed that a reference to the opinions in that case will indicate their purpose and effect as well as an extended recital of them here. (C. C.) 47 Fed. 15; 51 Fed. 309, 321, 322, 2 C. C. A. 174; 163 U. S. 564, 585-589, 16 Sup. Ct. 1173, 41 L. Ed. 265. The decree of the Circuit Court is assailed on many grounds, which are considered in the opinion.

John N. Baldwin (W. R. Kelly, on the brief), for appellant.

Frank B. Kellogg and James M. Woolworth (William D. McHugh and Cordenio A. Severance, on the brief), for appellee.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The chief contention of counsel for the Pacific Company is that the decree below is erroneous (1) because the acts of Congress never imposed upon the Union Pacific Railroad Company, the mortgagor under whose first mortgage of March 1, 1865, the appellant holds the property in question, nor upon its successor, the duty to grant the joint use of its bridge at Omaha, its passenger station in that city, or its railroad between Council Bluffs and Omaha to the appellee, or to any other railroad company; and (2) because, if such a duty was imposed upon it, it did not extend so far as to require that company, or any of its successors in interest, to grant to the appellee, or to any other railroad company, the use of its tracks or the use of its other transportation facilities between Omaha and South Omaha, or at any point west of Twentieth street in the former city.

The arguments and authorities in support of the position here taken by counsel for the appellant admonish us that the questions which it presents are grave, difficult, and of doubtful solution. We are, however, met at the threshold of our investigation by the

insistent claim of counsel for the appellee that each of the questions presented by this contention has been conclusively answered by the Supreme Court in *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265. The opinion in that case was rendered by the Supreme Court of the United States, a court whose decisions command and always cheerfully receive the acquiescence of this and all inferior courts, and, if it has decided the legal issues pressed upon our consideration, it is neither the province nor the duty of this court to discuss or consider them. So the first question which presents itself for our determination involves a consideration of the nature and effect of the decision in the *Rock Island Case*.

In that case the Union Pacific Railway Company, the successor in interest of the Union Pacific Railroad Company, which made the mortgage of March 1, 1865, had made a contract with the Rock Island Company to grant to it the joint and equal use of its bridge and passenger station at Omaha, and of its railroads from Council Bluffs to Omaha and South Omaha, upon the same terms upon which this decree requires the appellant to grant the use of these facilities to the Mason City Company. The Pacific Railway Company refused to perform this agreement, and the Rock Island Company brought a suit in equity to compel its performance. The chief defense which the Pacific Company presented was that the making of the contract was beyond its corporate powers. The counsel for the Rock Island Company answered that the powers of the Pacific Company were ample to permit it to enter upon and to execute the agreement between them (1) because the authority so to do was one of those incidental powers necessary to the full and convenient exercise of the authority to construct and operate a railroad, which had been expressly granted to it by its charter, and (2) because the act of July 25, 1866, c. 246, 14 Stat. 244, and the act of February 24, 1871, c. 67, 16 Stat. 430, relating to the Omaha Bridge, had expressly granted this authority to it. The Supreme Court considered and discussed at length, in the order in which they have been stated, each of the reasons which had been urged by counsel for the Rock Island Company for the existence of this corporate power. At the close of the discussion of the first reason, that court said:

"We think that it would be carrying the doctrine of *ultra vires* much too far to deny absolutely the competency of a railroad company, being a public highway, whose use is common to all citizens, to contract to give another running rights over its tracks without express statutory authority; and that, under proper circumstances, such a contract may well be held within its implied powers. In *Lake Superior Railway Co. v. United States*, 93 U. S. 442 [23 L. Ed. 965], Mr. Justice Bradley adverts to and comments on the fact that, in England and in this country, railroads when first constructed were by the legislatures and the people regarded and treated as public highways for the use of all who had occasion to run their vehicles thereon; and this is certainly so far true in modern acceptation that, being for the common use of the public, their owners are ordinarily competent to make contracts which will subserve such use. But the determination of the existence of the power to grant running rights in this instance does not rest on these considerations alone. For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and

trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included."

The court then proceeded to discuss the acts of Congress relating to the Omaha Bridge of the Pacific Company, and at the conclusion of that discussion held that it was within the corporate powers of that company to make the contract with the Rock Island Company which was in issue in that case. *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 585, 589, 16 Sup. Ct. 1173, 41 L. Ed. 265. In this opinion the Supreme Court clearly declared that the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river imposed upon the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and trains over the bridge and over the tracks between Council Bluffs, Omaha, and South Omaha. Unless the appellant has escaped the imposition of this duty because it holds the bridge and tracks under the mortgage of March 1, 1865, and not by virtue of a conveyance from the mortgagor or its grantee made subsequent to the Omaha Bridge act of February 24, 1871, c. 67, 16 Stat. 430, a question which will be subsequently considered, it owes the same duty to the Mason City Company now that the Pacific Railway Company owed to the Rock Island Company in 1890 before the contract between them was made, because the Mason City Company is practically in the same situation and has the same need of the use of these transportation facilities to-day that the Rock Island Company occupied and had at that time. The conclusion necessarily follows that the two reasons for the reversal of the decree below which are stated at the opening of this opinion cannot be sustained or considered by this court, unless it is at liberty to disregard the declaration of the opinion of the Supreme Court upon the very question they present, which that court so clearly announced in the Rock Island Case. May this court lawfully do so?

Counsel for the appellant argue, with great ability, ingenuity, and force, that the decision of this question was not necessary to the determination of the main issue presented in the Rock Island Case; that the real question in that case was the power of the Pacific Company to make the contract there under consideration, and not its duty to grant the joint use of its transportation facilities to other railroad companies. They insist that all that was said upon the subject of its duty to the Rock Island Company was the mere obiter dictum of Mr. Chief Justice Fuller, who delivered the opinion. They recite again and rely upon the oft-quoted words of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257, that "it is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is

seldom completely investigated"—and they insist that this court is not bound by the expression of opinion upon this question in the Rock Island Case, and that it should disregard it and consider the issue as a new question.

It is true that the power to grant the joint use of its transportation facilities at Council Bluffs, Omaha, and South Omaha might exist in the Pacific Company without the duty to grant them. But it is also true that the duty could not exist without the power. If the duty existed, it was imposed by the Congress, which had the authority to grant the power, and the imposition of the duty necessarily carried with it the power to discharge that duty. The opinion of the Supreme Court upon the second reason assigned by counsel for the Rock Island Company for the existence in the Pacific Company of the power to make the contract between the companies, when analyzed and stated in syllogistic form, reads in this way: The Congress of the United States, by its acts relating to the bridge over the Missouri river, imposed upon the Pacific Company the duty of permitting the Rock Island Company to use the bridge and the other transportation facilities of the Pacific Company between Council Bluffs, Omaha, and South Omaha. The imposition of this duty necessarily carried with it the grant of the power to discharge it. Therefore the Pacific Company had the power to make the contract which granted this permission. Now, how can the position be successfully maintained that the decision of the question involved in the major premise of this syllogism was beyond the case under the consideration of the court, or unnecessary to its decision, when a determination that no such duty was imposed would have been fatal to the argument, and would necessarily have resulted in the conclusion that no power to make the contract was granted by the acts of Congress relating to the Omaha Bridge? No satisfactory answer to this question has been made, and the conclusion is inevitable that the consideration and decision of the question whether or not it was the duty of the Pacific Company under the acts of Congress relative to the Omaha Bridge to permit the Rock Island Company to use the transportation facilities in question was necessary to and determinative of the decision that the Pacific Company had the power under those acts to grant to the Rock Island Company the permission to use them.

It is, however, contended that it was unnecessary to the determination of the ultimate question before it for the court to decide the latter question at all; that it was unnecessary for it to determine whether or not the Pacific Company had the corporate power to make the contract under the acts relating to the Omaha Bridge, because it had already decided in the earlier part of its opinion, and before it reached the discussion and decision of this question, that the Pacific Company had this power under its general grant of authority to construct and operate railroads. It is contended that because the court based its decision of the ultimate question upon its decisions of these two questions of law, each of which was debated, discussed, and deliberately decided, and the decision of either one of which furnished ample ground to sustain the ultimate conclusion, the decision of one of these preliminary questions was unnecessary, and

all that was said about it was obiter dictum. This argument, however, proves too much. If it establishes anything, it proves that, in every case in which a court places its adjudication of the ultimate issue of law upon its decisions of two or more legal questions, the decision of either of which is sufficient to sustain its adjudication, it decides nothing; that each of its preliminary decisions is unnecessary because the other or the others are sufficient to sustain the adjudication without it, and hence that all of them in turn may be held to be obiter dicta. Such is not the law. Where the conclusion of the court may be sustained by decisions of two or more questions of law that are fairly presented for its determination, the province and duty of the court which prepares the opinion and renders the decision is to determine whether it will rest its conclusion upon one or more of these legal issues, and where it places its ultimate adjudication upon two or more propositions of law which it properly discusses and decides, either one of which is sufficient to sustain its conclusion, each decision of each of the propositions is within the limits of the case presented to it, and is a conclusive and binding adjudication of the court. The decisions of all the legal propositions upon which the court places its adjudication of the ultimate legal question are pertinent and logically lead alike to the final conclusion, and they are alike decisive of the questions which they determine. *Railroad Cos. v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327; *Buchner v. Chicago, Milwaukee & N. W. Ry. Co.*, 60 Wis. 264, 270, 273, 19 N. W. 56; *Alexander v. Worthington*, 5 Md. 471, 481; *Jones v. Habersham*, 107 U. S. 174, 179, 2 Sup. Ct. 336, 27 L. Ed. 401.

Concede that the decision of the Supreme Court, that the power of the Pacific Company to make the contract with the Rock Island Company might be implied from the general grant of power to construct and operate its railroads, was ample to support its ultimate conclusion, and that it was unnecessary for it to decide that the duty was imposed upon that company, and that the power was granted to it so to do by the acts relating to the Omaha Bridge; yet it is equally true that the decision of the latter question was also sufficient to sustain its ultimate determination, and that the former decision was equally unnecessary to that conclusion. Yet each of these two questions was debated at the bar of the Supreme Court, each of them was pertinent to the legal issue which that court was compelled to decide, each of them was discussed and decided by that court, and was one of the logical steps to the determination of the ultimate legal issue which it was required to decide, and it placed its determination of that issue upon its decision of both of these questions, and upon its decision of one as much as upon its determination of the other. That court necessarily decided, when it approved and delivered its opinion—and that decision is not open to review or criticism here—that the discussion and decision of each of these two questions was within the case before it, and essential to the determination of the ultimate issue it was considering. If it had not so decided, it would not have discussed with equal care and labor, and have decided with equal clearness and certainty, each of these issues of law. It did not disregard or discard one of these questions and

place its decision upon a determination of the other, and an inferior court cannot now lawfully do so, because it cannot know upon which proposition the Supreme Court would prefer to rest its conclusion, if it were compelled to choose between them. The result is that the discussion and determination of each of these two questions must be considered within the limits of the case, pertinent and essential to the determination of the ultimate issue of law presented to the Supreme Court. It necessarily follows, as a corollary to this conclusion, that the discussion and decision of every legal question pertinent and essential to the determination of either of the two questions to which reference has been made was within the case before the court, and the determination of it became a binding and conclusive adjudication of the question in all the courts of the nation. The decision that, under the acts of Congress relating to the Omaha Bridge, the duty was imposed upon the Pacific Company to grant the use of its transportation facilities between Council Bluffs, Omaha, and South Omaha to the Rock Island Company, was the major premise of the argument, and was indispensable to the decision of the Supreme Court that under those acts the corporate power to make the contract with the Rock Island Company was granted to the Pacific Company, and that adjudication is therefore as binding and conclusive upon this and upon all inferior courts as the decision by that court of any other pertinent legal question properly presented to it for determination. The considerations to which reference has now been made have forced our minds irresistibly to the conclusion that the question whether or not the Pacific Railroad acts relating to the Omaha Bridge imposed upon the Union Pacific Railway Company the duty to grant to the Rock Island Company and to other companies, like the respondent, which are similarly situated, the joint and equal use of its transportation facilities described in the decree below, not only between Council Bluffs and Omaha, but also between Omaha and South Omaha, has been conclusively determined by the decision of the Supreme Court in the Rock Island Case, and that it is not open to our consideration or decision. The clear declaration of the opinion of the Supreme Court upon this question in the Rock Island Case does not appear to us to be the mere obiter dictum of the Chief Justice, who wrote it, and, even if we are in error in this conclusion, the declaration of that fact and the reversal of the decision there expressed will come with much better grace from the court which delivered the opinion, to which this case is removable by appeal, than from an inferior court, which ought not to presume, even when the answer to the question is doubtful, that the court whose decisions advise and control its determinations has unnecessarily or unadvisedly determined a question which was not lawfully presented for its consideration.

The conclusion at which we have now arrived renders the consideration of the questions relative to the Saunders deed and the tripartite agreement under which the Mason City Company claims the right to the use of the bridge, station, and tracks in question unnecessary to a decision of this case, and they will neither be stated nor decided.

Counsel for the appellant insist, however, that even if the duty was imposed upon the mortgagor company, or upon its successor in interest, the Union Pacific Railway Company, by the act of February 24, 1871, c. 67, 16 Stat. 430, to permit other railroad companies to enjoy the joint use of its bridge and transportation facilities at and near the city of Omaha, no such duty was ever fastened upon the appellant, because it is the purchaser of this property at the foreclosure sale of it under the mortgage of March 1, 1865, and it takes the title to it in the condition in which it was at the time the mortgage was given, and free from the burden placed upon it by the act of 1871. But the mortgagee and the purchaser under the mortgage took their lien upon and title to this property subject to the terms and conditions of the grant of the franchise to the mortgagor to construct and operate the Pacific Railroads contained in the acts of July 1, 1862, c. 120, 12 Stat. 489, and July 2, 1864, c. 216, 13 Stat. 356, 362. One of the conditions of this grant was that Congress might at any time, "to promote the public interest and welfare, * * * having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act." 12 Stat. 489, 497, § 18; 13 Stat. 356, 365, § 22. The act of February 24, 1871, c. 67, 16 Stat. 430, which imposed the duty to permit other railroad companies to use the bridge, station, and tracks, was an addition by Congress to the original grant of the franchise to the Union Pacific Railroad Company. It added to the authority given by that grant the power to issue bonds to the amount of \$2,700,000 for the purpose of raising the necessary funds to construct the bridge and its approaches, and the authority to mortgage this property to secure the payment of the bonds. It added to the conditions and burdens under which the property acquired under the original franchise might be held and operated the condition that permission should be given to other railroad companies to use the bridge, its approaches and appurtenances, upon payment of reasonable compensation therefor, and that Congress should at all times have the right to regulate the bridge and the rates for the transportation over it of freight and passengers. The reservation of a power to add to, alter, amend, or repeal a charter authorizes the proper legislative body to make any addition, alteration, or amendment which does not substantially impair vested rights or directly impede the accomplishment of the purpose of the grant, and which the legislative body deems proper to secure the best interests of the public. *Sinking-Fund Cases*, 99 U. S. 700, 720, 721, 25 L. Ed. 496; *New York & N. E. Railroad Co. v. Bristol*, 151 U. S. 556, 567, 14 Sup. Ct. 437, 38 L. Ed. 269. The mortgagee and the purchaser under the foreclosure of the mortgage of the property of a corporation held under a charter subject to a reservation of the power of addition or amendment take their lien and interest in the property subject to the right of the proper legislative body to exercise its power to condition the title and use of the property, as long as it is held by the mortgagor, to the same extent as if no mortgage had ever been made. The mortgagor cannot convey, nor can the mortgagee acquire, as against the grantor of the franchise and its beneficiaries, more than the mortgagor has

to give. Neither the mortgagee nor the purchaser at a foreclosure sale under him can acquire, as against the government and its beneficiaries, vested rights in the face of such a reservation of the power of amendment properly exercised before the foreclosure. *Chicago, Burlington & Quincy R. Co. v. Iowa*, 94 U. S. 155, 162, 24 L. Ed. 94. The imposition by the act of 1871 of the duty to permit other railroad companies to enjoy the joint use of the bridge, the station, and the tracks, which constituted a part of the terminal facilities of the Pacific Company at the three cities, upon payment of reasonable compensation therefor, impaired no vested right of the railroad company, or of its first mortgage bondholders, so long as the discharge of this duty did not substantially interfere with the present or prospective use of these facilities by the holder of the Union Pacific Railroad, or with the discharge by it of the duties which that company owed to the government and to the public under its franchise. *Tomlinson v. Jessup*, 15 Wall. 454, 459, 21 L. Ed. 204; *Miller v. The State*, 15 Wall. 478, 498, 21 L. Ed. 98; *Railroad Co. v. Maine*, 96 U. S. 510, 24 L. Ed. 836; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 656, 16 Sup. Ct. 705, 40 L. Ed. 838. In *Tomlinson v. Jessup*, Mr. Justice Field, speaking for the Supreme Court of the power to amend reserved in a charter, said: "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived directly from the state." The old Union Pacific Railroad Company, which made the mortgage upon which the appellant relies, acquired its right of existence, and its right to acquire, hold, and use these terminal facilities, from the acts of 1862 and 1864, which contained the reservation which we have recited, and no one could acquire from that corporation any right to this property which was not conditioned by it and by the subsequent exercise of the reserved power by the act of 1871. The appellant bought this property subject to this condition and burden. The joint use of it which the decree below requires it to allow to the Mason City Company does not deprive it of that use of its facilities which is necessary to the handling of its own engines, cars, and trains, the conduct of its own business, and the discharge of its corporate duties to the government and to the public. Neither the imposition of the duty, nor the discharge of that duty which the decree requires, impairs any vested right of the appellant or of its predecessors in interest. Both the imposition of the duty and the discharge of it fall far within the power reserved to the Congress in the original grant, and within the provisions of the act of 1871 as that act has been construed by the Supreme Court in the *Rock Island Case*, and all the rights of the appellant were acquired subject to and with notice both of the duty that had been imposed before its purchase and of the effect which the discharge of that duty would have upon the property and its use. There is no escape for the appellant from the discharge of this duty upon the ground that under the foreclosure of the first mortgage it takes the title which the Union Pacific Railroad Company had on March 1, 1865, free from the duty imposed by the act of 1871, because that title was subject, when the mortgage was made, to the

reserved right of the Congress to condition the use and enjoyment of the property here in question, with the discharge of the duty imposed upon its owner by the act of 1871, and by the decree of the Circuit Court for the District of Nebraska which it here challenges.

The next contention of counsel for the appellant is that the decree should be reversed because the evidence discloses no necessity for the Mason City Company to use the transportation facilities in question, and no probability of irreparable injury to it from the refusal of its use of them. It is said that there is another railroad bridge across the Missouri river at Omaha, owned and operated by another corporation; that the Mason City Company can obtain, by agreement with that corporation, the use of facilities for the transfer of its engines, trains, and business from Council Bluffs to the railroads entering Omaha and South Omaha from the South and West as serviceable to it as that provided by the decree; and that, if it does not desire to obtain the use of a bridge and tracks in this way, it can construct a new bridge across the river and new railroads between the three cities. The latter suggestion is unworthy of serious consideration. It is undoubtedly possible, but it is neither practicable nor advisable, either in the interest of the appellee or in the interest of the public whom it serves, that that company should invest the large amount of money that would be required to construct another bridge and to purchase a right of way through the city of Omaha, and that it should consequently impose upon the traffic of the country the tax that would be necessary to pay it a fair income upon such an investment.

The allegation that the Mason City Company can, by contract with the owner of the other bridge, secure the use of transportation facilities as serviceable to it as the use of those secured by the decree in this case, is denied by its counsel, and the proof does not satisfactorily support the averment. But suppose that this allegation were true; would that fact be a conclusive defense to the claim of the appellee that the Pacific Company shall discharge the duty which it owes to it under the act of 1871? A. agrees to convey to B. a lot in a city for a certain price. Is it any answer to B.'s bill for specific performance of the agreement that he can obtain another lot of equal value and equally useful to him from C. for the same price, and that consequently no irreparable injury will result to him from the refusal of A. to perform his contract? The state grants a franchise to a corporation to operate a railroad upon the condition that the grantee shall transport the goods of all shippers upon the same terms. Is it any answer to a bill to compel the railroad company to discharge this duty to a shipper that the latter can procure the transportation of his goods to their destination by another railroad company upon the terms he seeks, and that the refusal of the first company to discharge its duty to him will therefore inflict no irreparable loss upon him? The appellant owes the Mason City Company the duty of permitting it to enjoy the joint use of its bridge, station, and tracks for reasonable compensation. The proof is pleary that the appellee needs this use to bear its traffic from Council Bluffs to the railroads entering Omaha and South Omaha from the

West and South, and that the refusal of it must entail upon it substantial loss and damage. It is apparent that this injury is in its nature incapable of computation and insusceptible of proof, so that an action at law for damages could not afford adequate compensation for it. It is evident that the public interest, the interest of shippers, producers, and consumers alike, will be served, by the use of this property by the Mason City Company, by the increase of competition which naturally results from the admission of an independent line of railroad into great cities. The existence of the duty, the need of its performance on the part of the party to whom it is due, and the certainty of substantial and incalculable injury to it from a refusal of the party which owes it, furnish substantial and ample grounds to invoke the favorable action of the chancellor. The great purpose of the imposition upon the Pacific Company of the duty of permitting other railroad companies to use its bridge, approaches, and appurtenances by the act of 1871 was to provide a ready and facile means for the connection of the railroads entering Council Bluffs from the East with those entering Omaha and South Omaha from the South and West. The Mason City Company enters Council Bluffs from the East. It needs and demands the connection which the act of 1871 provided for it. A refusal of this connection must entail upon it substantial and incalculable injury. The decree compels the connection, enforces the discharge of the duty which the Pacific Company owes to the appellee, and thus accomplishes the chief object of the act of Congress which imposed the duty. This decree ought not to be reversed either because the appellee could procure its connection with Southern and Western railroads by the use of another bridge or by the construction of a new bridge, nor because, although the injury to the appellee from a refusal to compel the discharge of the duty would be great and incapable of calculation or proof, it would not be impossible of satisfaction if its amount could be ascertained.

Finally, it is contended that the decree should be reversed because the Mason City Company has no corporate power to acquire or hold any interest in, or use of the property of, the Pacific Company in the state of Nebraska. The Mason City Company is a corporation of the state of Iowa. On January 7, 1903, it accepted by a proper resolution of its board of directors, and on January 13, 1903, it filed its articles of incorporation with the Secretary of the State of Nebraska, and complied with the terms of the act of the Legislature of that state approved March 19, 1889, p. 407, c. 42, entitled "An act to enable foreign corporations to become domestic corporations of this state." Comp. St. Neb. 1901, c. 16, § 215. It thereby acquired the right to hold and use any interest in property in the state of Nebraska which the laws of Iowa and its articles of incorporation authorized it to acquire or use. The statutes of Iowa provide that any such corporation organized for the purpose of constructing a railway from a point within that state may construct or extend the same into or through another state under such regulations as may be prescribed by the laws of the latter state. St. Iowa 1897, § 2038.

The articles of incorporation of the company provide that "the object of said corporation is to construct, maintain and operate a railroad from Mason City in the county of Cerro Gordo to Ft. Dodge in the county of Webster in said state, thence to Lehigh in said county of Webster and thence from a point on its line at or near said Lehigh in a southwesterly direction to the city of Council Bluffs in the county of Pottawattamie in said state of Iowa with such lateral branches from any point on its said line and such extensions beyond each and every of said points, as the board of directors of said corporation may determine upon and designate and the law permit." On October 28, 1902, the officers of the company were authorized and directed, by a proper resolution of its board of directors, to negotiate for, to demand, and to enforce by this or other suits its demand for the use of the bridge, of the station, and of the transportation facilities of the appellant which has been awarded by the decree below.

The argument in support of the proposition that this company has no corporate power to acquire or enjoy the use of these transportation facilities of the Pacific Company in the state of Nebraska is this: The charter of a corporation is the measure of its powers; the enumeration of the powers there contained is the exclusion of all others. The power to acquire and enjoy the use of transportation facilities or of property in the state of Nebraska is not enumerated in the articles of incorporation which constitute the charter of the Mason City Company. Therefore that company has no such corporate power. The major premise is conceded. The minor premise and the conclusion do not appear to be sustained by the facts. The statutes of Iowa provided, as we have seen, that this corporation, and any other corporation organized for the purpose of constructing a railroad from a point within that state, might build or extend the same into or through any other state under such regulations as the laws of that state might prescribe. This company complied with the regulations which the state of Nebraska prescribed to enable it to construct or extend, and to acquire and hold, the necessary property to enable it to operate its railroad in and through that state. Its articles of incorporation empowered it to build and operate its railroad from Ft. Dodge to Council Bluffs, with "such extensions beyond each and every of said points as the board of directors of said corporation may determine upon and designate and the law permit." The acquisition of the joint and equal use of the bridge over the Missouri river, of the station at Omaha, and of the railroads of the Pacific Company between the three cities was in practical and in legal effect an extension of the railroad of the Mason City Company from Council Bluffs to Omaha and to South Omaha. The laws of Iowa and Nebraska permitted, nay, they authorized, such an extension, upon the single condition that the board of directors should determine upon and designate it. The resolution of the board of October 22, 1902, which empowered and directed the officers of the Mason City Company to demand and enforce its demand for the use of the transportation facilities of the Pacific Company between Council Bluffs and Omaha and South Omaha was a complete com-

pliance with this condition, and the acquisition and enjoyment of that use are not beyond the corporate powers of the appellee.

The result of the whole matter is that, under the opinion of the Supreme Court in *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 586, 16 Sup. Ct. 1173, 41 L. Ed. 265, to the effect that the appellant in that case owed to the Rock Island Company the duty, under the Pacific Railroad acts relating to the Omaha Bridge, to permit it to use the very facilities in question in this case—an opinion which this court, for reasons which have been fully stated, does not feel at liberty to criticise or disregard—there is no escape from the conclusion that the appellee is entitled to the relief granted to it by the decree below. That decree must accordingly be affirmed, and it is so ordered.

HENRY v. LANE.

(Circuit Court of Appeals, Fifth Circuit. February 16, 1904.)

No. 1,284.

1. PRINCIPAL AND AGENT—POWERS OF AGENT—WRITTEN AUTHORITY.

Where an agency is created by a written instrument, the nature and extent of the agent's authority are measured by the terms of such instrument, and he cannot bind his principal beyond their plain import.

2. SAME—POWER OF ATTORNEY TO SELL LAND—LIMITATION AS TO TERMS OF CONTRACT.

A power of attorney given by a landowner to his agent to contract for the sale of a tract of land on terms expressly specified, one provision being that \$30,000 of the purchase price should be covered by three notes of the purchaser for \$10,000 each, bearing 8 per cent. interest from date, secured by vendor's lien and a trust deed on the land, and maturing in one, two, and three years, respectively, did not authorize the agent to enter into a contract by which the purchaser was given the option of paying either or all of such notes at any time, and such a contract did not bind his principal.

3. SAME—RATIFICATION OF AGENT'S CONTRACT—WAIVER BY SPECIFIC OBJECTION.

Defendant gave a power of attorney to his agents authorizing them to contract within 60 days for the sale of certain land on stated terms and conditions. Within the time the agents signed a contract for the sale of the land, no copy of which, however, was sent to defendant. Immediately on the receipt by him of a deed for his signature, and copies of the notes and mortgage to be given by the purchaser, he telegraphed the agents that the purchaser must accept a different deed and a different description of the land, which the purchaser refused to do until after the time when the power of attorney had expired by limitation. *Held*, that such telegram was not a ratification of the contract in all other respects, nor a waiver by defendant of the right to refuse to carry out the same because the notes varied materially in their terms from those required by the power of attorney, it not appearing that defendant had at the time read the notes. Even if considered a waiver, it was on a condition which was not accepted until after the power of the agents to bind defendant had expired.

Appeal from the Circuit Court of the United States for the Southern District of Texas.

¶ 2. See *Principal and Agent*, vol. 40, Cent. Dig. § 290.

In 1901 the appellant was the owner of a tract of land in Wharton county, Tex., originally granted to Napoleon B. Williams, but patented to his heirs March 17, 1856. This tract of land was acquired by appellant in 1874, and, while it was commonly designated as the "Napoleon B. Williams league," it was found in 1898 that, according to the field notes set forth in the patent, it only embraced 4,317 acres of land instead of a full league of 4,428 acres. A resurvey was made early in 1898 for appellant under the direction of Trueheart & Co., of Galveston, Tex., when it was found that by reason of a conflict with an older survey—the Scobey grant—the tract really contained but 4,014, or 414 acres less than a league, and 303 acres less than the field notes accompanying the patent called for. This discrepancy becomes important because of the controversy arising herein relative to the quantity of land authorized and intended to be sold under the power of attorney, wherein the appellant authorized on certain terms the sale of "my Napoleon B. Williams league of land in Wharton county," while the sale alleged to have been made thereunder was for "the league of land in Wharton county, Texas, originally granted to Napoleon Williams." After preliminary correspondence with regard to the sale of the land in question, the appellant executed the following power of attorney:

"I, E. J. Henry, of the City of Princeton, New Jersey, do hereby authorize H. M. Trueheart & Co., of Galveston, Texas, to contract for the sale of my Napoleon B. Williams league of land in Wharton county, Texas, at and for the price of forty thousand five hundred and ninety-eight dollars and eighty cents (\$40,598.80) and upon the additional terms hereinafter prescribed.

"1. Ten thousand five hundred and ninety-eight dollars and eighty cents (\$10,598.80) of said sum to be paid in cash, and thirty thousand dollars (\$30,000) thereof to be paid in three (3) notes for ten thousand dollars (\$10,000) each maturing respectively one (1), two (2) and three (3) years after date thereof, and bearing interest from such date at the rate of eight per centum (8%) per annum, payable annually and containing the usual stipulation for the further payment of ten per cent. (10%) attorney's fees, and reservation of the vendor's lien, and reference to the trust deed lien; all of said notes, principal and interest and exchange, payable at the American Exchange National Bank, New York. The payment of said notes according to their terms to be further secured by trust deed of the purchaser, and by reservation in the deed of conveyance of said land of the vendor's lien and reference to the trust deed.

"2. H. M. Trueheart & Co. are authorized to add to the selling price such amount as will cover the taxes for the year 1901, their own costs, commissions and charges and counsel fee to be paid F. Charles Hume for passing on the papers completing the sale, and cost of such abstracts or examinations of title as may be necessary.

"3. My deed conveying the land by title to be executed, and delivered to the purchaser when said cash payments of ten thousand five hundred and ninety-eight dollars and eighty cents (\$10,598.80) is made to H. M. Trueheart & Co., and said notes and trust deed duly executed, and the latter duly acknowledged, are delivered to them for transmission to me, after their having trust deed promptly recorded.

"4. My said deed to reserve to me, my heirs and assigns, the right and title to all minerals, oil and gas in said land and the right to enter upon said land and operate for the location, development and use thereof.

"5. The fraction of five hundred and ninety-eight dollars and eighty cents (\$598.80) of said first and cash payment of ten thousand five hundred and ninety-eight dollars and eighty cents (\$10,598.80) is to cover and be applied to the following items:

"(a) Paid by me for maps and surveying and other expenses, \$508.80.

"(b) Revenue stamps to be paid by me on my deed conveying the land, \$40.00.

"(c) Balance due by me to my attorney F. Charles Hume, for professional services, \$50.00.

"Provided further that this power of attorney shall be valid and binding for sixty days from the date hereof only.

"In witness whereof I hereunto sign my name this eighteenth day of April, A. D. 1901, at Princeton, State of New Jersey.

Evan J. Henry."

The word "perfect" preceding "title" in the third clause of the said power of attorney, as contained in the original draft, was erased by appellant before signing. This power of attorney was transmitted by mail to Trueheart & Co., at Galveston, accompanied by a letter stating that the purchaser must expect "only a quitclaim deed, meaning thereby a deed of specific warranty." This is the evidence of the appellant, and it is not disputed by any of the parties. This matter is more or less important as it bears upon the intention of the appellant in regard to the title to be conveyed and the knowledge thereof to the agents, Trueheart & Co.

On the 5th day of May, the following agreement was entered into between Trueheart & Co., acting as agents for appellant, Henry, and Jonathan Lane, the appellee herein, to wit:

"\$2,000.

Galveston, Texas, May 5th, 1901.

"I, E. J. Henry, of the State of New York, do hereby acknowledge that I have received from J. Lane, of Houston, Harris County, Texas (\$2,000.00) earnest money to close sale to the said J. Lane of the league of land in Wharton County, Texas, originally granted to Napoleon B. Williams. The said deed to said land shall reserve to said E. J. Henry, and to his heirs and assigns forever, the right and title to all mineral, oil and gas in said land and a right to enter upon said land and operate for location, development and use of said rights, provided that said location, development and use shall not interfere with the use of the surface of said land beyond what is reasonably necessary. Total price to be paid \$43,000.00; terms of payment, cash, including this earnest money, on delivery of deed \$13,000, so that upon the delivery of the deed there shall be paid in addition to the earnest money \$11,000. One note due one year after its date, with interest at 8% per annum, for \$10,000; one note due two years after date, with interest at eight per cent. per annum, for \$10,000; and one note due three years after date thereof with interest at 8% per annum for \$10,000. All of said notes are to be payable at American Exchange National Bank, N. Y. City, and interest on each note payable yearly at said New York bank, and each note to contain a stipulation for 10% attorney's fees in case suit is brought after maturity of said notes for foreclosure. The said notes to be paid in full at any time, at the option of the maker thereof, but not in partial payments. Notes to be secured by vendor's lien reserved in the deed and by deed of trust. All papers and interest to date from ten days after the abstract showing good title to said lands is furnished by seller to buyer. Title to the land to be good or made good within a reasonable time. In case of defect in title, which cannot be cured within a reasonable time, then upon application of buyer this earnest money shall be refunded at the office of said Lane, in Houston, Harris County, Texas. Deed and notes to be delivered and furnished at expense of seller, as well as the abstract and all other things necessary to show good title. Trust deed at expense of buyer. All back taxes, if any, to be paid by seller, and seller to pay pro rata of taxes of 1901 to date of delivery of deed to buyer; buyer to pay taxes of 1901 from date of delivery of deed to him. This sale to be finally closed up within thirty days after delivery of abstract of title showing good title to the buyer, or in default thereof, deed conveying good title having been tendered to buyer, this contract may thereupon, after five days' notice to the buyer, be declared null and void, and this earnest money may then be paid to the seller, which in said case is hereby agreed to be liquidated damages, or said seller may enforce specific performance of this contract in Galveston County at his option, provided he shall promptly elect, in case of forfeiture, which remedy he will adopt and insist upon it. Cash payment to be made and papers to be delivered at the office of H. M. Trueheart & Co., at Galveston, Texas. This contract is not transferable.

"E. J. Henry,

"By his Agents H. M. Trueheart & Co.

"I accept the foregoing contract of sale.

J. Lane."

On May 6, 1901, Trueheart & Co. advised appellant by letter as follows:

"Galveston, Texas, May 6th, 1901.

"E. J. Henry, Esq., Princeton, N. J.—Dear Sir: We have the pleasure of advising you that we have closed the contract of sale of your N. B. Williams

league in Wharton County, in accordance with the written authority given us by you and all approved by your attorney, Maj. Hume. We will prepare deed, &c., and send forward as soon as possible, or rather will have your attorney, Hume, prepare deed, &c.

"Yours truly,
"Dic. H. M. T."

H. M. Trueheart & Co.

But no copy of the alleged agreement was forwarded to or received by the appellant until after the appellant had repudiated the agreement, and after the expiration of the 60-days limit of the power of attorney. On June 11, 1901, Trueheart & Co. forwarded to the appellant letter as follows:

"Galveston, Texas, June 11th, 1901.

"Mr. E. J. Henry, Princeton, N. J.—Dear Sir: Referring to the proposed sale of your N. B. Williams league of land in Wharton County, Texas, to Mr. Jonathan Lane, we hand you herewith drafts of:

"1. Deed from you to Mr. Lane, for the land in question.

"2. Deed of trust from Mr. Lane to you, to secure payment of notes.

"3. Three purchase money notes, for \$10,000.00 each.

"4. Letter from your attorney Maj. F. Chas. Hume, addressed to us, stating that the papers herewith enclosed are in proper form, &c. All of which kindly return to us, after you have executed the deed before a notary public using an official seal. Kindly see that the notary uses the form of certificate as printed on the deed, which is in conformity with the Texas statutes. Upon return of the papers to us we will proceed to close the sale with all despatch.

"Yours very truly,

H. M. Trueheart & Co. G."

This was received by the appellant on June 15th, and, through the deed of conveyance and trust deed and purchase-money notes, was the first specific notification to the appellant of the actual character and terms of the alleged contract of May 6th. The conveyances and notes inclosed were in accordance with the contract, the deed containing a full warranty, and describing the land in accordance with the field notes attached to the original patent.

Immediately on receiving the foregoing papers on June 15th, the appellant forwarded to Trueheart & Co., the following telegraphic message:

"Princeton, N. J., June 15, 1901.

"H. M. Trueheart & Co., Galveston. Papers received sent my son. Purchaser must accept quit-claim deed. And land described as in your survey.

"E. J. Henry."

This telegram was answered by Trueheart & Co. in the following letter:

"Galveston, Texas, June 15th, 1901.

"Mr. E. J. Henry, Princeton, N. J.—Dear Sir: We are greatly surprised at your telegram of even date herewith. We contracted sale of your land, describing it as you described it in your written authority to us, viz., 'The Napoleon B. Williams league of land in Wharton county, Texas,' and in describing it in the deed used the field notes given in the patent, adding the words 'more or less,' and all of which was done, both in drawing the contract of sale and in drawing the deed, after consultation with your attorney, Major Hume, and submitting all of same to him.

"You did not restrict us in such authority to a quit-claim deed, and which, in Texas, is no good, and would be refused by any man of ordinary intelligence.

"We will submit your telegram to the purchaser and advise you of his reply.

"Yours very truly,

H. M. Trueheart & Co. G."

And thereafter, on June 17th, for the first time, Trueheart & Co. forwarded the alleged contract of May 6th, as indicated by letter as follows:

"Galveston, Texas, June 17th, 1901.

"Mr. E. J. Henry, Princeton, N. J.—Dear Sir: Enclosed herewith we hand you copy of the contract of sale, or earnest receipt, between you and Mr. Lane; also a copy of his letter to us of the 16th inst., which explains itself.

"Yours very truly,

H. M. Trueheart & Co. G."

On June 16th the appellee wrote the following letter to Trueheart & Co., which in due course was forwarded to appellant, to wit:

"Houston, Texas, June 16th, 1901.

"Messrs H. M. Trueheart & Co., Galveston, Texas. Gentlemen: Yours of the 15, together with message from Mr. Henry, received. I shall insist on the general warranty clause, and that the deed embrace all the land described and embraced in the patent, or that the price to be paid be reduced accordingly.

"Unless this is done, I shall sue for specific performance of my contract and for damages for breach thereof by Mr. Henry.

"Yours truly,

J. Lane."

The sixty-days limit of the power of attorney to Trueheart & Co. expired June 17, 1901. While the record shows many letters between Messrs Trueheart & Co. and appellee, Lane, and by them to the appellant, relating to the contract of sale, it is not pretended that any further contract was entered into between the parties.

Under this state of facts the appellee instituted suit in the Circuit Court for specific performance, relying upon the power of attorney and the alleged agreement and earnest receipt. The appellant answered the bill, wherein he charged that the contract was void, and of no force and effect against him, for the following reasons: "(1) Because in and by said alleged contract the three notes therein mentioned of \$10,000 each were made payable in full at any time at the option of the complainant, Jonathan Lane, there being no authority for such provision in the said power of attorney, and it being against the interest of this defendant that said complainant should have such privilege, inasmuch as the said promissory notes were to draw interest at the rate of eight per centum from their respective dates—one for the full term of one year, one for the full term of two years, and one for the full term of three years; (2) because in and by said alleged contract it was provided that the title to the lands to be conveyed by this defendant should be good or be made good to the said complainant within a reasonable time, there being no provision in the said power of attorney authorizing the said H. M. Trueheart & Company to make any such covenant on the part of this defendant; (3) because in and by said alleged contract it was provided that the deed of conveyance to be executed by this defendant to the said complainant, and the said three notes to be given by the said complainant to this defendant, and the abstract of title, and all other things necessary to show good title, should be furnished and delivered at the expense of this defendant, there being no authority for such provision in the said power of attorney; (4) because in and by said alleged contract it was further provided that all back taxes imposed upon said lands, and a proportionate part of the taxes for the year 1901, should be paid by this defendant, there being no such provision authorized in and by said power of attorney; (5) because in and by said alleged contract it was provided that this defendant should execute and deliver to said complainant a deed of conveyance for the league of land in Wharton county, Texas, originally granted to Napoleon B. Williams, whereas in and by the said power of attorney the said H. M. Trueheart & Company were only authorized to contract for the sale of lands in Wharton county, Texas, set forth in the survey and maps previously made by the direction of said H. M. Trueheart & Company, and which in and by said power of attorney were described as 'my Napoleon B. Williams league of land in Wharton County, Texas'; (6) because in and by said alleged contract the rights of this defendant as against the complainant in case of the complainant's default or breach of contract were limited in a manner not authorized in and by said power of attorney." And otherwise appellant put at issue all matters charged in the bill.

On final hearing on the evidence in the case and on waivers of alleged rights of the appellee, the court rendered a decree by which it established an entirely different contract from that authorized by the power of attorney, and different from that alleged to have been made between the parties in the so-called agreement and earnest receipt, and then proceeded to decree specific performance of the same.

On this appeal the following are errors assigned:

"(1) Because the alleged contract sought to be enforced was unauthorized by defendant and void for the reason that it varied materially from the power

of attorney, executed by the defendant in providing that the maker of the notes therein provided for should have the right at his option to pay the same at any time.

"(2) Because the alleged contract sought to be enforced was unauthorized by defendant and void because of a material departure from the power of attorney executed by the defendant in requiring that the title should be good, or that the defendant should make it good within a reasonable time.

"(3) Because the alleged contract sought to be enforced was unauthorized by defendant and void for the reason that it varies from the power of attorney executed by defendant in providing for a cash payment of two thousand dollars instead of ten thousand five hundred and ninety-eight dollars and eighty cents, leaving the balance of the first payment to be made in thirty days after delivery of an abstract of title.

"(4) Because the alleged contract sought to be enforced was unauthorized by defendant and void because of a material departure from the power of attorney executed by the defendant in requiring the defendant to show good title to the land instead of merely to convey such title as he had.

"(5) Because the alleged contract sought to be enforced was unauthorized by defendant and void because of a material departure from the power of attorney executed by the defendant in requiring defendant to pay all back taxes, a portion of the taxes for 1901, and the expense of the abstract.

"(6) Because the alleged contract sought to be enforced was unauthorized by defendant and void because of a material departure from the power of attorney executed by the defendant in limiting the rights of the defendant in case of breach of the contract by the complainant.

"(7) Because the alleged contract sought to be enforced was unauthorized by defendant and void because of a material departure from the power of attorney executed by the defendant, in that as construed by complainant and by H. M. Trueheart & Co. it required defendant to convey the land described by and according to the field notes in the patent to the heirs of Napoleon B. Williams, instead of the land described by the field notes prepared by H. M. Trueheart & Co. upon the resurvey made by them.

"(8) Because the alleged contract sought to be enforced was unauthorized by defendant and void because of a material departure from the power of attorney executed by the defendant, in that it sought to bind defendant to execute a deed containing covenants of general warranty.

"(9) Because the alleged contract sought to be enforced was never executed by defendant, nor by any person or persons authorized by him.

"(10) Because the only authority possessed by H. M. Trueheart & Co. to act for defendant was conferred by the power of attorney dated April 18, 1901, and was thereby carefully specified and strictly limited, and the alleged contract sought to be enforced was unauthorized thereby.

"(11) Because the inadequacy of the price, coupled with the other circumstances in evidence, renders it inequitable to compel defendant to convey the land upon the terms stipulated in the alleged contract of sale.

"(12) Because the evidence shows that H. M. Trueheart & Co., who signed the alleged contract as agents for defendant, procured the power of attorney from defendant at the instance of complainant for the purpose of enabling complainant to purchase said land, and shows efforts upon their part to consummate said sale regardless of the interest or wishes of defendant, and under such circumstances it would be inequitable to enforce said alleged contract.

"(13) Because the evidence shows that defendant never intended to convey according to the field notes in the patent, as demanded by complainant, nor to convey with covenants of general warranty, as demanded by complainant, and that, therefore, and in view of the ambiguity of the contract, the minds of the parties never met.

"(14) Because the failure of the minds of the parties to meet the ambiguity of the contract respecting the land to be conveyed, the difference in the situation of the parties, the conduct of the alleged agents, and the inadequacy of the price as shown by the evidence, renders it inequitable to specifically enforce the alleged contract.

"(15) Because the evidence shows that defendant has never owned about three hundred acres of land which it is sought to compel him to convey, and it would be against equity to compel him to convey land which he does not own.

"(16) Because the court in and by said decree requires the making and execution of a contract which neither the complainant nor the defendant ever agreed to make or execute, and which departs from the alleged contract sought to be enforced, and from the bill of complaint with respect to, first, the time in which the deferred payments should be made; second, the right of the maker of the notes, at his option, to pay the same before maturity; third, the quantity and description of the land to be conveyed; fourth, the covenants of warranty in the conveyance of said lands; fifth, the remedy of complainant in case of deficiency in the quantity of said land; sixth, the trustee to be named in the deed of trust required to be given to secure the notes for the deferred payments; seventh, in not reserving the mineral rights in said land to the defendant; and in other particulars.

"(17) Because the complainant was not entitled to any relief against the defendant because upon the pleadings and the evidence a decree should have been entered dismissing the bill of complaint and awarding defendant his costs."

Jas. A. Baker, R. S. Lovett, and W. M. Lanning, for appellant.
H. M. Garwood, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). An inspection of the transcript will show that, while the complainant below sets forth, and asks specific performance of, the agreement of May 5, 1901, as binding upon the appellant, Henry, yet the decree herein appealed from does not conform to the said agreement. The decree commences by holding that the alleged contract ought to be specifically enforced, but then proceeds by changes here and there to make a materially different contract from that alleged, and require the execution of an agreement and trade which no one contends the parties ever made. Some of the particulars in which the decree varies from the alleged contract are as follows:

(1) The contract provides that the notes for the deferred payments shall date "ten days after the abstract showing good title to said land is furnished by seller to buyer." The record shows that the abstract was forwarded to Lane on or about May 9, 1901. It was received by Lane, examined, and forwarded by him to Trueheart & Co. prior to May 15, 1901. By the terms of the contract, therefore, the notes should bear date not later than May 25, 1901. The decree, however, requires the notes to bear even date with the decree, which is April 17, 1903.

(2) The contract expressly reserved to the maker of the notes the right to pay the same at any time at his option, "the said notes to be paid in full at any time at the option of the maker thereof." The decree provides simply that said notes shall be "due and payable respectively in one, two, and three years from their said dates," and there is no clause giving the maker the right to pay them off at any time at his option.

(3) The contract provides that appellant shall convey to Lane "the league of land in Wharton county, Texas, originally granted to Napoleon B. Williams." The decree provides that appellant shall convey to Lane the land described by field notes in the patent to the heirs of Napoleon B. Williams, but further provides that, in the event there shall be a shortage in said league, and the same contains less than 4,428 acres, then the appellant shall not be liable in any

manner therefor, and said Lane shall not be entitled to an abatement of the unpaid purchase price on account of the shortage, and that this provision shall be inserted in the deed.

(4) The decree provides that appellant shall convey "with covenants of special warranty." The contract provides, "Title to the land to be good, or to be made good within a reasonable time," clearly requiring a general warranty of the title.

(5) The decree provides that, if there shall be a shortage in the land, appellee shall not be entitled to any abatement of price on account thereof. Under the contract of May 5th, in case of failure of title to any of the land conveyed, appellee would be entitled to a pro rata abatement of the purchase price.

(6) The contract of May 5th does not name a trustee for the deed of trust given by the appellee to secure the deferred payment of the purchase price, or allow him any commissions. Under such circumstances the trustee should be named and his commissions fixed by agreement, but the decree names F. Charles Hume as trustee for the deed of trust, without reference to the wishes of either of the parties, and allows him 5 per cent. commissions.

(7) The contract expressly provides that the deed to the said land "shall reserve to the said E. J. Henry and to his heirs and assigns, forever, the right and title to all minerals, oil, and gas in said land, and the right to enter upon said land and operate for location, development, and use of said right." But the decree wholly fails to make any provision whatever for reserving said mineral rights to appellant. It is true that on June 21, 1903, the judge of the Circuit Court undertook to make an order curing this omission, but that order was made after the adjournment of the term, the allowance of the appeal, the filing of the bond, and the issuance and service of the citation.

From this it would seem that the decree appealed from should be radically amended, if not entirely reversed.

But underlying the whole matter is the question whether the alleged contract and earnest agreement entered into on May 5, 1901, between the appellee Lane, and Trueheart & Co., as agents for the appellant, was and is a valid existing contract; and that depends upon whether or not the said earnest agreement was authorized by the special power of attorney granted by the appellant on April 18, 1901, giving authority to Trueheart & Co. within 60 days to contract for the sale of certain lands on certain terms therein specified. It is well settled that when an agent acts under special authority conferred by a formal instrument his powers must be ascertained from the instrument itself. The rule is given by Judge Moore in *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611, as follows:

"It is a well-settled general principle that, when an agency is created and conferred by written instrument, the nature and extent of the authority given by it must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases."

In *Skaggs v. Murchison*, 63 Tex. 348, the rule is declared:

"It is so well settled as to be elementary that powers of attorney and similar instruments have to be strictly construed, and that under no circumstances will the principal be bound beyond the plain import of the instrument."

See, also, *Gouldy v. Metcalf*, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912; *Holladay v. Daily*, 19 Wall. 610, 22 L. Ed. 187; *Mechem on Agency*, § 409.

The appellant, by his power of attorney, authorized Trueheart & Co. to contract for the sale of "my Napoleon B. Williams league of land in Wharton county, Texas." There is no doubt that the appellant intended by this description of the land to be sold the Napoleon B. Williams league as reduced and restricted by the then recent survey procured through Trueheart & Co., whereby it clearly appears that the said league contained only 4,014 acres of land, instead of 4,317 acres, as called for by the field notes accompanying the original patent. There is no doubt, either, that Trueheart & Co. fully understood the power of attorney to refer to the league as restricted by the last survey. No other conclusion can be reached from the evidence. There is some evidence in the record tending to show that appellee, Lane, the claimed purchaser, knew all about the surveys; knew that Henry really owned but 4,014 acres; and also knew thereby and from preliminary negotiations of appellant Henry's intention to sell only the lands he owned. The alleged contract provides for sale by the appellant to appellee, Lane, of the league of land in Wharton county originally granted to Napoleon B. Williams, which would call for 4,317 acres following the original field notes, and makes appellant liable for any deficiency.

The power of attorney, as originally drafted, provided for appellant to give a deed by perfect title. Before executing the instrument, however, the word "perfect" was stricken out, so that the power of attorney provided for "my deed conveying the land by title to be executed." There is no doubt whatever that by this provision the appellant intended only to give a quitclaim deed with special warranty. He so notified the agents, Trueheart & Co., in a letter transmitting the power of attorney. There is evidence in the record tending to show that the appellee, Lane, knew of this intention to restrict the title given; yet the contract as claimed provides that the title to the land shall be good, practically calling for a deed with full warranties. The record abounds with evidence on these propositions, and counsel in their briefs have threshed it out in the light of adjudged cases and on principle; but we do not find it necessary to rule definitely on either; because we think that there is an unquestioned variance between the power of attorney and the alleged contract which requires us to hold that the appellant Henry was not bound by the agreement of May 5, 1901. The alleged contract is void because of a material departure from the power of attorney in providing that the notes might be paid at any time, at the option of the maker, whereas the power of attorney stipulated that they should mature in one, two, and three years after date. The power of attorney left no discretion whatever to the agents respecting the terms of sale. It stipulated absolutely for \$10,598.80 in cash, and for three notes of \$10,000 each, maturing in one, two, and three years after date, and bearing interest from date at the rate of 8 per cent. per annum, payable annually. It was not a general, but a special, power and agency that was conferred and created. Appellee knew the charac-

ter of the agency and of the particular limitations upon the power conferred. He would not even negotiate until the agent should obtain and produce authority in writing as suggested and demanded by him. When the power of attorney was executed and sent to the agents, the latter satisfied appellee of its existence, and furnished him a copy of it. The power of attorney was the sole measure of the agents' authority. It specified in detail the terms upon which appellant was willing to sell, and, whether wise or unwise, beneficial or prejudicial, they were the terms which appellant chose to name; and Trueheart & Co. and appellee were powerless to change them. It was appellant's land. As the owner he had the right to specify the terms upon which he would sell his own property. No matter how absurd or unreasonable his terms might be, it was, in the very nature of things, his right, as owner of the property, to fix his own terms, and Lane had either to assent thereto or decline to buy.

As a matter of fact, the departure which Lane and Trueheart & Co. made in stipulating that the notes for the deferred payments might be paid at any time, at the option of the maker, was materially and substantially to the detriment of appellant. Eight per cent. is a high rate of interest in these days, even in Texas. Five per cent., no doubt, would have been considered a good rate in New Jersey. These notes afforded appellant a safe investment for a large sum of money for a considerable period. Notes, \$10,000 for one year, \$10,000 for two years, and \$10,000 for three years, at 8 per cent. interest, with first-class landed security, and payable in bank in New York, were and are worth above par. It is evident, therefore, that, even if the question depended upon the materiality of the variance, the departure made by Trueheart & Co. and Lane from the power conferred and from the instructions given by appellant was material, and was substantially detrimental to the interests of appellant.

It has long been settled that the legal effect of an instrument payable on a date certain is different from that of an instrument payable on or before that date. *Kikindal v. Mitchell*, 2 McLean, 402, 14 Fed. Cas. 468, No. 7,763. In that case there was no express provision that the obligor should have the right to pay the note, at his option at any time before the date, but the court held that the words "on or before" gave the obligor that right, and that this was a right which, without these words, he did not have, and, further, that this made a material difference. In the instant case it is not left to be inferred from the use of the words "on or before," but it is expressly stipulated in the alleged contract that "the said notes to be paid in full at any time, at the option of the maker thereof." The power of attorney, on the other hand, provides that the notes shall mature, respectively, one, two, and three years after date, and makes no provision for the payment of the notes before their maturity. It is clear, then, that the alleged contract gave the maker of the notes a right which was not authorized by the power of attorney.

In *Everman v. Herndon*, 71 Miss. 827, 15 South. 135, which was a bill in chancery for specific performance of an alleged contract to sell land, the Supreme Court of Mississippi said:

"Looking to the only authority given by Herndon to Cross Bros. to make sale of the land, it is found to be limited to that of accepting the \$4,000 propo-

sition. * * * This firm was specially authorized to do and perform one particular act, viz., to accept a definite proposition which had before then been submitted to Herndon. Nothing is better settled in the law than that one dealing with an agent expressly appointed to do a particular act must inform himself of the extent of authority conferred, and must see to it that the act done is within the authority. * * * They (Cross Bros.) were authorized to accept the \$4,000 proposition, which was to pay that sum half in cash and the balance in one and two years, with interest at 8 per cent. per annum from date. They entered into an agreement under which the whole purchase price was payable in cash, which may have been a better or worse contract than that they were authorized to make, determinable by circumstances, but which was certainly not the contract they were directed and empowered to make. In legal effect, here was an offer by Herndon to sell his land at a fixed price, half in cash and the remainder in one and two years, with interest at 8 per cent., and a counter proposition by Everman & Blanton to buy at the price named, payable in cash. There is not a legal identity between the contract which Cross Bros. were authorized to make and the one they attempted to make, and their principal, Herndon, was not bound."

Batty v. Carswell, 2 Johns. 48, 1 Am. Leading Cas. 653; Schultz v. Griffin, 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825.

The complainants in that case offered either to pay for the land all in cash, or to pay one-half cash and the remainder at one and two years, with interest at 8 per cent. per annum. Counsel contended that, as the terms were not expressly stipulated in the contract, nor signed by Cross Bros., it should be construed, under all the circumstances, to mean that the payments were to be as specified by Herndon, one-half cash, and the remainder in one and two years, with 8 per cent. interest. But the court said:

"This would be to make a contract by construction different from that actually entered into by the parties. Clearly, under the written agreement signed by Cross Bros., the complainants would have been entitled to make instant payment of all the purchase price of the land. * * * Looking through the whole record, we find that the defendant, Herndon, agreed to sell his land for \$5 per acre, one-half in cash and the balance in one and two years, with interest at 8 per cent. * * * Cross Bros. were authorized by Herndon to make sale on the terms of his offer. They in fact made an agreement for him to sell on different terms from complainant's offer, which act on their part was never ratified by Herndon. On these facts the law is with the defendant."

In Monson v. Kill, 144 Ill. 248, 33 N. E. 43, Anton Kill gave Monson authority to sell an acre lot of ground in Evanston, Ill., for \$12,000 net. "Whatever you get over and above this amount is your commission. Terms, \$6,000 cash, balance in one, two, and three years, with 6 per cent. interest." Monson, in the name of Kill, entered into a contract with one Beveridge, by which Beveridge agreed to purchase for the sum of \$12,000. The contract recited that the purchaser had paid \$500 purchase money to be applied on the purchase when consummated, and agreed to pay within 90 days after the title had been examined and found good the further sum of \$5,500, at the office of Monson, provided a good and sufficient warranty deed, etc., should be then ready for delivery. It further provided that the balance should be paid in three equal installments of \$2,000, due, respectively, on or before one, two, and three years after the date of the contract. The contract was placed of record, and Kill filed a bill in equity to cancel the contract. A decree was rendered in accordance with the prayer of the bill, and on appeal the Supreme

Court of Illinois affirmed the decree canceling the contract, as unauthorized on the part of the agent, and said:

"If it be conceded—which is unnecessary to determine—that Monson had authority to execute the contract with Beveridge, and to extend the time ten days for the examination of the abstract by the purchaser, there was still a clear departure from the power and authority given. The authority to sell for one-half cash in hand is in no sense complied with by a sale on ninety days' time. The authority was special and limited, and the purchaser was required to know that the authority must be strictly construed. Beveridge took from Monson a contract in writing, and, in the absence of proof to the contrary, will be presumed to have known of Monson's authority to sell. There is nothing in the case tending to show that Beveridge was led to deal with Monson as a general agent. * * * Again, the authority to sell the land and to make the balance over and above the cash payment payable in one, two, and three years, did not authorize the making of the contract that such payments might be made on or before said time, at the option of the purchaser. This precise question arose in *Siebold v. Davis et al.*, 67 Iowa, 560 [25 N. W. 778]. * * * Appellee had the right to prescribe the terms upon which his land should be sold, and, having done so in express terms, the stipulation must be substantially followed."

Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778, referred to by the court in *Monson v. Kill*, was an action in chancery to enforce the specific performance of a contract for the sale and conveyance of land. The specific performance was refused by the court below, and the judgment was affirmed by the Supreme Court of Iowa. The authority to sell in that case was conferred by letter from Pierce, the owner of the land, to Ostrom and Messinger, the agents who made the contract. The plaintiff offered \$2,000 for the land—\$500 cash and the balance in five equal payments. The agents communicated this offer to Pierce, and Pierce, in a letter, replied: "I will only make three notes of \$500 each for balance. They can have all the time they want, say three, four, and five years; but I won't make little bits of payments out of \$1,500." The agents then executed in favor of Siebold a receipt for \$500 as the first payment on the land reciting that it was sold for \$2,000, "to be paid as follows, to wit, \$500 in hand paid, the receipt whereof is hereby acknowledged, and the balance of the two thousand dollars in three equal payments; the first deferred payment on or before three years from date of deed; all deferred payments to draw interest at 8 per cent. per annum." The Supreme Court held that, because the contract makes the three deferred payments payable on or before three, four, and five years from date, where the seller only authorized them to be made payable three, four, and five years after date, there is such a variance between the authority conferred upon the agent and the contract made by him as to render the contract unenforceable. Upon this ground specific performance was denied.

In the case of *Jackson v. Badger* (Minn.) 26 N. W. 908, that court, without stating the facts of the case, said:

"In respect to the time for the payment of the deferred portion of the purchase price, the contract made by the agent, and upon which this action is brought, was substantially different from the terms of sale dictated by the defendant, and, so far as appears, he was not bound thereby. Making the \$3,000 payable on or before three years was not in accordance with the prescribed condition that it should be payable in three years."

And see *Miller v. Sawbridge* (Minn.) 13 N. W. 671.

The alleged contract is not a separable contract. Plainly, it is one and indivisible, all the terms being interwoven and interdependent. If the agents exceeded their authority in signing the contract on behalf of appellant, then it plainly does not bind him; and, appellant having repudiated it as soon as the papers were presented to him, there is no basis in law or equity for sustaining any suit against him.

There remains to dispose of the question of waiver or ratification. Immediately upon the receipt by the appellant of the proposed conveyances for him to sign in order on his part to complete the sale of the land in question, to wit, on June 15, 1901, the appellant forwarded to the agents, Trueheart & Co., a telegram as follows: "Papers received sent my son. Purchaser must accept quitclaim deed, and land as described in your survey." This telegram was the same day communicated to the appellee, Lane. There is very little, if anything, in this telegram to express acceptance or approval. It indicates that delay was necessary to examine the papers, and declares disapproval with regard to the title to be given and the description of the land. It is reasonably well settled that the principal cannot be held to conclusively approve or ratify the acts of an agent when he is in ignorance of the nature of such acts. At the time this above telegram was sent, the appellant was ignorant of the details and provisions of the agreement which had been made by Trueheart & Co., on his behalf, with reference to the sale of the land. While it cannot be said that its existence had been concealed from him, it is true that, although requesting the same, he had not been furnished with a copy. The general rule is that ratification will not be inferred from any act or declaration of the principal unless he acts with full knowledge of the material facts. See *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246; *Bennecke v. Insurance Co.*, 105 U. S. 360, 26 L. Ed. 990. *Halsey v. Monterio* (Va.) 24 S. E. 258. But, passing this, it is plain on the face of the telegram that, if it was intended as a ratification or waiver, it was only upon two conditions, not embraced in the alleged agreement of May 5, 1901: First, the purchaser must accept a quitclaim deed; and, second, that the description of the land was to be according to the then recent survey superintended by Trueheart & Co. As said above, the telegram of Henry was immediately communicated to appellee, Lane, and he refused to accept either one of the conditions, for on June 17th he wrote a letter to Trueheart & Co., as follows:

"Yours of the 15th inst. together with message from Mr. Henry received. I shall insist on a general warranty clause and that the deed embrace all the land described and embraced in the patent, or that the price to be paid be reduced accordingly. Unless this is done I shall sue for specific performance of my contract, and for damages for breach thereof by Mr. Henry."

This letter was duly forwarded to the appellant, and ended all correspondence and negotiations, so far as the appellant was concerned. All other correspondence between Trueheart & Co. and appellee, Lane, some of which was forwarded to appellant, Henry, but not answered by him, was after the 60-days limit of the power of attorney of April 18, 1901, had expired. Of course, after the power of attorney expired by limitation, the appellant was not in any wise bound by

any declarations of his agents, Trueheart & Co., or by concessions made by the appellee. Many other matters are developed in the evidence, and interestingly discussed in the briefs, but we do not find it necessary to consider them.

For the reasons given, we are satisfied that the appellant was not bound by the agreement and earnest receipt made by Trueheart & Co. with the appellee, Lane, on the 5th of May, 1901, and that the appellee has no right to the enforcement of that agreement.

The decree of the Circuit Court is reversed, with costs, and the cause is remanded, with instructions to make such disposition of moneys paid into court as equity may require, and thereupon dismiss the bill, with costs.

NORTHWEST FIXTURE CO. v. KILBOURNE & CLARK CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1904.)

No. 980.

1. BANKRUPTCY — CLAIMS — CONTRACTS — BREACH — LIQUIDATED DAMAGES — ENFORCEMENT.

A contract for the merger of two corporations provided that defendant company should immediately cease purchasing goods, and as rapidly as possible dispose of all of its present stock to pay off its liabilities and then turn over to claimant its remaining assets, together with its good will and business, receiving in exchange therefor paid-up shares of the capital stock of claimant at par equal to the value of the merchandise so transferred, to be fixed by appraisers, and that in case of default of either party the party in default should pay the other \$10,000 as liquidated damages. Defendant company thereafter became bankrupt before completing a sale of its property under the agreement, and its assets were insufficient to pay its liabilities. Held that, since claimant sustained no actual damages by the bankrupt's breach of its contract, claimant was not entitled to prove the contract damages as a claim against the bankrupt's estate.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

The following are the claim in suit, the report of the referee, and the opinion of the trial court:

"C. A. Kilbourne, being first duly sworn, on oath deposes and says: That he is the treasurer of Kilbourne & Clark Company, a corporation, and files herewith his amended claim as against the Northwest Fixture Company, the above-named bankrupt, leave of court being first had and obtained therefor, and for such amended claim as against the said bankrupt alleges: That at and before the filing of said petition the said Northwest Fixture Company was and is justly and truly indebted to said Kilbourne & Clark Company in the sum of ten thousand (\$10,000.00) dollars. That the consideration of said debt is as follows: That heretofore and at all the times herein mentioned the Northwest Fixture Company was a corporation organized and existing under and by virtue of the laws of the state of Washington, and having its principal place of business in the city of Seattle, in said state. That heretofore, at a special meeting called by the board of directors of the Northwest Fixture Company, duly called for that purpose, at which meeting all of the directors were present except one Mr. Gould, those present at said meeting constituting a quorum of the board of directors, and being the owners of all of the stock of the Northwest Fixture Company except six shares thereof, the said Northwest Fixture Company being capitalized for the sum of ——— dollars, divided into ———

shares of the par value of one hundred dollars each, and said director, Mr. Gould, being the owner of said stock, was fully aware of said proceedings, and thereafter, having ratified all the matters and things done at said meeting, the following resolution was offered at said meeting to the board of directors aforesaid representing all of the stock of the Northwest Fixture Company excepting said six shares, and by the authority of the by-laws of said company said board of directors had full power and management of the business of said Northwest Fixture Company, and power and authority to enter into any agreement or contract which they believed to be for the best interest of said company, which said resolution was as follows:

"Whereas, a proposition has been made this Company by the Kilbourne & Clark Company, with a purpose in view of consolidating the two companies; and whereas, a proposition has been suggested that the consolidation should be brought about pursuant to the following terms and agreements, to wit: Fifty thousand (\$50,000.00) dollars in cash shall be considered as the value of the stock of merchandise of the Kilbourne & Clark Company, and the value of the stock of merchandise of the Northwest Fixture Company shall be fixed by appraisers appointed by agreement, and the business of the new consolidated firm shall be carried on under the name of the Kilbourne & Clark Company, and stock in said company shall be issued to the respective companies or whom they may designate, according to the values herein stated: Now, therefore, it is hereby resolved that the agreement on file and this date proposed and read is hereby accepted and authorized, and the president and secretary of this company are hereby authorized to execute the same and affix the seal of our company to said agreement, which said agreement is dated this 19th day of April, A. D. 1902.

"(Certified true Copy.)

C. J. Purdy, Secty.'

"That in pursuance of said resolution, and being duly authorized, the following memorandum of agreement was made and entered into by and between the said Northwest Fixture Company and the said Kilbourne & Clark Company, which is in the words, letters, and figures following, to wit:

"Memorandum of Agreement, made and entered into this 19th day of April, 1902, by and between the Kilbourne & Clark Company and the Northwest Fixture Company, both corporations duly organized and existing under and by virtue of the laws of the state of Washington, and having their principal place of business in the City of Seattle, King County, Washington:

"Witnesseth: That, whereas, said corporations are now and have been for some time past engaged in the business of selling electrical machinery and supplies:

"And, whereas, it is the intention, desire and purpose of said companies to combine their business by consolidating the same under the firm name of the Kilbourne & Clark Company, which company, if necessary to carry out the plan of consolidation hereinafter mentioned, will increase its present capitalization, which is now one hundred thousand dollars (\$100,000.00);

"And whereas the Northwest Fixture Company is not now in condition to turn over its stock of merchandise to effect said consolidation and is desirous of reducing its stock of merchandise to such a degree that the remaining merchandise of said Northwest Fixture Company shall be free and clear from all incumbrances at the time said stock of merchandise is turned over to the said Kilbourne & Clark Company under the terms of this agreement:

"Now, therefore, it is hereby agreed by the parties hereto as follows:

"That the Northwest Fixture Company shall immediately cease purchasing goods, except as hereinafter specified, and shall at once begin to sell and as rapidly as possible dispose of so much of its present stock of merchandise as will pay off its liabilities, and shall then turn into the Kilbourne & Clark Company the remainder of its stock of merchandise, together with its good will in business, receiving in exchange therefor fully paid up shares of capital stock of the Kilbourne & Clark Company, at par value equal to the value of merchandise to be fixed by appraisers hereinafter referred to.

"In determining the value of said stock of merchandise of the Northwest Fixture Company each party hereto shall appoint one appraiser, and these two appraisers shall appoint a third person to act as referee, and said two

appraisers shall inventory and fix said valuation of merchandise of the Northwest Fixture Company on the basis herein mentioned. In case the two appraisers appointed by the parties hereto cannot agree, the third person appointed by said appraisers shall determine the valuation and his determination shall be final. Said appraisers shall make a full and complete inventory of the merchandise stock of the Northwest Fixture Company at the time said Northwest Fixture Company is ready to turn over the same to the Kilbourne & Clark Company, and shall fix the cash value of the same, and upon the delivery to the Kilbourne & Clark Company, at their place of business, # 815 Second Avenue, in Seattle, together with a bill of sale of the same free from all incumbrances and together with the good will and business of the Northwest Fixture Company, said Kilbourne & Clark Company will deliver to the person or persons designated by the Northwest Fixture Company certificates of stock fully paid and non-assessable of the Kilbourne & Clark Company, amounting in par value to the sum fixed as the value of the Northwest Fixture Company's stock of merchandise as determined by said appraisers.

"It is further agreed between the parties hereto, that each of the parties hereto shall sell goods one to the other to enable each to fill orders that they may receive, charging therefor the present market cost price plus freight at the less than car load lot rate, and an advance of five per cent. thereover. And the Northwest Fixture Company shall not make any purchases of any goods of any kind whatsoever, other than those purchased from the Kilbourne & Clark Company, herein provided.

"It is also agreed that the two companies shall work in harmony from this date on as though the consolidation were already perfected, but is expressly understood that neither party shall be liable for the debts of the other.

"And it is further expressly understood and agreed by and between the parties hereto that the Northwest Fixture Company shall, in the event this agreement being consummated or otherwise, save harmless, the said Kilbourne & Clark Company from any loss, cost, damage or expense by reason of the indebtedness of the Northwest Fixture Company, it being expressly understood and agreed that the Kilbourne & Clark Company does not assume in any way, either directly or indirectly, by this consolidation or agreement, any of the debts or liabilities of the Northwest Fixture Company.

"It is further agreed, that until such time as the said Northwest Fixture Company has sold or disposed of a sufficient amount of its stock of merchandise to liquidate its indebtedness, Mr. E. C. Kilbourne, of Seattle, shall have sole supervision and control of the management of said Northwest Fixture Company, in order that said Northwest Fixture Company may place itself in condition to consummate the consolidation herein agreed to.

"It is further agreed, by and between the parties hereto that for the purpose of this agreement and its consummation the value of the merchandise and stock of the Kilbourne & Clark Company is hereby agreed upon and fixed as the sum of Fifty Thousand (\$50,000.00) Dollars and to be accepted at this value provided said business, merchandise and stock shall be valued at that amount at the time of consolidation, and the value of the stock and merchandise of the Northwest Fixture Company shall be the value fixed by the appraisers thereof, herein referred to.

"And it is further agreed by and between the parties hereto, and said appraisers are to be instructed accordingly, that in making said inventory said appraisers shall stipulate and define in a separate lot all obsolete and unsalable goods as junk, and fix the value of the same as junk or unsalable goods, and the same is to be reserved and left out of the inventory, and a gross value shall be placed upon the same by said appraisers, and the said Kilbourne & Clark Company shall have the privilege of accepting the same or otherwise, as in their judgment may seem best.

"And it is further agreed, that in the event that at the time of the consummation of the consolidation hereafter proposed there shall be any indebtedness owing by the Kilbourne & Clark Company or the Northwest Fixture Company, such indebtedness shall be guaranteed personally by the present stockholders of the respective companies.

"And it is also mutually agreed that any misunderstanding or difference arising between the two companies previous to the final and complete condi-

tion, shall be referred to E. C. Kilbourne, whose decision in which case shall be final.

"It is further expressly understood and agreed that the building and fixtures attached thereto, now occupied by the Northwest Fixture Company, is not to be included in the transfer or considered as contemplated by this agreement or in any manner affected thereby.

"It is further hereby agreed that in the event either party hereto fails to keep this agreement, the party thus in default, their successors and assigns, shall pay to the other party the sum of Ten Thousand Dollars (\$10,000.00) as liquidated damages for the breach thereof.

"In witness whereof, the parties hereto have caused these presents to be subscribed in duplicate, by their respective Presidents and Secretaries, the day and year hereinabove first written.

"[Seal.]

Kilbourne & Clark Company,

"By C. A. Kilbourne, Its President.

"By V. J. Dwyer, Its Secretary.

Northwest Fixture Company,

"By A. L. Kasson, Its President.

"By C. J. Purdy, Its Secretary."

"[Seal.]

"That thereafter a petition for adjudication in bankruptcy was filed by certain creditors of the Northwest Fixture Company, and to said petition the said Northwest Fixture Company filed an answer admitting that the said Northwest Fixture Company was a bankrupt. That the said Northwest Fixture Company has refused, and still refuses, to perform its said contract, and that by the petition asking that the said Northwest Fixture Company be adjudged a bankrupt, and under and by virtue of the adjudication in bankruptcy of the said Northwest Fixture Company, and under and by virtue of all the matters and things which have taken place in the above-entitled cause, it is now impossible for the said Northwest Fixture Company to carry out its said agreement. That under and by virtue of said contract, and by the refusal and inability of the said Northwest Fixture Company to carry out its said contract as aforesaid, the said creditor herein, Kilbourne & Clark Company, has been damaged in the sum of ten thousand (\$10,000.00) dollars, and that said sum of \$10,000.00 under and by virtue of the contract herein set forth has been agreed upon as liquidated damages in case either of the parties should fail to carry out its said agreement; and the said Northwest Fixture Company, by virtue of its failure to carry out the agreement mentioned herein, has become indebted as and for liquidated damages to said Kilbourne & Clark Company in the sum of ten thousand (\$10,000.00) dollars. That no part of said debt has been paid. That there are no offsets or counterclaims to the same; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for the use of said Kilbourne & Clark Company, had or received any manner of security for said debt whatever, nor has any person for or on behalf of said Kilbourne & Clark Company received any note or any evidence of the indebtedness other than the agreement herein above set forth.

"C. A. Kilbourne.

"Subscribed and sworn to before me this 17th day of September, 1902.

"James J. McCafferty,

"Notary Public in and for the State of Washington, residing at Seattle."

"John P. Hoyt, the referee herein, having heretofore made and filed an order disallowing and expunging the amended claim of the Kilbourne & Clark Company filed herein on the 18th day of September, 1902, and the attorneys for the claimant having excepted to making of said order and filed a request that it be certified to the honorable judge of this court for review, in compliance with said request the undersigned does hereby certify and return the said amended claim with the submitted proof thereof, the objections to its allowance, and the motions that it be expunged, filed, and made in reference thereto, together with the said order made upon the hearing of said objections and motions and the proof offered thereat, and for the information of the said judge, the undersigned further certifies that his reasons for holding that said claim was not provable against said bankrupt's estate were briefly stated as follows, to wit: First. That the contract set out in said proof of claim, and upon which the same was founded, was shown

by the proof not to have been so executed as to be binding upon the Northwest Fixture Company, the above-named bankrupt; that in the opinion of said referee the contract was of such a nature that no presumption could be indulged in aid of proof of its proper execution, and for that reason he was of the opinion that upon objections made it devolved upon the claimant to show affirmatively the execution of the contract; that in his opinion not only was this not done, but, on the contrary, it affirmatively appeared that the attempted authorization of the execution of the contract was made when only two of the three acting trustees were present, without any notice to or consultation with the third trustee; that the execution of the contract was never authorized or ratified by the said third director, or any meeting of the trustees or directors of said Northwest Fixture Company nor of its stockholders. Secondly. That the contract in itself was so indefinite, and the amount of property to be transferred by the Northwest Fixture Company so uncertain and indefinite, as to make said contract unenforceable. And, thirdly, that the contract only contemplated the transfer by the Northwest Fixture Company of such property as they might have left after selling enough to pay their debts; and, the proceedings in bankruptcy having shown that there would be no property left after such debts were paid, the claim for failure to transfer property could not be enforced as against the creditors.

"Dated at Seattle, in said district, this 20th day of February, A. D. 1903.

"John P. Hoyt, Referee in Bankruptcy."

"HANFORD, District Judge. I have read the evidence submitted in support of the claim of the Kilbourne & Clark Company, which was disallowed by the referee, and I concur in his findings and conclusions in every particular. The contract sued upon is somewhat peculiar. The apparent object of the parties was to extinguish the Northwest Fixture Company, which could not be done in the manner proposed if any stockholder objected; and it was necessary, therefore, to sustain the validity of the contract, to prove affirmatively that every stockholder did consent, or at least that a full opportunity was given by reasonable notice for every stockholder to protest if he desired to do so. If the contract could be sustained at all as a valid contract, I do not believe that the action of the creditors in instituting bankruptcy proceedings would constitute a breach of the contract without proof that there would have been a surplus of merchandise to have been delivered to the Kilbourne & Clark Company, pursuant to the terms of the contract, after a sufficient amount had been disposed of to pay all of the debts of the Northwest Fixture Company, as provided for in the contract. If in fact the Northwest Fixture Company, at the time of making the contract, did not have a surplus of assets over and above what was necessary to pay its debts, then such a contract entitling the other party to claim liquidated damages cannot be enforced without perpetrating a fraud upon its creditors, because the Kilbourne & Clark Company have not paid anything, nor promised to pay anything except the ascertained value of whatever surplus should be found after payment of the then existing indebtedness of the Northwest Fixture Company. If there was no surplus, there would be no payment, and the Kilbourne & Clark Company could not possibly suffer a pecuniary loss. Therefore the mere promise of an insolvent debtor to pay a sum of money as liquidated damages is a nudum pactum, and to allow the Kilbourne & Clark Company to share in the distribution of the assets, so as to diminish the dividends payable to other creditors, would impose upon them a loss in fulfillment of a promise which an insolvent debtor could not lawfully make. The decision and order of the referee disallowing this claim are hereby confirmed."

Tucker & Hyland and McCafferty & Kane, for appellant.
Peters & Powell, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. In April, 1902, the appellant, Kilbourne & Clark Company, a corporation created under the laws of the

state of Washington, entered into an agreement with the Northwest Fixture Company, a corporation also created under the laws of that state, whereby it was agreed that the latter company should immediately cease purchasing goods and begin to sell and as rapidly as possible dispose of sufficient of its present stock of merchandise to pay off its liabilities, and should then turn over to the appellant the remainder thereof, together with its good will in business, receiving in exchange therefor fully paid-up shares of capital stock of the appellant company at par value equal to the value of the merchandise so transferred, the value whereof was to be fixed by appraisers. The agreement contained the following provision: "It is further agreed that, in the event either party hereto fails to keep its agreement, the party thus in default, their successors and assigns, shall pay to the other party the sum of ten thousand dollars as liquidated damages for the breach thereof." The sale of the property under the agreement referred to was never carried out. About two months after the execution of the agreement an involuntary petition in bankruptcy was filed against the Northwest Fixture Company, and thereupon it was adjudged a bankrupt. The appellant filed its claim against the bankrupt's estate for the sum of \$10,000, claiming that the same was due it as the liquidated damages provided for in the agreement. Exceptions were filed to the claim, and a hearing was had thereon before the referee in bankruptcy, who sustained the exceptions. From that ruling an appeal was taken to the district judge, and by his decision the ruling of the referee was affirmed, the court holding that no damages were recoverable by the appellant under the agreement for the reason that it was not shown that there was a surplus of merchandise belonging to the bankrupt after the payment of its debts. This ruling is assigned as error.

It is clear that no damages were recoverable by the appellant for the breach—if breach there were—of the contract. Conceding the rule to be that, in order to recover a sum as liquidated damages, it is unnecessary to prove actual damage, it is also true that no provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages, will be enforced in a case where the court can see that no damages have been sustained. It is the general rule that, where the sum named in the contract to be paid on a breach thereof is evidently wholly disproportionate to the damage actually sustained, or where it is shown that no actual damage has been sustained by the breach, the courts will deem the parties to have intended to stipulate for a mere penalty to secure performance. 19 Am. & Eng. Enc. of Law (2d Ed.) 410; *Gay Manufacturing Company v. Camp*, 65 Fed. 794, 13 C. C. A. 137; *Wilcus v. Kling*, 87 Ill. 107. In this case it is apparent that the appellant has sustained no damage. The adjudication of bankruptcy creates the presumption that the Northwest Fixture Company was insolvent. No proof is offered to show that that presumption is not sustained by the facts. If bankruptcy had not intervened, and the corporation had proceeded to carry out the terms of its agreement, it is evident that its assets would have been no more than sufficient to pay its debts, and that it would have had nothing left to turn over to the appellant. In that event not only would the appellant have suffered no damage, but the North-

west Fixture Company would have had no funds out of which to pay its claim for liquidated damages. In short, to permit the appellant now to share in the bankrupt's estate, pro rata with the creditors of the bankrupt, to the full extent of its claim for damages, would be to violate the spirit, if not the letter, of the agreement, for by the terms of the agreement the assets of the Northwest Fixture Company were to be devoted first to the payment of its creditors.

The order of the District Court is affirmed.

LEATHER MFRS.' NAT. BANK v. TREAT, Collector of Internal Revenue.

(Circuit Court of Appeals, Second Circuit. January 28, 1904.)

No. 43.

1. BANKS—FEDERAL TAXATION—UNDIVIDED PROFITS—CAPITAL.

Where a fund accumulated by a bank was carried on its books under the head of "profit and loss" for a period of years, and was used in the bank's business like its other capital, such fund, though not "surplus," should be regarded as an accretion to capital, and was therefore subject to federal taxation under Act Cong. June 13, 1898, c. 448, § 2, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], providing that bankers using or employing a capital not exceeding certain amounts shall pay certain federal taxes, and that, in estimating capital, surplus shall be included.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 116 Fed. 774.

James M. Gifford, for plaintiff in error.

Chas. D. Baker, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the plaintiff in the court below, and brings this writ of error to review a judgment for the defendant entered upon sustaining a demurrer to the complaint. It appears by the complaint that in February, 1902, the defendant, in assessing the plaintiff the amount of a tax upon its capital, included as part of its capital the sum of \$77,796, which, according to the complaint, was standing on the books of the plaintiff under the profit and loss account, and "represented the undivided profits of the plaintiff as the same existed at the end of the preceding fiscal year." The complaint stated the facts with reference to the sum in question as follows: "Instead of paying out to the holders of the capital stock of the plaintiff all the profits from year to year and at the expiration of each fiscal year, the plaintiff reserved a portion thereof, and passed the same to the credit of 'profit and loss,' holding the amount so reserved subject to the application of the same in payment of any dividends which might be declared from the said profits whenever the business condition of the plaintiff warranted, and as a protection against losses which might arise, thereby diminishing and depreciating the surplus fund already reserved and carried on the books of the plaintiff. The said sum of \$77,796, so reserved, constituted in part

the profits reserved and accumulated for a period of years terminating with said 30th day of June, 1901, premiums on bonds, and other increments of value, as the same appeared on said 30th day of June, 1901"; and it further alleges such sum to have been "held in no other way and for no other purpose except as a protection against losses, and as a guard and protection to its surplus and capital." Upon the facts thus stated in the complaint, the court below held that the sum in controversy was properly assessed by the defendant.

The case thus presents the question whether the profits of a banking corporation which accrue from its earnings, after deducting all expenses and dividends, and which are thereafter carried on its books as a distinct fund, sometimes called "profit and loss," but usually "undivided profits," are liable to taxation under section 2 of the act of Congress of June 13, 1898. That section reads as follows:

"Sec. 2. That from and after July first, eighteen hundred and ninety-eight, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

"(1) Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars, shall pay fifty dollars; when using or employing a capital exceeding twenty-five thousand dollars, for every additional thousand dollars in excess of twenty-five thousand dollars, two dollars, and in estimating capital surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus of the preceding fiscal year. Every person, firm or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this Act." War Revenue Law of June 13, 1898, c. 448, § 2, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286].

The argument at the bar has been largely directed to the question whether the undivided profits are "surplus" within the meaning of the statute. The provision for including "surplus in estimating capital" was probably inserted to remove the doubt created by a decision of Mr. Justice Nelson in construing a former statute which imposed a tax upon capital as taxing only the share capital of a banking corporation. *Bank v. Townsend*, 5 Blatchf. 315, Fed. Cas. No. 9,381. The provision would seem to have been unnecessary, as without it, when a statute, as this does, levies a tax upon the capital used or employed by bankers generally, firms and individuals as well as corporations, the meaning is to tax all the money and assets invested in the business as the basis of profits (*Bailey v. Clark*, 21 Wall. 284, 22 L. Ed. 651), not only the original investment, but also the additions and accretions. *Mutual Insurance Co. v. Supervisors of Erie*, 4 N. Y. 442; *People v. New York*, 23 N. Y. 219; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Tradesman's Pub. Co. v. Car Wheel Co.*, 95 Tenn. 654, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. Rep. 943; *Hannibal R. Co. v. Shacklett*, 30 Mo. 558; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Security Co. v. Hartford*, 61 Conn. 89, 23 Atl. 699. The term "surplus," as used in the nomenclature of bankers, does not include undivided profits, such as are now in controversy. Such profits may be surplus in the sense that they are a constituent of capital, but they are not surplus in the commonly accepted sense. It is quite usual, upon the or-

ganization of financial corporations, for the stockholders to contribute, besides the share capital, a fund which is known as "surplus." It is also quite usual for the directors or managers of these institutions to set apart and to add to this fund from time to time some part of the accumulated profits of the business in excess of dividend requirements. The fund produced in either of these ways is what is known as "surplus." The term is not used to designate the accumulated profits of ordinary banking firms or individual bankers; and when the statute uses it, it does so with reference to the particular class of bankers to which alone it is applicable, and means the fund created by corporate or quasi public institutions as an addition to or re-enforcement of the share capital. Undivided profits do not become a part of this fund until they have been assigned to it by some formal act of the institution; and it is for the directors, and not for the taxing officers of the government, to determine when this should be done. It does not follow, however, because undivided profits are not "surplus" within the correct definition of that term or its statutory meaning, that they are not taxable under the present statute. If they have become capital by reason of the manner in which they have been appropriated and invested, the statute reaches them, just as it would reach surplus, without any other enumeration. In subjecting all classes of bankers to taxation upon their capital, the statute does not discriminate in favor of any class, and the term "capital" should be read as meaning the same thing in respect to a corporation that it does in respect to an individual banker. In other words, whatever comprises capital in the business of an individual banker, likewise comprises capital in the business of a banking corporation for the purposes of the statute. Beyond question, the profits left and used in the banker's business for a period of years, with the purpose of so leaving and using them indefinitely, become capital; the part derived from accumulated profits—that is, from profits not withdrawn or intended to be withdrawn for income—equally with the part originally invested, constitutes his capital. The undivided profits of a banking corporation are understood to be profits which remain after the payment of the current dividends. They do not necessarily become capital because they are not immediately distributed to the stockholders, as where they are carried over, after the dividend period, for temporary purposes, and not with a purpose of indefinite use in the business of the corporation. But the longer they are carried without any distribution, and used in common with the other funds of the corporation, the stronger the presumption becomes that they have been mingled with those funds permanently. Presumably, when a dividend is declared, the amount represents the profits made by the corporation during the past dividend period, after reserving a sufficient fund to cover all offsets or deductions likely to arise, subsequently, growing out of the transactions of that period. Unless this is so, the dividend has not been earned. The reserved fund is not profits, but is merely earnings. The dividend, therefore, represents actual profits. If they have been earned, the surplus or undivided profits are ordinarily used by the corporation as supplementary capital, unless they are distributed to the stockholders. When they are not distributed at the next dividend period, a fair presumption is cre-

ated that they are not retained for distribution, but are retained to feed the resources of the corporation. When it appears, as it does in the present case, that the undivided profits have been carried over many dividend periods and have been accumulated "during a period of years," and have in the meantime been used in the business like the other assets of the corporation, the inference is irresistible that they have become an accretion to the capital. When this appears they are taxable, just as the accumulated profits of an individual are taxable when they have been merged with his capital. This, we think, is the meaning of the statute.

The argument for the plaintiff in error, if carried to its logical conclusion, would enable a banking corporation to escape the tax at its volition, merely by refraining from making any distinct appropriation of the undivided profits. The tax reaches whatever has become substantially a part of the capital of the corporation, without regard to bookkeeping. Upon the facts set forth in the complaint, there is nothing to distinguish the undivided profits in controversy from the fund which many banking associations carry for years under that name, and which, though not technically surplus or theoretically capital, are actually a part of the capital of the bank. There is nothing in the circumstance that they were considered by the bank as a fund applicable to extra dividends, and to unexpected losses, and to depreciation of assets, to distinguish such accumulations from the technical surplus fund of the bank. Extra dividends are not infrequently declared by banking corporations out of that fund, and that fund is of course applicable to the payment of losses, and, so far as it serves to offset depreciation of assets, it replaces diminished capital.

The judgment is affirmed, with costs.

LIVERMORE v. BRAUER.

(Circuit Court of Appeals, Second Circuit. January 13, 1904.)

No. 75.

1. VESSELS—SALE—CONTRACTS—CONSTRUCTION.

Where a contract for the sale of a vessel required the sellers to deliver to the buyer all necessary papers and documents to vest in him a good and sufficient, unincumbered title to the ship and her equipment, together with "her unexpired insurance fully paid," and no policies were mentioned in the contract, and the buyer did not know how many policies there were, or by what underwriters they had been issued, and only knew that the ship was insured for a certain amount, the contract should not be construed to require a transfer of the identical policies under which the vessel was then insured, some of which could not be transferred over the insurer's objection, but was sufficiently complied with by an offer to vest in the buyer equivalent policies.

2. SAME.

Where a contract for the sale of a vessel required the sellers to deliver the ship, together with her unexpired insurance fully paid up, but no policies were mentioned in the contract, and the purchaser did not know how many policies there were, nor by whom issued, the seller was not required to vest the purchaser with the title to the particular policies then covering the ship, but only title to equivalent policies.

3. SAME—CONCURRENT CONDITIONS—ACTION FOR BREACH.

Where a contract of sale requires further acts to be done than the mere delivery of the property and the payment of a price at the same time, the conditions are concurrent, and neither party to such contract can maintain an action for a breach by the other party, without showing performance of conditions on his own part, or an offer to perform, even though it is not certain, from the terms, which is to do the first act.

In Error to the Circuit Court of the United States for the Southern District of New York.

J. Parker Kirlin, for plaintiff in error.

L. E. Warren, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a verdict for the plaintiff entered by the direction of the court. The action was brought to recover a sum of money deposited by the plaintiff with the defendant pursuant to a written contract between the plaintiff and Macbeth & Gray, the owners of the steamship Dunmore, for the purchase of the vessel. The contract was dated December 18, 1900, and fixed the purchase price at the sum of £21,000. The contract provided that Macbeth & Gray should on or before February 1, 1901, execute and deliver to plaintiff all necessary papers and documents to vest in him a good and sufficient, unincumbered title to the ship and her equipment, "her unexpired insurance fully paid," and her earnings from and after the date of the contract. The contract also provided that plaintiff should deposit with Livermore, the defendant, £2,100; that, upon the delivery to plaintiff by Macbeth & Gray of the necessary papers and documents to vest in him title to the ship, her equipments, and the insurance, he should, at Glasgow, Scotland, pay them £7,000, deliver to them an approved first mortgage upon the vessel for £11,900, conditioned as specified in the contract, and deliver to them an order upon Livermore for the £2,100. It further provided that, in the event of either party failing to fulfill, Livermore should pay over the £2,100 to the other party. The action was brought upon the theory that Macbeth & Gray neglected and refused to fulfill the contract, and this was the only issue presented by the pleadings.

By previous arrangement the parties to the contract met at the office of Macbeth & Gray, at Glasgow, on the 1st day of February, 1901, to exchange the documents and close the purchase. In directing a verdict, the trial judge ruled that it appeared by the evidence that Macbeth & Gray had failed to perform the contract upon their part on that day, and that there was no question of fact for the jury. The principal assignment of error is based upon the exception to that ruling.

If the contract required Macbeth & Gray to vest a good title in plaintiff to the policies of insurance upon the ship in force on December 18th, it is conceded that they did not perform, and were not ready to perform, that condition. At the date of the contract the insurance aggregated in amount £13,850, all of which would expire on the ensuing 20th day of February. It had been effected in various mutual

underwriting associations, in which the insured becomes a member, and pays an initial premium and subsequent assessments so long as he remains a member. By the rules of these associations, an insurance becomes void upon the nonpayment by the member of any future call, and the policies cannot be transferred without the written consent of the association. When the parties met at Glasgow some of the associations had refused to consent to a transfer of the insurance covered by their policies. The amount of this insurance was £2,500. The other associations had consented to the transfer of their insurance, but their formal written consent had not been obtained. The evidence introduced by the defendant was to the effect that at the interview Macbeth & Gray offered to procure new insurance for Brauer to the extent of £2,500, or to stand as insurers themselves to that extent, and furnish him a guaranty for their responsibility by the Bank of Scotland; that the plaintiff made no objection to this proposition; that the matter was under discussion when the parties separated to go to luncheon; and that they separated with the understanding that the plaintiff would return after luncheon and resume the interview. It further appeared that the plaintiff did not return, but sent a letter to Macbeth & Gray, notifying them, in substance, that he declined their tender of performance, because they were unable to transfer the insurance policies to him; and immediately thereafter the plaintiff left Glasgow for Liverpool. The evidence for the defendant tended to show that there was no formal offer of performance by either party at the interview. It appeared that the plaintiff was ready to perform the conditions on his part.

The contract did not, in terms, require Macbeth & Gray to vest the plaintiff with good title to the existing policies on the ship. The condition was to vest him with good title "to the unexpired insurance fully paid." No policies are mentioned in the contract, and when it was made the plaintiff did not know how many policies there were, or by what underwriters they had been issued. He only knew that the ship was insured for a certain amount. Policies of insurance ordinarily are conditioned to become void upon a transfer of the insured property, and to become void upon a transfer of the instrument without the consent of the underwriter; and it is unreasonable to suppose that either party to the contract contemplated that its fulfillment should be defeated in case any of the underwriters should see fit to insist upon either of these conditions. It is quite inconceivable that the plaintiff wished to acquire any specific policies. He wanted to save himself the cost of the insurance during the life of the existing insurance. We think the contract does not mean that Macbeth & Gray should vest him with the title to the particular policies covering the ship, and that it only obligated them to vest him with title to equivalent policies. Adopting this view, if Macbeth & Gray had made tender of such insurance at the interview at Glasgow, they would have satisfied the condition.

We think there was a question of fact for the jury. If, as the evidence for the defendant tended to show, there was no offer of performance by the plaintiff, he was not entitled to recover. Upon the other hand, if, as the evidence tended to show, the plaintiff deprived Macbeth

& Gray of an opportunity of tendering performance on their part, he cannot insist upon their default.

In contracts of sale the delivery of the property and the payment of the price are presumably concurrent acts, and, when the contract requires further acts relating to the transfer to be done at the same time, the conditions are concurrent. Neither party to such a contract can maintain an action for a breach by the other without showing performance of the conditions upon his own part, or an offer to perform, even though it is not certain from the terms which is to do the first act. This was the rule stated by Lord Mansfield in *Kingston v. Preston*, 2 Doug. 698, and is the accepted rule to-day. Mere readiness to perform is not equivalent to performance, but an actual offer of performance may be excused when there is a willingness and an ability to perform, and performance or an offer has been prevented or waived by the conduct of the other party. Neither party can insist upon the default of the other if he was in default himself, and, where both are in default, either party, after relieving himself of his default by performance, or an offer to perform, can require the other to perform within a reasonable time. *Brown v. Slee*, 103 U. S. 828, 837, 26 L. Ed. 618; *Lester v. Jewett*, 11 N. Y. 453; *Nelson v. Plimpton Fireproof Co.*, 55 N. Y. 480.

The judgment is reversed.

BLOOMINGDALE et al. v. WATSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1904.)

No. 511.

1. APPEAL—PARTIES—DISMISSAL FOR NONJOINDER.

Creditors of an insolvent partnership, whose claims have been allowed in proceedings to wind up its business, are necessary parties to an appeal from an order of distribution made therein; and where, because of the failure of the appellant to have citation issue for them within the required time, the appeal, as to them, has become inoperative, and their dividends have been paid, they cannot thereafter be brought in, and the appeal will be dismissed.

2. JURISDICTION OF FEDERAL COURT—SUIT TO WIND UP PARTNERSHIP—CITIZENSHIP OF CREDITORS.

In a suit in a federal court to dissolve a partnership and distribute its assets, where the court had jurisdiction, and has taken possession of the property and sold the same, through a receiver, and brought in the creditors by order, the fact that one of such creditors was a citizen of the same state as the complainant does not affect its jurisdiction.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

A. Leo Weil and B. M. Ambler, for the motion.
Daniel P. Hays and F. B. Enslow, opposed.

¶ 2. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

Before SIMONTON, Circuit Judge, and BOYD and KELLER, District Judges.

PER CURIAM. A motion is made to dismiss the appeal in this case because a number of creditors whose claims have been allowed and paid, whose interest is affected by the decree of February, 1903, have not been cited to appear and answer the appeal. No appeal was allowed in open court. The citation the court issued in the case to Watson and his codefendant, Drey, was made returnable to the November term, 1903, of this court. No citation was issued to these parties, who are creditors, and the citation was not waived. The citation to the creditors not having been issued and served before the end of the next ensuing term of this court, the appeal, as to them, has become inoperative. *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Foster's Federal Practice*, § 508.

These parties whose names have been omitted from the citation are creditors to whom, under the order of February —, 1903, money has been paid on claims which had been fixed and adjudicated by the decree of January 25, 1901. They were necessary and essential parties to the appeal from that order. *Wilson v. Kiesel*, 164 U. S. 248, 17 Sup. Ct. 124, 41 L. Ed. 422. Not having been included in the citation, and the appeal, as to them, having become inoperative, were we now to issue a citation and require them to come in, we would deprive them of rights which have been secured to them by reason of the inaction of the appellants.

It has been urged upon us by the appellants that an inspection of the record would show that the court below was without jurisdiction, because of the want of diversity of citizenship. The bill was filed originally to close up a copartnership, and to set aside an assignment for creditors alleged to be fraudulent and void. When the bill was filed the court certainly had jurisdiction. The prayer of the bill was granted to this extent: The copartnership was dissolved, a receiver was appointed, the property of the firm was sold, and its proceeds were held by the court. All the creditors were called in. Among these creditors was one, a citizen of the same state as Watson, complainant. This did not deprive the court of jurisdiction. Having taken possession of the res, and proceeding to administer the same, all that took place thereafter was in the nature of ancillary proceedings, in which neither the amount in controversy, nor the citizenship of the parties, could deprive the court of jurisdiction.

The motion to dismiss the appeal is granted.

NOAH et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1904.)

No. 962.

1. PERJURY—PENSION AFFIDAVIT—INDICTMENT.

Where an indictment for perjury, consisting in false testimony contained in a pension affidavit, charged that on a certain day there was filed in the pension office, at the instance and on behalf of Frances A. Moon, her application to be placed on the pension roll as the widow of P. R. Moon, and that defendants, while such application was pending, for the purpose and with intent to deceive the pension officers, and of fraudulently obtaining the allowance of a pension to the said Frances A. Moon, did make the affidavit set out, the indictment sufficiently showed the purpose for which the affidavit was made, though by inadvertence the affidavit was entitled as though P. R. Moon was the applicant, and the name Frances A. Moon was not found therein as the surviving widow of P. R. Moon, she being named therein as Mrs. Moon.

2. SAME—ALLEGATIONS—MATERIALITY.

Where an indictment for perjury in the execution of a pension affidavit to secure a pension for a widow averred that the affidavit stated that defendants did not think the veteran was ever married until he married the applicant, who was his surviving widow; that they were married about 1889; and that affiants were both present at the wedding—it sufficiently showed that the averments of the affidavit were material.

3. SAME—USE OF EVIDENCE.

Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], declares that every person who, having taken an oath before a competent officer, and, contrary to such oath, subscribes any material matter which he does not believe to be true, is guilty of perjury; and section 5396 [page 3655] declares that, in every indictment for perjury, it shall be sufficient to set forth the substance of the offense charged, before whom the oath was taken, averring the person to have had competent authority to administer the same, with a proper averment to falsify the matter wherein the perjury is assigned, without more. *Held*, that an indictment for perjury contained in a pension affidavit was not objectionable for failure to set out that the affidavit was ever used by or on behalf of the applicant for whom it was made.

In Error to the District Court of the United States for the Northern District of California.

The plaintiffs in error were convicted of perjury under an indictment which charged them with making a false oath to an affidavit which was to be used on behalf of Frances A. Moon, in aid of her application to be placed on the pension roll of the United States as the widow of one Pardy Rosson Moon, late a soldier in the military service of the United States, in the War of the Rebellion. The indictment, after stating the circumstances under which the affidavit was made, sets forth the affidavit in *hæc verba*. It is entitled, "In the Matter of Pension Claim No. ——— for Pardy Rosson Moon, late of Co. F 116 Regt. Indiana Inf't." Thereupon the affiants deposed as follows: "We were well acquainted with Pardy Rosson Moon during his lifetime, and had known him for 9 or 10 years. We knew him for about 10 years before he was killed. We were living in San Bernardino county, California, during all of that time. We do not think that Mr. Moon was ever married until he married the woman who is now his surviving widow, and, if he ever had been previously married, I think we would have heard of it, as we were intimately acquainted with him, and often talked together about our early lives and experiences. We also know that Mrs. Moon and her husband were never divorced, and that they lived together, and appeared to be happy together, up to the time of his death. They were married about the year 1889—in the spring of that year. We were both present at the wedding." The indictment then proceeds, in proper form, to allege that the matters contained in the

declaration were material in the premises, and that the affiants thereto took oath to the same on November 11, 1899, before a properly qualified officer named therein, and proceeds further to set up in detail the falsity of each statement contained in the affidavit. It charges that each of said affiants knew the same to be false at the time thereof, and did not believe any of said matters to be true, and that therein they committed willful and corrupt perjury. A demurrer was interposed to the indictment on the ground that it does not appear therefrom that any of the alleged false statements contained in the affidavit were material, or that they were made on behalf of the alleged application of Frances A. Moon for a pension, or that the affidavit was ever used for that purpose. The demurrer was overruled. After a verdict of guilty as charged had been returned against both the plaintiffs in error, they interposed a motion in arrest of judgment upon the grounds presented by the demurrer, which motion was also overruled. The rulings of the District Court upon the demurrer and the motion are assigned as error.

T. C. West, for plaintiffs in error.

Marshall B. Woodworth and Benjamin L. McKinley, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We think it sufficiently appears from the indictment that the matters set forth in the affidavit were material to, and that the affidavit was made and sworn to on behalf of, the application of Frances A. Moon for a pension. It is true that in the heading to the affidavit, which was evidently a printed form, it appears that the name of the claimant for a pension was inserted as "Pardy Rosson Moon," instead of "Frances A. Moon"; but the indictment elsewhere distinctly charges that on March 18, 1897, there was filed in the Pension Office at Washington, at the instance and on behalf of Frances A. Moon, her application to be placed on the pension roll of the United States as the widow of Pardy Rosson Moon, and that the plaintiffs in error, while said application was pending, for the purpose and with the intent of deceiving the officers of the Pension Office, and "of unlawfully, improperly, and fraudulently obtaining the allowance of the said application, and the granting to her, the said Frances A. Moon, of a pension," did appear before the notary named in the indictment and make oath to the affidavit. This shows the purpose for which the affidavit was made. The fact that by inadvertence the name of Pardy Rosson Moon was inserted in the blank as the claimant, instead of that of the applicant herself, is no proof to the contrary, and it does not have the effect to controvert or lessen the effect of any of the prior averments. It is true, also, that in the affidavit the name of Frances A. Moon is not found, and that the surviving widow of Pardy Rosson Moon is therein named as "Mrs. Moon." It is argued from this that it does not appear from the affidavit that it was to be used on behalf of Frances A. Moon. But it is not necessary that the affidavit, by its terms, shall show for whose benefit it was intended to be used. It is enough if the indictment charges the fact to be that it was intended to be used in aid of the application of Frances A. Moon. In view of these considerations, the statements in the affidavit, or some of them, at least, were material—as, for instance,

the averment, "We do not think that Mr. Moon was ever married until he married the woman who is now his surviving widow," and that Pardy Rosson Moon and Mrs. Moon were married about the year 1889, and the affiants were both present at the wedding. If the plaintiffs in error were guilty, as charged in the indictment, of making a false affidavit for the purpose of deceiving the Pension Office, and fraudulently obtaining the allowance of the application of Frances A. Moon for a pension as the widow of Pardy Rosson Moon, these averments were material, as they stated that Pardy Rosson Moon married the woman "who is now his surviving widow," and that the marriage took place in the year 1889. The affidavit contains further material information, in stating that Pardy Rosson Moon and Mrs. Moon were never divorced.

It is contended further that the indictment is defective for the reason that it does not show, and it cannot be ascertained therefrom, whether the alleged false affidavit was ever used by or on behalf of Frances A. Moon in connection with her application for a pension. The answer to this is that section 5392 of the Revised Statutes [U. S. Comp. St. 1901, p. 3653], under which the indictment was drawn, does not require that, in order to predicate perjury upon its violation, the false affidavit shall have been filed or used. It is enough if it appear from the indictment that it was made with the intention and under the circumstances set forth in the statute. Section 5396 [page 3655] specifies the allegations which are essential to an indictment for perjury. Tested by those statutes, the indictment is clearly sufficient. *United States v. Volz*, 14 Blatchf. 15, Fed. Cas. No. 16,627; *State v. Lloyd*, 77 Wis. 630, 46 N. W. 898; *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196; *State v. Geer*, 46 Kan. 529, 26 Pac. 1027.

We find no error in the rulings of the District Court. The judgment will be affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. BILLS.

(Circuit Court of Appeals, Sixth Circuit. March 16, 1904.)

No. 1,241.

1. MASTER AND SERVANT—DUTY TO WARN INEXPERIENCED SERVANT OF DANGERS OF SERVICE—INSPECTION OF TELEPHONE POLES.

In an action by a lineman against a telephone company, by which he was employed, to recover for an injury received by the breaking and falling of a decayed pole on which he was placing a cross-arm, it appeared that he had worked at such employment for less than a year, and only in defendant's service, and that the line on which he was working was an old one, the poles having been set for 11 years. There was evidence tending to show that plaintiff had not been warned of the danger, nor instructed to inspect the poles before climbing them, and that he was preceded by the foreman and another whose duty it was, under the rules of the company, to make the inspection, but that they did not do so. *Held*, that a positive duty rested on defendant both to warn plaintiff and to require an inspection, and, the evidence being in conflict as to the performance of such duties, both questions were properly submitted to the jury.

2. SAME—FELLOW SERVANTS—FOREMAN CHARGED WITH MASTER'S DUTY OF INSPECTION.

Where the duty of inspecting telephone poles before a lineman climbs the same is delegated by the company to a foreman, he is not a fellow servant of a lineman in that regard, but a vice principal, and the company is liable to the lineman for an injury due to the failure of the foreman to perform the duty of inspection.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Hays & Biggs (Wm. L. Granberry, of counsel), for plaintiff in error.

Hunter Wilson, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge, delivered the opinion of the court.

This was a suit to recover damages for personal injuries claimed to have been caused by the negligence of the defendant below. The plaintiff was a lineman in the employ of the telephone company, and was severely injured by the breaking of a pole which he had climbed for the purpose of putting on a cross-arm and transferring two wires from brackets to this cross-arm. The case went to the jury, and a verdict and judgment was rendered for \$2,000. It is claimed the court erred in refusing to instruct the jury to find for the defendant, in denying certain requests to charge, and in charging as it did.

The plaintiff, Bills, had been employed by the company about a year, first as a groundman, and then as a lineman. He had never worked for any other telephone company. On the day of the accident, along with three other men, Atkins, Allen, and Barnett, all in charge of Scruggs, the foreman, he was doing work on the Lexington Line, about one mile east of Jackson, Tenn. The gang was engaged in cross-arming the route, that is, placing cross-arms on the poles, and transferring the wires from brackets to the cross-arms; also, incidentally, in placing new poles where the spans were too great, and in resetting or replacing defective poles. In doing this work, the foreman and Atkins, another lineman, preceded the plaintiff. Atkins climbed the pole which subsequently broke, boring a hole and cutting a place for the cross-arm, before the plaintiff reached it. Atkins testified he "kind of shook" the pole before he climbed it. The plaintiff saw him on the pole, and there was no indication that it was unsound. The plaintiff testified that before climbing the pole he tried it by throwing his weight against it. The pole was about 25 feet high. The plaintiff had put the cross-arm on, but had not completed his work when the pole broke, about an inch under the ground, and fell, seriously injuring him. An examination of the pole showed it had rotted through just below the ground. The pole was of chestnut wood

¶ 2. Who are fellow servants, see note to *Northern Pac. Co. v. Smith*, 8 C. C. A. 668; *Canadian Pac. Ry. Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286.

See *Master and Servant*, vol. 34, Cent. Dig. §§ 406, 465.

and an old one, the telephone line having been up about 11 years. There was testimony tending to show that the ordinary life of a chestnut pole is between 6 and 10 years.

On behalf of the plaintiff, testimony was introduced tending to show that the company knew the age of the pole, while the plaintiff did not. That the company might have ascertained the rotten and dangerous condition of the pole by a reasonable inspection, but did not inspect it, although, under the custom and usage of the company, it was the duty of the foreman to inspect the poles. That the plaintiff was never instructed by the company to inspect the poles, and did not inspect this one, because he relied upon the foreman doing his duty. On the other hand, testimony introduced by the company tended to show that the plaintiff had been told that the line was an old one, and cautioned carefully to inspect the poles before climbing them; also, that he had been instructed to transfer the wires one at a time, and that his failure to do so caused the fall of the pole; but it was a disputed question upon the evidence whether he was so instructed, and whether he loosened both wires from the bracket before attaching either to the cross-arm.

The defendant below asked the court to direct the jury to return a verdict for the defendant, and in separate special charges to instruct the jury that the plaintiff could not recover, because: (1) The risk of the pole breaking was one which he assumed when he entered the employ of the company as lineman; (2) the alleged negligence of the foreman in not testing or inspecting the pole was that of a fellow servant; (3) the plaintiff was guilty of contributory negligence in not himself testing the pole; (4) the plaintiff was guilty of contributory negligence in removing both wires from the bracket before attaching either to the cross-arm. In view of the conflict of testimony referred to, the court declined to do this, leaving the jury to determine the disputed questions of fact, and instructing them that if they found it was the duty of the foreman, under the custom and usage of the company, to inspect the poles, a failure on his part to do so would constitute negligence for which the company would be liable.

These were proper questions to be left to the jury. This was not the case of an experienced lineman, working alone, where, upon the undisputed testimony, it was not only customary, but necessary, for him to inspect a pole before climbing it; in other words, the case of an employé to whom the company owed no duty either in the way of instruction or inspection. *McIsaac v. Northampton Electric, etc., Co.*, 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; *McGorty v. Southern New Eng. Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62. Plaintiff had worked for this company about a year, and for no other. All his training and instruction he got from it. Now, one of the positive duties of an employer conducting a dangerous occupation is to warn the inexperienced employé of the hidden hazards of the work, so he may not needlessly expose himself to danger. If, as plaintiff claimed, the company failed properly to warn and caution him, and for this reason he climbed the pole without testing it, as he otherwise would, this was the neglect of a positive duty, for which the company is responsible. *L. & N. R. R. Co. v. Miller*, 104

Fed. 124, 43 C. C. A. 436; *Felton v. Girardy*, 104 Fed. 127, 43 C. C. A. 439.

So, too, with respect to the duty of furnishing a reasonably safe place for its employes to work. If the telephone company, by not instructing the linemen to inspect, assumed the duty itself of seeing that the poles were safe to work on, this was a positive duty. The company could not escape the obligation by delegating the duty to the foreman or any one else. If the duty of inspection rested upon the foreman, the foreman was not a fellow servant, but a vice principal, and the company is responsible for his neglect. *Hough v. R. R. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Western Union Telegraph Company v. Tracy*, 114 Fed. 282, 52 C. C. A. 168; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; *Western Union Telegraph Company v. Burgess*, 108 Fed. 26, 47 C. C. A. 168; *Kelly v. Erie Telegraph & Telephone Co.*, 34 Minn. 321, 25 N. W. 706.

As to the question whether the plaintiff was or was not guilty of contributory negligence, that, too, was properly left to the jury. It was a disputed question whether the plaintiff was instructed to transfer the wires one at a time from the brackets to the cross-arm, and whether he had actually fastened the wires to the cross-arm before the pole fell.

The judgment of the lower court is affirmed.

In re SEARS, HUMBERT & CO.

In re BATTLE'S ESTATE et al.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 96.

1. **BANKRUPTCY—APPEAL FROM DISMISSAL OF INVOLUNTARY PETITION—EFFECT OF SUBSEQUENT ADJUDICATION.**

Where, pending an appeal from an order dismissing a petition in involuntary bankruptcy, the defendants were adjudicated bankrupts in another district, the appeal will be dismissed, since, under general order No. 6, the court making the first adjudication has exclusive jurisdiction, and the questions involved in the appeal have therefore become academic; and especially where such questions relate to an alleged preferential transfer of property, charged as an act of bankruptcy, which may again come before the court in a suit by the trustee against the transferee.

2. **SAME—COMPENSATION OF RECEIVER.**

Where, pending action on an involuntary petition, which was subsequently dismissed by the court, a receiver was appointed, who remained in possession of the property when defendants were adjudicated bankrupts in another district, the authority to compensate the receiver passed to the court making the adjudication, which took exclusive jurisdiction of the estate.

3. **SAME—RES JUDICATA—FINDING ON INVOLUNTARY PETITION.**

A finding on a creditors' petition that a charge of preferential transfer of property by the alleged bankrupts was not sustained is not an adjudication which could bind a trustee subsequently appointed on an adjudication made by another court, in a suit brought by him against the alleged preferred creditor to recover the property.

Appeal from the District Court of the United States for the Western District of New York.

This is an appeal by the petitioning creditors from a judgment of the District Court for the Western District of New York, dismissing their petition and refusing to adjudicate Sears, Humbert & Co. bankrupts, on the ground that the act of bankruptcy alleged in the petition had not been established. The act of bankruptcy so alleged was that Sears, Humbert & Co., being insolvent, had transferred a large portion of their property, consisting of notes and accounts, to the Whitehall Portland Cement Company, one of their creditors, with intent to give a preference.

Moses Shire and E. L. Jellinek, for appellants.
George M. Mackellar, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. It appeared at the argument that the members of the firm of Sears, Humbert & Co. have been duly adjudicated bankrupts, both individually and as copartners, upon petition filed in the Southern District of New York, and that the estate is now being administered there. The question presented by this appeal has, therefore, become academic. The copartnership being now in bankruptcy, it is a matter of no moment whatever whether the specific act of bankruptcy alleged in the petition in the Western District was or was not established. A reversal of the judgment appealed from would lead to no practical result and would only tend to complicate a situation which is now perfectly plain and simple. General order 6 provides that "the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed." It is manifest, therefore, that every right and remedy which the petitioning creditors had has been preserved and may be asserted and enforced in the proceeding in the Southern District.

It was suggested by counsel for appellants, as a reason why a decision should be made upon the merits, that the court in the Western District had appointed a receiver who would be compelled to turn over the fund in his hands without compensation for his disbursements and services in collecting and preserving it. The answer is that whatever authority was vested in the court of the Western District to compensate the receiver, was transferred to the court for the Southern District, and as the latter court has now sole jurisdiction of the estate it is probable that its authority would have to be invoked by the receiver in any event. But be this as it may, there can be no doubt that the court for the Southern District, upon proper presentation, will take cognizance of the matter and make an equitable disposition of the claims of the receiver. Nothing more is needed.

Again it is suggested that the judgment appealed from will be a bar to an action by the trustee to set aside the alleged preference to the Whitehall Portland Cement Company which was pleaded as an act of bankruptcy. This proposition is also untenable. The trustee, if he proceeds in the matter, must begin a plenary suit in which he is plaintiff and the cement company is defendant. How a judgment in a proceeding instituted by certain creditors to have Sears, Humbert & Co. declared bankrupts can be regarded as *res judicata* of such a

suit we are unable to comprehend. The parties are different, the proof is different and the subject-matter is different. The reasoning of the court in dismissing the petition is entitled to respect and will, in all probability, be examined, if the suit suggested is brought to trial; but we are unable to perceive why the issues in such a suit should not receive full and independent consideration from the trial court. Indeed, the possibility that the decree in such a suit may be brought before this court on review, is an additional reason why at this time we should refrain from expressing an opinion upon the merits of a controversy which may again be presented, but upon a new issue and in wholly different circumstances.

The appeal is dismissed without costs.

EAU CLAIRE NAT. BANK V. BENSON.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904.)

No. 845.

1. RES JUDICATA—CONCLUSIVENESS OF JUDGMENT OF STATE COURT—CONSTRUING LAWS OF ANOTHER STATE.

Where a state court determined, either as a question of law or fact, that a suit therein to enforce the statutory liability of a stockholder of a corporation of another state could not be maintained under the laws of the latter state, which, as construed by its Supreme Court, gave a right of action only to the creditors as a body against the stockholders as a body, and thereupon dismissed the action on the merits, its judgment was conclusive on the parties, and a second action by the same complainant against the same defendant on the identical cause of action cannot be maintained in a federal court.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

The case was heard in the Circuit Court on demurrer to the bill and amended bill. The demurrer being sustained, the bill and amended bill were dismissed. From the decree of dismissal the appeal is prosecuted.

The bill is to enforce the liability of appellee, as a stockholder in the Minnesota Elevator Company, a corporation organized August 16, 1883, under the laws of Minnesota, and doing business in that state. The Elevator Company ceased to do business September 2, 1884, when a voluntary assignment was made under the laws of Minnesota, and all its property distributed, through one of the state district courts, among all the creditors who filed their claims and releases under the Minnesota insolvency act.

The appellant is a national bank, located at Eau Claire, in the state of Wisconsin, and on October 8, 1883, loaned to the Minnesota Elevator Company two thousand dollars, and on October 22, 1883, the further sum of two thousand dollars, both loans being evidenced by promissory notes, bearing interest at the rate of ten per cent. No part of these notes, either interest or principal, has been paid.

The appellee, at the dates of these loans, was the owner of thirteen thousand dollars par value of the stock of the corporation, and continued to be such owner until December 15, 1883, when the stock was sold and transferred.

Liability is claimed under the following provision of the constitution of Minnesota then and still in force: "Each stockholder in any corporation (except those organized for the purposes of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1508.

The bill shows that on December 20, 1884, judgment was recovered upon these notes, by the appellant against the Minnesota Elevator Company, in the Circuit Court of the United States for the District of Minnesota, and, an execution having been issued thereon, was returned nulla bona, December 22, 1884, a date preceding the commencement of this suit.

The bill further shows that there were some ten or eleven other stockholders, holding in the aggregate nearly two thousand shares of stock, of the par value of nearly one hundred thousand dollars; that all of these stockholders are non-residents of Wisconsin; that none, except appellee, have been found in Wisconsin; that two of them were dead; that all of them except five are insolvent; and that of these five (holders of about thirty-five thousand dollars, par value) there is no showing that they were either solvent or insolvent.

The bill further shows that November 18th, 1897, suit was brought in the Circuit Court of Eau Claire County, Wisconsin, by appellant against appellee, to recover upon the indebtedness upon which this suit is founded, and based upon the same facts upon which this suit proceeds. In this suit in the state court appellee answered, setting forth, among other defenses, the constitutional and statutory provisions of Minnesota and the decisions of the Supreme Court of Minnesota interpreting the same, wherein it is held that the liability of one is enforceable only in the District Courts of Minnesota in a general suit of settlement on behalf of all the creditors and against all the stockholders; that there had been no such general suit of settlement in any District Court of Minnesota as determined the right of the creditors and the liability of the stockholders; wherefore no liability against appellee in favor of appellant could be enforced in the courts of Wisconsin. In addition to this, the statute of limitations of both Wisconsin and Minnesota were pleaded in bar.

Issues of fact and law having been taken upon these contentions, the Circuit Court of Eau Claire County found, that under the constitution and laws of Minnesota the liability is of all the stockholders to all the creditors; that each stockholder is liable only for such proportion of the total debts of the corporation as the stock held by him bears to the total stock held by the solvent stockholders; that a suit to enforce such liability must be in equity in one of the District Courts of the state of Minnesota, and can be enforced nowhere else than in such District Court; that the action was not brought within six years from the time the alleged causes of action or any thereof mentioned, accrued in favor of plaintiff against the defendant; and, as a general conclusion, that the plaintiff could not maintain such action at that time in that court. Thereupon a judgment was entered "That the plaintiffs complaint herein be, and the same hereby is, dismissed," and for costs. On appeal to the Supreme Court of the state of Wisconsin, this judgment was affirmed. The question here is whether the demurrer to the bill was rightly sustained by the United States Circuit Court.

H. B. Walmsley, for appellant.

C. T. Bundy, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court.

The Supreme Court of Minnesota has interpreted the constitutional provision quoted, and the Minnesota legislation in pursuance thereof, to the effect that a suit to enforce stockholders' liability must be brought in one of the District Courts of Minnesota and must be in the nature of a suit in equity, prosecuted by, or on behalf of, all the creditors against the corporation and all the stockholders. *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Minn. 173, 14 N. W. 799; *In re Martin's Estate*, 56 Minn. 420, 57 N. W. 1065. These cases hold that under the Minnesota constitutional provision the stockholders are liable as a body to the creditors as a body, the object being to create a fund to the extent of such liability for the benefit of all the cred-

itors. A suit by a single creditor, therefore, against the stockholders would not lie, for the fund might be exhausted in favor of a single creditor. A suit by all the creditors, or by a single creditor on behalf of all the creditors, against a single stockholder would not lie, for the stockholder thus sued might be compelled to contribute more than his just proportion of the amount remaining due. The suit must be in the nature of a general settlement wherein the right of each creditor may be settled, the liability of each stockholder determined, the fund resulting being thereby ratably contributed by stockholders, and ratably distributed among creditors.

Whatever might have been our ruling, had the questions herein presented come to us at first instance, it is plain to us that the Wisconsin courts have in the suit set forth in the bill ruled, as a matter either of law or of fact, that in view of the Minnesota constitution and statutes, as interpreted by the Minnesota courts, appellant could not enforce liability against the appellee in any court outside the appropriate District Courts of Minnesota, or in any suit to which the corporation, the stockholders and the creditors were not parties. The judgment entered in the Wisconsin state court, and affirmed by the Supreme Court, is not shown to have been one of non-suit. Its effect, under the findings, is one of dismissal on the merits. The judgment thus rendered, whether of law or of fact, was by a validly constituted court, having jurisdiction of the cause. The parties in that suit were the same as the parties in this suit. The causes of action in the two suits were identical, and the points passed upon were the same. Questions thus determined, whether they be questions of law or of fact, become, as between the same parties respecting the same subject matter, the law and the fact of the controversy; and cannot afterwards be litigated by new proceedings, either before the same or any other tribunal. This is applicable to federal courts, as well as to state courts; for although the federal courts and the state courts are organized under distinct governmental authority, their judgments are not to be treated as foreign judgments, but as the judgments of concurrent courts, giving to each the full faith and credit that is to be accorded to courts of record within the state. *Tioga Railroad Company v. Blossburg Railroad Company*, 20 Wall. 137, 22 L. Ed. 331. The demurrer was rightly sustained and the decree below must be affirmed.

LOCKMAN v. LANG et al.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1903.)

No. 1,923.

1. ASSIGNMENT OF ERRORS—FILING BEFORE APPEAL INDISPENSABLE.

The filing of an assignment of errors before or at the time of the allowance of an appeal is indispensable under the eleventh rule of the Circuit Courts of Appeals (91 Fed. vi, 32 C. C. A. lxxxviii), and the appeal will be dismissed if the assignment is not thus filed.

¶ 1. Appeal and review in bankruptcy, see note to *In re Eggert*, 43 C. C. A. 9.

2. BANKRUPTCY—ORDERS AND DECREE IN, NOT REVIEWABLE BY WRIT OF ERROR.

A proceeding in bankruptcy is a proceeding in equity, and orders and decrees therein cannot be reviewed by writs of error.
(Syllabus by the Court.)

Appeal from the District Court of the United States for the District of Colorado.

Lester McLean (W. Scott Bicksler and Edmon G. Bennett, on the brief), for appellant.

H. W. Currey (William L. Dayton, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and HOOK, District Judge.

SANBORN, Circuit Judge. This is an appeal from an adjudication in bankruptcy rendered on March 24, 1903. On the same day the bankrupt prayed an appeal and it was allowed, but he filed no assignment of errors until March 31, 1903. A motion is made to dismiss the appeal because the assignment of errors was not filed when the appeal was allowed. Section 997 of the Revised Statutes [U. S. Comp. St. 1901, p. 712] makes an assignment of errors, a prayer for reversal, and a citation to the adverse party essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. When an appeal is prayed and allowed in open court, the prayer for reversal and the citation may be waived, but the assignment of errors is indispensable to the perfection of the appeal. Rule 11 (91 Fed. vi, 32 C. C. A. lxxxviii) of this court provides that "the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed." The reasons for this rule and the importance of a compliance with it have been stated in numerous opinions of this court. *City of Lincoln v. Sun-Vapor Street Light Co.*, 8 C. C. A. 253, 256, 59 Fed. 756, 759; *Union Pac. R. Co. v. Colorado Eastern R. Co.*, 4 C. C. A. 160, 54 Fed. 22; *U. S. v. Goodrich*, 4 C. C. A. 160, 161, 54 Fed. 21, 22. In *Frame v. Portland Gold Min. Co.*, 47 C. C. A. 664, 665, 108 Fed. 750, 751, this court dismissed a writ of error because the assignment of errors was not filed until two days after the issue of the writ. In *Webber v. Mihills* (C. C. A.) 124 Fed. 64, we dismissed an appeal because the assignment of errors was not filed until seven days after the appeal was allowed. There are other authorities which illustrate the application of this rule: *Flahrity v. Railroad Co.*, 6 C. C. A. 167, 56 Fed. 908; *Crabtree v. McCurtain*, 10 C. C. A. 86, 61 Fed. 808; *Lloyd v. Chapman*, 35 C. C. A. 474, 93 Fed. 599; *Insurance Co. v. Conoley*, 11 C. C. A. 116, 63 Fed. 180; *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891; *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 838; *Railway Co. v. Reeder*, 22 C. C. A. 314, 76 Fed. 550. The assignment of errors in this case was not filed until the seventh day after the appeal was allowed, and under

rule 11 and the uniform decisions of this court the appeal must be dismissed.

On March 31, 1903, seven days after the adjudication in bankruptcy, the bankrupt filed a petition for a writ of error, an assignment of errors, and a bond for the purpose of reviewing the decree in bankruptcy, and the judge of the district court approved the bond, allowed the writ, and issued a citation. But a proceeding in bankruptcy is a proceeding in equity, and cannot be reviewed by a writ of error. In *re Rochford* (C. C. A.) 124 Fed. 182, 187; *Swarts v. Siegel*, 117 Fed. 13, 16, 54 C. C. A. 399, 402; *Highland Boy Gold Min. Co. v. Strickley*, 54 C. C. A. 186, 189, 116 Fed. 852, 855; *Hoo-ven, Owens & Rentschler Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 234, 111 Fed. 81, 86.

The writ of error in this case is accordingly also dismissed.

KEYSER v. WESSEL.

(Circuit Court of Appeals, Third Circuit. March 1, 1904.)

No. 50.

1. BANKRUPTCY — BUSINESS PROPERTY — SALE — PROCEEDS—APPORTIONMENT—LANDLORD'S LIEN.

Where a bankrupt's liquor stock and license were offered for sale separately, and \$144.61 was bid for the stock and fixtures, and \$1,000 for the license, after which the stock, fixtures, and license were offered as an entirety, and sold for \$3,500, there could be no apportionment of such sum, so as to entitle the bankrupt's landlord, who had a lien on the stock and fixtures, which were subject to distraint, as authorized by Laws Pa. 1891 (P. L. 122), to have a year's rent for the premises paid in full from the proceeds of the sale.

2. SAME—NOTICE OF SALE—OBJECTIONS—WAIVER.

Where a landlord, though not having been notified of the sale of his tenant's liquor stock, fixtures, and license in bankruptcy proceedings, attended the sale, which was made in bulk for a larger sum than was offered for the stock and fixtures and the license separately, and made no objection to the sale on the hearing of the petition for confirmation, he thereby ratified the sale, and waived the objection that he was not notified.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 123 Fed. 188.

Ira J. Williams, for appellant.

C. O. Mayer, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The facts of this case have been sufficiently stated by the learned District Judge in the opinion which he filed, and in which we concur. It is as follows:

"The bankrupt was the holder of a liquor license in this city, and owned the fixtures in a rented place of business. At the receiver's sale \$144.61 was bid for the stock and fixtures offered separately and \$1,000 for the license. The stock, fixtures, and license were then offered as an entirety, and brought \$3,500

The sale was on September 16th, and upon the 18th the receiver reported the sale to the court, and asked for an order of confirmation, which was thereupon granted. The landlord did not receive notice of the sale, but he did know when the petition for confirmation would be presented, and, although he was in attendance, he made no objection to the sale or to the order. Several months afterwards he presented a petition to the referee, averring that the stock and fixtures were subject to distraint for rent, and that he was therefore entitled under the Pennsylvania statute (P. L. 1891, p. 122) to have a year's rent paid in full out of the proceeds of the sale, arguing that, as the sum bid for the license separately was only \$1,000, \$2,500 should be taken as the value of the stock and fixtures, and this sum should be applied to the claim for rent. The referee disallowed the claim on the ground that it was impossible to say how much of the fund produced by the sale was the product of the license and how much was the product of the stock and fixtures. I agree with this conclusion, which accords with two previous decisions in this district. In *re Gerry*, 7 Am. Bankr. R. 462 [112 Fed. 957], and in *re Klapholz*, 7 Am. Bankr. R. 703 [113 Fed. 1002]. It is certain that no apportionment of the \$3,500 can be made with any degree of accuracy; for, while it is true that only \$1,000 was bid for the license separately, and therefore it may be contended with some degree of plausibility that the remaining \$2,500 was bid for the stock and fixtures, it may also be contended, and with equal plausibility, that, as only \$144.61 was bid for the stock and fixtures separately, the license must have produced the balance of the \$3,500. Clearly, the two lots as an entirety were more valuable than when offered separately, but the excess of value cannot now be assigned to its proper source or sources. Probably each lot contributed something to the higher price, but it would be a mere guess to attempt to say how much. If the landlord had desired to object to the sale upon the ground that he had not received notice, his time for so doing was at latest when the petition for confirmation was presented, for of this, at least, he had knowledge, and he was actually present when the order was made. His acquiescence in the report and confirmation was a clear ratification of the sale in bulk, and a waiver of the failure to give him notice. The action of the referee in rejecting the claim is approved."

This case is plainly distinguishable from that of *Carroll & Bro. Co. v. Young*, 119 Fed. 577, 56 C. C. A. 380, which was decided by this court about a year ago. In that case the lien creditors had been prompt and persistent in asserting their rights. They had made timely objection to the property being sold divested of their liens, and had pointed out the very difficulty which was subsequently brought forward as a bar to their rights. In that case, as in this, it was too late to question the propriety of the order of sale which had been made; but it was not impossible, as it is in the present case, to determine the proportional value of the particular part bound by the liens to the gross purchase price, and hence the order which was there made, by which the distribution was opened to permit the lien creditors to prosecute their claims as such, was both just and practicable. We adhere to our decision in *Carroll & Bro. Co. v. Young*, but to the very different circumstances and situation disclosed by the record now before us it has no application.

The order of the District Court approving the action of the referee in rejecting the claim of this appellant is affirmed.

HUTTER v. DE Q. BOTTLE STOPPER CO. et al.

(Circuit Court of Appeals, Second District. January 12, 1904.)

No. 31.

1. PATENTS—INFRINGEMENT—VARIATION IN FORM.

Where a patent shows invention, although it is of narrow scope, one who has appropriated all that is valuable in the invention cannot escape infringement by changes in form or structure which are nonessential, and do not change the principle of operation of the device.

2. SAME—EVIDENCE OF INFRINGEMENT.

A single sale of an infringing article, made under circumstances which indicate a readiness to make other similar sales upon application, is sufficient to make out a prima facie case of infringement.

3. SAME.

Where an allegation in the bill that defendant was located and doing business in the city of New York was not denied, proof of the purchase of infringing articles at a place in New York City bearing a sign with defendant's name on it is sufficient, prima facie, to establish that the sale was made by defendant.

4. SAME—SUIT FOR INFRINGEMENT—JOINDER OF OFFICER WITH CORPORATION.

The joinder with a corporation of one of its officers as defendant in a suit for infringement, where there is no proof that he had any part personally in the infringement, is not justified, and warrants the imposition of costs on the complainant.

5. SAME—INFRINGEMENT—BOTTLE STOPPERS.

The Hutter patent, No. 491,113, for a bottle stopper, is for a new and useful combination, which discloses patentable invention; also *held* infringed.

6. SAME—DESIGN FOR BOTTLE STOPPER.

The Hutter design patent, No. 25,435, for a design for a bottle stopper, conceding its validity, *held* not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 119 Fed. 190.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, sustaining the validity of two certain letters patent, granted to the complainant. The first of these, No. 491,113, dated February 2, 1893, is for a combination of mechanical elements constituting a bottle stopper. The second, No. 25,435, dated April 28, 1896, is for a design for a bottle stopper. The opinion of the Circuit Judge is reported in 119 Fed. 190. The opinion of Judge Gray, in the case of *Hutter v. Broome*, District of New Jersey, which was followed by the court below, is reported in 114 Fed. 655.

George H. Fletcher and Henry Schmitt, for appellants.

Arthur v. Briesen and Hans v. Briesen, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. Little need be added to the careful and comprehensive discussion of the defenses challenging the validity of the mechanical patent, to be found in the opinion delivered in *Hutter v. Broome*. It was there decided that the introduction into the

old mechanism of a stopper having in the top a heart-shaped slot resulted in a new combination producing a useful and novel result. That the theater of invention was circumscribed was admitted in the New Jersey case, but the court found that the advantages attributable to the new element were of sufficient importance to sustain patentability. In this we concur. The patented device is readily adjustable, easily kept clean and the bail mechanism can be used again in cases where the stopper is broken. The heart-shaped opening compels the bail piece to center automatically and properly when the pressure of the lever is applied and it permits the bent ends of the bail to be passed through it so that a new plug can readily be substituted for one that has, for any reason, ceased to be available. In short, the Hutter device seems to have remedied former defects and supplied what was needed, namely, a simple, cleanly, durable, cheap and easily manipulated bottle stopper. The fact that this result was accomplished by a simple change does not detract from its patentability.

The defense of noninfringement was not, apparently, relied on in the New Jersey suit, at least there was no discussion of the question in the opinion, the court, seemingly, regarding infringement as conceded, or so clearly established as to require no comment. In the case at bar the plea of noninfringement is strenuously urged, but the argument in its favor is based upon a limitation of the claim to the strictest possible construction, restricting it to the precise structures shown in the drawing and to a rigid interpretation of specification and claim which permits not even the slightest departure from the language employed.

The specification says of the heart-shaped slot:

"This slot, 1, is of such a size in cross-section, at its widest portion, that the inwardly bent ends, d^2 , of the bail-wire can be passed through it as shown in Fig. 3."

One of the elements of the claim is "the slot, 1, being wider than the bend, d^2 , of the bail-wire is long."

The defendants insist that this language must be construed literally so that when the bail is passed through the slot its base line must be at right angles to the axis of the slot and that if there be the slightest deviation from this position, as shown in Fig. 3, infringement is avoided. We find nothing in the file wrapper, the specification or the prior art requiring so illiberal a construction. It should be the endeavor of a court of equity to save rather than to destroy a meritorious invention; the court should not permit a notorious infringer to escape by the use of a perfectly transparent disguise. If the defendants' contention be correct no one can infringe except some brainless automaton who insists on using an exact reproduction of Fig. 3, alike in all details of length, width and angle down to the smallest fraction of an inch. Should such a one display the slightest common sense in the construction of the parts or even in their manipulation he would avoid infringement in spite of himself.

The court in the Broome Case understood the claim to mean that the upper part of the heart-shaped slot should be wide enough to

permit the bent end of the bail to pass through readily. Such an interpretation is not only reasonable, but accords with the following statement of the specification:

"With the aid of my heart or triangular shaped slot, I, made as described I am enabled to readily pass through it a bail-wire having its ends, d¹, already bent onto it."

We are clearly of the opinion that the defendants cannot appropriate all that is valuable in complainant's invention by making the ends of their bail-wire slightly longer than the width of the slot; if, by changing the angle at which the ends are inserted, or by making a slight flare at the opening of the slot, they are able to pass the bail ends through in the manner described in the patent. Structurally the bent end may be longer than the width of the slot; actually, during the process of being passed through, it is shorter. That the end of defendants' bail-wire passes readily through the slot is admitted, but it is necessary to give it a swinging motion which, it is assumed, is prohibited by the patent. One of defendants' experts says:

"In all the stoppers shown me both complainant's and defendants', the transverse apertures through the plugs although varying somewhat in width are so narrow that the end of the bail cannot be passed through it, otherwise than by the movement in a curved path, and for this reason I find that the Exhibits 'Defendants' Bottle Stoppers' do not contain the alleged invention shown in the drawings, described in the specification and particularly recited in the claim of complainant's mechanical patent."

A position so highly technical and hypercritical cannot be maintained. The defendants' stoppers, in so far as the mechanical construction is concerned, are substantially identical with those of the complainant; some of them, indeed, meet the requirements of the claim even as construed by the defendants, for they permit the bail end to pass straight through the slot without any swinging motion.

The defendants argued at great length in support of the proposition that there was not sufficient proof of sales of the infringing stopper by the defendant corporation. A single sale made in circumstances which indicate a readiness to make other similar sales upon application is sufficient to make out a prima facie case. It appeared that a young man, one Rieglesperger, in the employ of the complainant, was directed by the head shipping clerk to go to 47 Murray street with a written order and to buy a gross of bottle stoppers with attachments complete. He went to that address and entered a place of business with the sign "Fensterer & Ruhe." It stands admitted by the pleadings that Francis H. Ruhe is the secretary and treasurer and that Gabriel Fensterer is a director of the defendant, The De Q. Bottle Stopper Co. In the store of Fensterer & Ruhe at 47 Murray street, Riegelsperger found three men whom he had never seen before, and whose names he did not know. He spoke to the first one he met and asked him for bottle stoppers. The person so addressed requested him to wait a while, and after about 10 minutes took him over to another store at 50 Warren street, in the next block, up two flights of stairs. In this building the only sign he noticed was one on the ground floor as he went inside the

building. It read "The De Q. Bottle Stopper Company." There the man who had taken him over from Murray street got a gross of bottle Stoppers and gave them to him, with a paper on which was written in pencil the words "Jan. 12 1900 1 Gross Stopper Complete 1.75 Paid." Riegelsperger gave what he bought to the shipping clerk who sent him, and the latter produced the contents of the package, and testified that the stoppers were in the same condition in which he received them. The answer admits—by not denying—that the De Q. Bottle Stopper Co. is "located and doing business in the city of New York." It is, of course, possible that such company is located and does business in some place in said city remote from 50 Warren street, and that at the latter place, some persons unknown, wholly disconnected from the defendant company, deliver bottle stoppers to individuals who come provided with the cash to pay for them, and at the same place, without the knowledge, or assent, or connivance of the defendant company display a sign reading "The De Q. Bottle Stopper Co." This is possible, but to an intelligent mind it seems highly improbable, and we are clearly of the opinion that complainant's evidence made out a prima facie case, sufficient to put this defendant to its proof. If the complainant's witness were mistaken a few words of denial would have saved years of protracted and expensive litigation. The fact that no denial was vouchsafed is persuasive that it could not have been made truthfully.

The assignments of error, which present various points of practice and the other assignments which challenge the correctness of the rulings of the Circuit Court in refusing to expunge certain testimony as incompetent and irregularly taken, need not be considered, for the reason that they are academic and inconsequential, in view of the disposition made of the cause upon the merits. They might have some relevancy to the question of costs, were it not for the fact that this question also must be disposed of by paramount considerations.

Francis H. Ruhe, who is alleged in the bill to be secretary, treasurer and one of the directors of the defendant company, is made a party defendant. There is not the slightest proof to establish infringement by him as an individual and no sufficient reason is shown for making him a defendant. An injunction against the corporation restrains all its officers, agents and servants and there is little justification for making these persons defendants except in rare instances where it is shown that they have infringed the patent as individuals or have personally directed infringement. The courts of this circuit have frequently had occasion to criticise this practice and have, in some instances, imposed costs upon the complainant as a penalty for thus subjecting innocent parties to the expense and annoyance of defending themselves against an unwarrantable accusation. *Farmers' Mfg. Co. v. Spruks Mfg. Co.* (C. C.) 119 Fed. 594; *Consolidated Fastener Co. v. Columbian Fastener Co.* (C. C.) 79 Fed. 795; *Bowers v. Atlantic Co.* (C. C.) 104 Fed. 887; *King v. Anderson* (C. C.) 90 Fed. 500; *Greene v. Buckley* (C. C.) 120 Fed. 955; *Rowbotham v. Iron Co.* (C. C.) 71 Fed. 758; *Linotype Co. v. Ridder* (C. C.) 65 Fed. 853; *Howard v. Plow Works* (C. C.) 35 Fed. 743.

The design patent is for a bottle stopper having a head portion, A, a base portion, B, and two beads, C and D. The specification says:

"C is a bead having its periphery substantially parallel to the periphery of the head portion. D is a bead located below and extending beyond the lower edge of the bead, C."

The claim is for a stopper having these four characteristics, namely, a head, a base, and two beads.

Conceding the validity of the patent, a proposition which we assume but do not decide, we are of the opinion that the defendants have not infringed. Of course the two stoppers resemble each other, just as two corks resemble each other; they are both stoppers, have the same general characteristics and are designed to accomplish the same purpose. The defendants' stopper does not, however, have some of the features made essential by the language of the patent. Without entering into details, it suffices to say that the annular bead, C, is entirely absent from the defendants' structure. There is no equivalent substituted for the missing part and in this respect the two present a different appearance to the eye. Regarding the absence of the bead, C, from the defendants' stopper the complainant is in accord with the two experts of the defendants. He was shown the alleged infringing exhibits and was asked "whether any of them contain the bead, C, shown in the design patent." His answer was "No." The best explanation which counsel for complainant can make of this answer is "that he did not understand the meaning of the word 'bead,' giving it probably the conventional meaning of a pearl-shaped bead. He saw no such beads on the stoppers." The suggestion that the originator of the design supposed that the cross-examiner desired to know whether he found an article of jewelry attached to the defendants' "plug bottle-stoppers," cannot be criticised for want of "novelty" and "invention," but it is lamentably lacking in "utility."

It follows that the decree, in so far as it relates to patent No. 491,113 is affirmed, and in so far as it relates to patent No. 25,435 is reversed.

Neither the complainant nor the defendant corporation is entitled to costs as against the other either in this court or in the Circuit Court.

As to the defendant Ruhe the decree is reversed with costs and the Circuit Court is instructed to dismiss the bill as to him with costs. The cause is remanded to the Circuit Court to enter a decree in conformity with this opinion.

THE BAYONNE

THE NELLIE

(District Court, E. D. Pennsylvania. February 3, 1904.)

No. 45.

1. ADMIRALTY—SUIT FOR COLLISION—ISSUES AND PROOFS.

In a libel for collision against two vessels, although separate answers are filed, and separate issues raised, all the evidence taken is properly before the court on final hearing, to be considered on all the issues to which it is relevant, no matter by what party it was put in.

2. COLLISION—TUG WITH LOG RAFT IN TOW—DUTY OF CARE.

While the fact that a tug is burdened with a heavy and unwieldy tow, like a raft of logs, may relieve her from liability for a collision in some circumstances, it also imposes on her the duty of taking extraordinary care to keep her tow out of the way of other vessels.

3. SAME—STEAMSHIP AND LOG RAFT IN TOW—NAVIGATING IN DELAWARE RIVER.

A tug which was proceeding up the Delaware river at night, with a log raft in tow, 400 feet long and 140 feet wide, was in fault for a collision between the tow and a meeting steamship which could have been seen when more than a mile away, where she had the raft in the main channel, which was only 250 feet wide, and to which the steamship was confined because of her draft, and made no change of course until the two vessels were within a half mile of each other. The steamship was also in fault where she kept her speed of 11 miles, and also kept her course in the center of the channel, without signaling until within half a mile of the tug, and when it was too late to avoid collision with the tow.

In Admiralty. Suit for collision.

H. N. Abercrombie, for owner of logs.

Henry R. Edmunds, for steamship Bayonne.

Horace L. Cheyney and John F. Lewis, for tug Nellie.

J. B. McPHERSON, District Judge. This is an action by the owner to recover damages for injury done to a raft of logs by a collision with the steamship Bayonne in the early morning of November 30, 1901. The raft was in tow of the tug Nellie, and both vessels are declared by the libel to have been in fault. It appears without controversy that about midnight the tug took the raft in tow at Delaware City, and proceeded up the Delaware river, on the way to Bordentown, N. J. In accordance with the custom of the river, the raft was being towed on the flood tide. When the tide is against them, these unwieldy tows are tied up at a convenient wharf until the current is again in their favor. This raft was construed of 12 units, called "lockings"; each locking being 23 feet wide and 200 feet long, and containing about 50 logs, fastened together with chains. Six lockings were arranged side by side, suitably fastened together; and to these the remaining six, similarly fastened, were attached. The raft, therefore, was 400 feet long, 140 feet wide, and contained 592 logs, fastened together in the way just described. The hawser that connected it with the tug was long enough to make the length of the tow about 600 feet. I do not know the dimensions of the tug, but she was not a large vessel—probably 40 or 50 feet long, and about 15 or 16 feet wide. The Bayonne is

a large tank steamer, employed in carrying oil across the Atlantic. She is of 2,154 tons net register, and on the morning in question was bound down the Delaware river with a full cargo, drawing nearly 27 feet of water. The collision took place near the foot of the Cherry Island Channel, which runs perfectly straight for 2 miles, and for vessels of this draught is only 250 feet wide. Both the tug and the steamship had the proper lights set and burning, and there was no fog to obstruct the view. Lights could be seen for much more than a mile.

Before passing to the disputed facts, let me consider briefly a position taken by the proctor for the tug. He insists that the issues made by the libel and the two answers are so distinct that no testimony can be regarded in deciding the charges against the tug, except the testimony taken by the libellant and the tug, and that the testimony offered by the steamship must be wholly disregarded. In support of this position, *Gardiner v. Bibbins*, Fed. Cas. No. 5,222 is cited, but an examination of the report does not bear out the citation. In that case, Judge Betts merely decided that, where two were charged with a joint tort, and had put in separate answers, the answer of one respondent was not evidence for the other; but there is nothing in the decision to justify the conclusion that the court was not permitted to look at all the relevant evidence, no matter by which party it had been put in. In reason, as it seems to me, all the evidence taken in such an action is properly before the court on final hearing. In this class of cases, more than one controversy is usually being carried on at the same time. The injured tow charges both vessels with fault, and each of them endeavors to fasten the whole responsibility upon the other. The witnesses are heard and examined by counsel for the three separate interests, and I do not see why testimony taken under such safeguards should not be competent, no matter by whom it has been offered. Of course, it must also be relevant, and its relevancy is to be determined by an examination of the issues that are raised by the pleadings. As was said in *McKinlay v. Morrish*, 21 How. 343, 16 L. Ed. 100:

"The libel and answer are directly at issue, and no answer could be made more responsive to the charges in a bill than this is. According, then, to the rules of pleading in admiralty, there is no necessity for doing so, nor are we permitted to consider much of the testimony in this regard. When litigants make their case in express allegations, and by express denials of them, and then introduce testimony inapplicable to the issues they have made, it is not a part of the case, unless as it shall inferentially bear upon evidence properly in it, upon which the parties rely for determination of their controversy."

This case was cited with approval in *United States et al. v. Hucklebee*, 16 Wall. 414, 21 L. Ed. 457, where Mr. Justice Clifford, on page 424, 16 Wall., 21 L. Ed. 457, used this language:

"Pleadings, in informations for seizures upon land, or for confiscation of property, as well as in causes of admiralty or maritime jurisdiction, or in actions at law or suits in equity, are governed by certain well-established rules of practice, which require that the allegations shall correspond with the facts as proved," etc.

McKinlay v. Morrish was followed by Judge Acheson, in the Western District of Pennsylvania, in *Hays v. Packet Co.*, 33 Fed. 552, and by Judge Butler, in this district, in *The Earnwell*, 68 Fed. 228.

But this is elementary, and need not be dwelt upon. Turning to the pleadings, therefore, to discover the issues, the third paragraph of the libel is found to be as follows:

"That on the night of the day in question the moon was shining brightly, and lights and objects could be clearly and distinctly seen. The said tug had taken the raft in tow, as above set forth, and was proceeding with it up the western side of the Delaware river. The proper lights were set and brightly burning on the said raft. The said tug, with the raft, had proceeded about fifteen miles up the river, when about 4 o'clock in the morning the said steamship Bayonne came into sight, on her way down the river. When the said steamer Bayonne came within signaling distance, the tug blew two whistles, which were not responded to by the steamer until she was nearly upon the tug, and then she gave two whistles. That the said steamer approached the tug, bearing very slightly on the tug's starboard bow, and continued her course, coming at a high rate of speed. As the vessels came toward each other, there was little change, if any, in the course of the steamship Bayonne, and none whatever in that of the tug or raft. The said steamer came very rapidly toward the tug and raft, and when abreast of the Nellie, hardly 50 feet away, gave two sharp blasts of her whistle and sheered off to port, but too late to avoid a collision with the raft in tow of the Nellie, which she struck between the first and second lockings, and cut her way the entire length of the raft."

Based upon these averments, the charges of fault against the tug are:

"That those in charge of the tug Nellie were in fault in proceeding up the west side of the Delaware river, in not having a proper lookout, and not changing her course, and not giving timely signals to the steamer, and in other respects which will appear at the hearing of this case."

The libel was filed on August 18, 1902; but on October 2d, after the answer of the tug had been filed—which denied that the tug had been guilty of the faults specified in the foregoing quotation, and prayed that, "if the libelant intends to allege at the hearing that those in charge of the said tug were guilty in other respects than as set forth in said fifth article, the claimant prays that he shall be compelled to amend the libel at the present time, and to set forth fully all specifications of fault which he intends to make against those in charge of the said tug Nellie"—the libelant amended in these words:

"And in amending said libel he desires to allege other faults against the said tug Nellie than those charged in the fifth paragraph of the libel, namely, that the said tug was in fault in not having a proper lookout, in changing her course just before the collision, in attempting to cross the bow of the approaching steamer with a heavy tow, which she was barely able to control, and the mismanagement of those in charge of the tug in not keeping well over to the side of the channel, rendered specially necessary by the location, the tide, the character, size, and make-up of the tow, and the strength and capacity of the tug."

A supplemental answer was filed, denying the new charges, and averring that two of the faults charged against the tug were contradictory; the first being that she had not changed her course, while the second alleged that she had changed her course improperly. This averment seems to me to be mistaken. The libelant's language is not as clear as it might be, but I think the amendment must be taken as a substitution for the charges originally made. Otherwise the conflict would undoubtedly exist. It might have been wiser to bring the apparent conflict to the attention of the court before the testimony was taken, in order that the issue upon this point might be made certain. This was not done, however, and the steamship proceeded to take her testimony,

followed by the libellant, and last of all by the tug. The result of this looseness of pleading and procedure has been confusing, and has added much to the labor of the court. As will be observed, when the testimony is read, the pleadings are at odds with the facts; but, as the case has been heard on the merits, I shall dispose of it in the same way, without much regard to the pleadings, cautioning the bar, however, against regarding this disposition of the matter as a precedent.

Returning to the facts of the accident, I may say at once that in my opinion the tug was in fault for keeping her course too long. The captain testified that as he approached the mouth of Christiana creek, about 4 o'clock in the morning, coming up on the westerly side of the river, and intending to tie up at Edgemoor because the tide was about to turn, he saw the lights of a schooner lying at anchor about 100 feet below the mouth of the creek, and close to the western edge of the channel. In order to avoid collision with the schooner, he took the tow out into the channel, and, having passed the schooner to the eastward, directed his course again to the westward, in order to reach the wharf, which was about a mile and a half above the mouth of the creek. As he changed his course from the middle of the channel to the westward, he saw the lights of the Bayonne about two miles away. He declares that he first saw the red light of the steamship, then the green, then the red again, and finally the green, which he continued to see until the collision took place. He himself was showing his green light to the steamship all the time. Thereupon he straightened up in order to get the tow in proper position behind him, and then proceeded up the river. Soon afterwards he blew two blasts to the steamship, to which she did not reply as soon as is customary. After an interval, however, she did answer the signal with two blasts; and, being by this time not more than a quarter of a mile away, she followed it up with another signal of two blasts, which the captain of the tug accepted by two blasts upon his own whistle. Both vessels then changed their course to port, but by this time the collision was inevitable; and, although the steamship succeeded in escaping the tug by 50 or 60 feet, she could not escape the raft, but struck it upon the starboard corner, carrying away some of the lockings, and ultimately causing the loss of 65 logs, that could not be recaptured. As a whole, this cannot be true. The "capers" of the steamship, as one of the witnesses described the rapid changes of course that showed her red and her green lights alternately, are incredible. The channel is perfectly straight at this point, and so narrow for a deep-daught vessel that she must be kept on the ranges. No reason can be imagined for several changes of course, and I am confident that they were not made. There are other discrepancies and contradictions in the captain's testimony that prevent me from giving it very much weight. It is true that the tug was the burdened vessel, and being, therefore, unable to move rapidly, would be relieved of liability in some situations; but her very incumbered condition laid a duty upon her to take proper care to keep out of the way of other vessels whom she might fairly expect to meet at close quarters. The Alabama (D. C.) 114 Fed. 218. She was towing a heavy raft of logs, 140 feet wide and 400 feet long, nearly, if not quite, in the middle of a narrow channel; and, in a river like the

Delaware, that is much frequented by other craft, this was a serious menace to their safety, especially after dark. The lights on the raft were so placed that they might not be easily seen, being only 5 feet above the water; and, of course, if an approaching vessel supposed that she had only a tug with a vessel in tow to look out for, instead of an obstacle 140 feet wide, she would naturally believe herself free to pass at a less distance than if she knew the truth. I think, therefore, that the tug should have altered her course to the westward as soon as she made out the lights of the steamship, for I think it is certain that, while it may have been the Bayonne's green light that was seen, she was very little to starboard of the tug, and the part of prudence for the light-draught vessel, with a formidable obstruction in tow, and having the whole river open to her, and not merely a narrow channel, was to increase the distance between herself and the approaching danger. Undoubtedly, if she had increased it, even by a few feet, the collision would have been avoided, and her obstinacy in holding her course too long was, therefore, in my opinion, a prominent and contributing cause of the injury. I do not think that the raft was in fault. Nothing is charged against it, except the failure to keep the lights burning brightly, and the evidence on this subject is too slight to be accepted.

It remains to consider the liability of the Bayonne, against whom it is charged that she was "running at too high a rate of speed in the said Delaware river, in not taking proper steps to keep out of the way of the said raft, in not having a proper lookout, and in other respects which will appear at the hearing of this case." Her account of the collision is, I think, equally incredible. It is as follows:

"At about 1:15 a. m. of said 30th day of November the Bayonne left her anchorage at League Island in charge of a duly licensed pilot, who, together with an officer and the master, were on the bridge, and a competent man forward on the lookout. About 4 o'clock a. m., when the steamer was in the Cherry Island Cut Channel, the lights of the tug Nellie were discovered coming up. The lights seen were the masthead and red side light of the tug, and a considerable distance away and about two points off the port bow of the steamer. The channel or cut at this point is about 2 miles long, and for vessels of the draft of the steamship Bayonne (26 feet 8 inches) about 250 feet wide, and perfectly straight. The steamship's draft compelled her to keep as nearly as possible in midchannel. She kept up her speed, which was $10\frac{1}{2}$ or 11 miles. The tug and the steamship were on courses that prevented any thought of a collision; but, when they had approached within a very short distance of each other, the tug shut out her red light, and showed her green, and gave two whistles, indicating that she was going to the westward, and thus crossing the course of the Bayonne. The Bayonne at once replied with two whistles, and starboarded her wheel, throwing her head to the eastward about two points, when, being so near the bottom, she refused to go any further; and the raft in tow of the Nellie, tailing up with the flood tide, and unable to follow the tug, was struck on the starboard corner of the first section by the Bayonne, doing the damage complained of. The Nellie, it appears, was making for Edgemoor, on the western shore, where she expected to lie for a flood tide."

To suppose that the tug, with so heavy a tow, would have deliberately tried to cross the bows of the steamship when they were only 300 feet away, is too severe a strain upon my imagination. *Haney v. Packet Co.*, 23 How. 291, 16 L. Ed. 562; *The Maggie S. Hart* (D. C.) 38 Fed. 765; *The Hercules* (C. C.) 17 Fed. 606; *The Peters* (D. C.)

42 Fed. 269. What happened, as it seems to me, must have been simply this: Both vessels were in the middle of the channel. The Bayonne certainly was, and there the collision took place. They saw each other nearly head on in time to get out of each other's way, but neither was inclined to move, in the hope that the other would be obliging enough to yield the road. They both held on, therefore, until a dangerous situation was created, and, while their efforts to escape were nearly successful, they did not succeed altogether. The steamship was in fault for holding her course too long, under the circumstances, for not signaling sooner, and for not slowing down until the danger to be encountered became perfectly clear.

A decree may be entered in accordance with this opinion.

ATLANTA NAT. BUILDING & LOAN ASS'N et al. v. GILMER et al.

(Circuit Court, M. D. Alabama. January 22, 1904.)

No. 190.

1. MORTGAGES—NOTICE OF DEFECTIVE TITLE—POSSESSION AS NOTICE OF EQUITABLE CLAIM.

Residence property was occupied by a mother and her daughters, the legal title being in the daughters, who conducted a boarding house, while the mother occupied a room therein. *Held*, that the possession was presumptively in the daughters, and that one who lent money to them, taking a mortgage on the property as security, being a purchaser for value, was not charged by the joint occupancy of the mother with notice of any equitable right she might have in the property.

2. SAME—ESTOPPEL TO ASSERT EQUITABLE TITLE.

The owner of the equitable title to real estate, who, with full knowledge, permits the holder of the legal title to mortgage the same for borrowed money without objection or notice to the mortgagee, cannot set up such equitable title to defeat the mortgage; nor does a subsequent purchaser through such equitable owner after his title had been established as against the mortgagors, and who bought with notice of the mortgage, stand in any better position.

3. VENDOR AND PURCHASER—BONA FIDE PURCHASER—TAX TITLE.

A purchaser from one holding under a tax deed is as fully protected as a bona fide purchaser for value as one through any other source of title, where the proceedings were regular, and the deed conveyed the legal title.

In Equity. Suit to foreclose mortgage.

Thomas H. Watts, for complainants.

Gordon Macdonald and A. A. Wiley, for defendants.

SHELBY, Circuit Judge. This is a suit to foreclose a mortgage, brought by Jerry W. Goldsmith, a citizen of Georgia, and the Atlanta National Building & Loan Association, a Georgia corporation, against J. M. Dennis, Rebecca C. Gilmer, Eleanor E. Gilmer, Susan W. Jones, and A. E. Pentecost, all citizens of Alabama, except A. E. Pentecost, who is a citizen of Mississippi. The mortgage sought to be foreclosed is made an exhibit to the bill. It was duly executed by the four last named defendants in June, 1891, and was acknowledged by the Misses Rebecca C. and Eleanor E. Gilmer on the 17th day of June, 1891, and

subsequently by the other mortgagors, and was filed in the probate office of Montgomery county, Ala., for record on July 24, 1891, and was duly recorded. The mortgage is to secure the note of the mortgagors for \$5,000, which the Atlanta National Building & Loan Association lent to the mortgagors contemporaneously with the execution of the mortgage. The mortgage is on a lot situated in the city of Montgomery, and described as "the east half of lot number five (5) in square number nine (9) in that part of said city known as 'East Alabama,' fronting seventy-five (75) feet on Bibb street, and running back, with the uniform width, along Lee street, 100 feet."

It appears from an agreement of solicitors and from evidence in the cause that Susan W. Gilmer owned the real estate described in the mortgage from 1875 till 1882, when it was twice sold at tax sale. One sale was for state and county taxes, but it appears that the description in the proceedings was inaccurate. In the same year, however, it is agreed that it was sold by regular proceedings for unpaid city taxes due the city of Montgomery; that one Marlin bought and received a deed to the property, which title he afterwards conveyed to one Stoelker, and Stoelker conveyed such title in 1882 to A. Campbell Jones; and that afterwards, on June 17, 1890, A. Campbell Jones conveyed the lot to the four mortgagors. This last deed was recorded in the office of the probate judge of Montgomery county July 10, 1890. It appears, therefore, that the legal title to the property in question was in the four mortgagors at the time they executed the mortgage sought to be foreclosed. This fact is not controverted. It is also admitted that the four mortgagors and their mother, Mrs. Susan W. Gilmer, resided in the house on the property at the time of the execution and delivery of the mortgage. There is conflict in the evidence as to who was in possession of the house and lot, claiming to own it, from the time of the transfer of the tax title to A. Campbell Jones to the date of the mortgage. The evidence of several witnesses tends to show that the mortgagors, after Jones made the conveyance to them, were in possession of the property as owners; that they paid the taxes and used the property as a boarding house, keeping boarders, and collecting the board, and that their mother lived with them, and was supported by them. There is other evidence, however, that tends to show that Mrs. Susan W. Gilmer was holding possession of the property and permitting her daughters to use the same without rent.

Mrs. Gilmer brought suit in the state chancery court in 1892 to have the title divested out of her daughters. This suit was successfully prosecuted by her successors, she dying pending the suit. The lot having been determined to be the property of the estate of Mrs. Gilmer, it was by decree of court sold for division among her heirs, and the defendant Dennis became the purchaser. The decision of the appeal in the case is reported in *Waller v. Jones*, 107 Ala. 331, 18 South. 277. This decision is, of course, conclusive as between Mrs. Gilmer's estate and her four daughters. The mortgagee (a complainant here) not being a party to that suit, its rights are in no way affected by it. It was not the purpose of Mrs. Gilmer's bill to vacate the mortgage that had been given by her daughters. If she desired to avoid the mortgage, it was not shown in that case nor in this one. When the defendant Dennis

bought the lot, the mortgage in suit here was registered in the proper office, and he is charged with notice of it. I find no evidence in the record that the mortgagee at the time it lent the \$5,000 on the mortgage, had notice of any claim of Mrs. Susan W. Gilmer to the property. The defendant Dennis contends that Mrs. Gilmer's possession of the property was notice to the mortgagee of her rights. He asserts that the possession of the lot by her was constructive notice of her equitable claim. It is true that actual, open, notorious, exclusive, and unambiguous possession by Mrs. Gilmer would have been notice to the mortgagee of her claim. 2 Pomeroy's Eq. (2d Ed.) § 620. But is it shown that Mrs. Gilmer had such possession? It is agreed that the four mortgagors and their mother occupied the house, and the evidence shows that the daughters were exercising acts of ownership at the time the mortgage was given. It is true that there is also evidence tending to show that Mrs. Gilmer was claiming possession and exercising acts of ownership. If there had been no recorded title in favor of her daughters on this state of the evidence, the position of the defendant Dennis would have been better than it now is. But the four daughters also lived in the house, and the recorded legal title to the premises was in them. Under such circumstances it seems to be the unquestioned rule that the possession is presumptively that of those who have the legal title. Where the actual possession is joint, and one of the joint possessors is vested with the legal title, the possession is considered that of the one who has the title. The possession of the other, who has no title, is no notice of any claim he may have. *McCarthy v. Nicrosi*, 72 Ala. 332, 334, 47 Am. Rep. 418; 3 Washburn on Real Prop. 138; *Preston v. McMillan*, 58 Ala. 84, at page 91. Mrs. Gilmer's occupancy of a room in the house was not inconsistent with the title of her daughters, they also occupying the house under a recorded deed, and using it as a boarding house. The possession that will charge a purchaser with notice must be unambiguous, and not liable to be misunderstood or misconstrued. The joint occupation of the claimant of an equity with the holder of the legal title is not notice of the claim of the former. *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012; 23 A. & E. Enc. of Law, 509.

Jones obtained title to this property through the tax sales in 1882, and he conveyed it in 1890 to the mortgagors, who executed the mortgage in 1891. Mrs. Gilmer took no steps to redeem the property or to vacate the tax sales until 1892, after her daughters had executed the mortgage and obtained the \$5,000. It is clearly proved, and without conflict, that pending the negotiations to secure the loan Mrs. Gilmer knew of the fact that the money was to be borrowed. This is shown by the testimony of six witnesses—her four daughters (the mortgagors), A. Campbell Jones, and Charles Wilkinson. She could have prevented the loan by asserting her claim, but she did not assert it; or she could have protected her equitable interest against the mortgage by giving notice of her claim. Her mere occupancy of a room in the house, asserting no claim to the property which came to the notice of the mortgagee, cannot be construed as a notice to the mortgagee of her equity. Knowing that the money was to be borrowed; that a mortgage was to

be given on the property; that her daughters, who were to borrow the money, had the legal title to the property—she acquiesced in the arrangement, and made no objection until the money was secured. Afterwards to assert her claim as superior to that of the mortgagee would have been inequitable and unjust. That she did not intend to contest the mortgage is shown by her subsequent acts, for when she filed a bill to vacate the title she did not make the mortgagee a party to the suit and pray to have the mortgage vacated. The uncontradicted evidence that Mrs. Gilmer knew of the purpose of her daughters, who held the legal title to the lot, to mortgage it to borrow money, and that she made no objection, strongly corroborates the contention of the complainants that she was asserting no claim to the property, and that the actual possession and control of the lot at the date of the mortgage was in the mortgagors.

When the defendants fail to prove facts that charge the mortgagee with notice of Mrs. Susan W. Gilmer's equitable claim to the property, the mortgagee stands as a purchaser for value without notice. As against her four daughters, Mrs. Gilmer had a good claim to the lot. This is now *res judicata* as between her and them. *Waller v. Jones*, 107 Ala. 331, 18 South. 277. But the mortgagee, having no notice of her equities, had a right to rely on the legal title shown by the record to be in the mortgagors. Jones quotes and approves Lord Hardwicke, who said: "When I speak of a purchaser for a valuable consideration, I include a mortgagee, for he is a purchaser *pro tanto*." 1 Jones on Mortgages, § 458; *Id.* § 549. A mortgage taken to secure a debt contemporaneously contracted constitutes the mortgagee a purchaser for a valuable consideration, who will be protected in equity against outstanding claims or incumbrances of which he had no notice. *Wells v. Morrow*, 38 Ala. 125; *Whitfield v. Riddle*, 78 Ala. 99; *Alston v. Marshall*, 112 Ala. 638, 20 South. 850; 23 A. & E. Enc. of Law, 476.

It is urged in defense of this suit by the solicitors of the only defendant who contests the foreclosure that the mortgage cannot be foreclosed so far as the interests of Mrs. S. W. Jones and Mrs. A. E. Pentecost are concerned, because they were married women at the time of the execution of the mortgage, and that their husbands did not join in the mortgage, as required by the Alabama statute. In reply the solicitor for the complainants in his brief says:

"It is really not of much importance whether it be held that the mortgage is good or bad as to the two quarter interests of Mrs. Jones and Mrs. Pentecost, because, the property being worth \$20,000, a half interest is worth \$10,000—more than enough to pay complainants in full; and, as the obligation of the four daughters was joint, each of them, and the property or interest of each, is liable for the whole debt."

As the complainants are content to have the mortgage foreclosed on the interest in the lot vested at the date of the mortgage in the two Misses Gilmer, it is unnecessary to decide whether the mortgage is a valid charge or not on the shares of the two married women mortgagors.

A decree will be entered foreclosing the mortgage on the one-fourth interest of Eleanor E. Gilmer and on the one-fourth interest of Rebecca C. Gilmer in the lot described in the mortgage.

On Rehearing.

Since the foregoing opinion was written, the solicitors for the defendants, with leave of the court, have filed additional briefs. I have carefully examined the new authorities which have been cited, and have not found any good reason for disturbing the conclusion to which I had come.

1. It has been again urged on the attention of the court that the possession of Mrs. Gilmer was sufficient to put the complainants on notice. The case of *Watson v. Murray*, 54 Ark. 499, 16 S. W. 293, is cited as sustaining that contention. It is true that it appears in that case that the mother and the son occupied the house on the real estate in question, with the legal title in the son, and that it was held, under the circumstances of the case, that the possession of the mother was notice of her equitable interest to the vendee of the son. The facts, however, of the case, as showing the character of the mother's possession, are very different from the facts in the case at bar. The son was a minor, living with his mother, she being the head of the family. The court found that there was "not a circumstance to indicate that she or her neighbors regarded her occupancy of the premises as being by the permission or sufferance" of her son. "She was the head of the family, and no one could reasonably have ascribed the actual possession of the property to her minor son, rather than to herself." It does not appear that the son had been emancipated from her control. On the contrary, the court said that "he was a minor, living with his mother, and that she was entitled to all of his earnings." The solicitors for the complainants call attention to the fact that his disabilities as a minor had been removed. But an examination of the case shows that when he was about 16 years of age, upon the application of his mother, "the disability imposed by his minority was so far removed as to enable him to execute a deed" to a purchaser of certain real estate not involved in the suit, the title to which was in him at that time. After that he lived with his mother as a member of her family, and under such circumstances that she was legally entitled to his earnings. It was a case in which the mother alone was in possession. The court observed that, if her possession was not in the "strictest sense exclusive," it was sufficiently marked and ostensible to put *Murray* upon inquiry, and to charge him with notice of her equitable estate. We do not think the court in that case intended to depart from the well-settled doctrine that, where the actual possession of the real estate is joint, and one of the joint possessors is vested with the legal title, the possession is considered that of the one who has the title. As I understand the opinion, the court has only decided in that case that the actual possession was in the mother, and not in the son. In the case at bar the evidence, I think, shows that at the date of the mortgage the property was in the possession of the mortgagors. And therefore Mrs. Gilmer's occupancy of a room in the house was not inconsistent with the title of the mortgagors, they being in actual possession, and using the house as a boarding house.

Much has been said in the briefs about the relationship that existed between the occupants of the house. In *Rankin v. Coar*, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661—a case in many of its features very

much like the one at bar—it is shown that the relationship of the occupants of the house, instead of having a tendency to excite inquiry on the part of the mortgagee, would have directly the contrary effect. The court said:

"The true rule is that, when the occupation by one is not exclusive, but in connection with another, with respect to whom there exists a relationship sufficient to account for the situation, and the circumstances do not suggest an inconsistent claim, then such a possession will not give notice of a right by unrecorded grant. It will be neither open, notorious, nor unequivocal."

2. The position is also taken that the complainant, as mortgagee, cannot be an innocent purchaser without notice, because the mortgagors held under a tax title. Many authorities are cited bearing on questions relating to the infirmities of tax titles. Consideration of these questions, however, is excluded by the agreement upon which the case is submitted for decision. It is agreed that the property was sold by regular proceedings which carried the title. As I understand the sixth section of the agreement upon which the case is submitted, it shows that the legal title was in the mortgagors at the time they executed the mortgage, and that there was no infirmity in the proceedings by which the property was sold for city taxes. If the mortgagee had examined the record before accepting the mortgage, it would have found that the legal title was in the mortgagors.

3. I cannot concur in the contention of the learned solicitors for the complainants that "a purchaser from one holding under a tax deed cannot become a bona fide purchaser for value without notice." If the proceedings are regular, so that the deed carries the legal title (and that is the agreement here), it is entitled to as much consideration as any other conveyance of title. In *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 8 Sup. Ct. 337, 31 L. Ed. 309, the court said:

"If a tax deed is valid, then from the time of its delivery it clothes the purchaser not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them."

A decree will be entered for the complainants as directed in the former opinion.

LADD et al. v. AETNA INDEMNITY CO.

(Circuit Court, D. Oregon. February 9, 1904.)

No. 2,763.

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT TO BORROW MONEY.

The power of an agent to borrow money on behalf of his principal does not depend upon whether or not he is a general agent, but, although not a general agent, such authority may be conferred, by implication, from the scope and character of the business he is empowered to transact.

2. SAME—QUESTION FOR JURY.

Defendant executed bonds of indemnity to secure the performance by a shipbuilding company of contracts for the construction of certain vessels, the contracts providing that in case of default by the company it should turn over its works to defendant, to enable it for its own protection

to complete the contracts. When the vessels were partially completed, the company abandoned the work and turned its plant over to defendant's agents, who had executed the bonds in its behalf. The evidence tended to show that such action was with defendant's knowledge, and that the agents proceeded with the work, and, being without sufficient money to carry on the same, they borrowed money from plaintiffs, giving a bond therefor in the name of defendant, and using the money so borrowed in carrying on the work. *Held*, that whether or not the evidence established a state of facts which conferred power on the agents, by implication, to borrow the money, was a question for the jury, and that a verdict for plaintiffs would not be disturbed.

At Law. On motion for new trial.

Williams, Wood & Linthicum and W. C. Bristol, for plaintiffs.
Campbell & Powell and Frederick V. Holman, for defendant.

BELLINGER, District Judge. This action grows out of certain contracts of indemnity entered into by the defendant to secure three shipbuilding contracts of the Hardy Shipbuilding Company, of the state of Washington. One of these contracts was for the construction of a steam passenger boat for one Horn, the second was with the Pacific Cold Storage Company for the construction of a barge, and the third was with the firm of Sudden & Christensen for the construction of a four-topmasted barkentine. The three bonds of indemnity were in the sums respectively of \$10,000, \$2,000, and \$15,000. It was a condition of each of said bonds that, in the event of a default by the Hardy Shipbuilding Company, that company would turn over its plant to the defendant, to the end that the defendant might for its own protection prosecute the contract to completion. The shipbuilding company entered on the work contracted for, and proceeded with the same until about May 15, 1902, when, being without the means or credit to continue the work, it defaulted in its contracts. Thereupon it delivered possession of its plant to the defendant, represented by Clemens & O'Bryan, its general agents, in order to enable the latter to complete the work for which it was liable on its indemnity agreements. In the prosecution of this work it became necessary to use a large amount of money, and the agents, being otherwise without resources, borrowed this money from the plaintiffs to the amount of \$9,500. In order to secure this advance, the agents executed a bond, as for the defendant, by themselves as agents, to the plaintiffs, in the sum of \$10,000. They also gave their individual promissory notes for the money so advanced. The defendant denied the authority of the agents to borrow this money, and refused to pay the same; whereupon this action was brought. The jury returned a verdict for the amount claimed, with interest. The defendant now moves to set this verdict aside, and for a new trial.

In support of the motion it is contended, among other things, that the court erred in instructing the jury that a general agent is one empowered to transact all his principal's business. But, as to this, it is immaterial whether a general agent is one authorized to transact all the principal's business, or all or less than all his particular business, in a particular place or of a particular kind. The authority of the agent in this case to borrow the money in question does not depend on defini-

tions. The extent of the agent's authority is not determined from the name used to designate the agency. That must be ascertained from the scope and character of the business which the agent is empowered to transact. *Montgomery v. Furniture Co.*, 104 Ala. 100, 16 South. 29. There seems to be no very well defined distinction between the powers of general agents, local agents, and subagents, and therefore they may become in any case a question of fact for the jury. May on Insurance, § 126. If the authority in this case to borrow money existed, it was a necessary implication from the authority formally conferred and from the circumstances of the case. The contention in this case is that the power to borrow money must be conferred in express terms; but there is no reason why this authority should be distinguished from that, implied from the circumstances of the case, to perform any other act necessary to the conduct of the business in the agents' hands. There is no doubt that it was the policy of the defendant, in case of default on the part of contractors for whom it stood as surety, to complete the contracts guarantied. The agents in this case were particularly reminded of this fact by the secretary of the company, who, under date of March 6, 1902, says:

"When executing bonds of this character you must always bear in mind that the surety company signing such a bond becomes a co-contractor, and in the event the contractor defaults on any part of the work, the company must step in and complete it or else stand the loss; which loss is represented by the difference between the contract price and the cost of actually completing the work."

This work necessarily involved the expenditure of money. It is not to be presumed that the defendant intended to complete only what may be termed "solvent" contracts. Ordinarily, such contracts would not require the intervention of the surety company; they would take care of themselves; but, in any event, the completion of a defaulted contract necessarily involved pecuniary risks. Such work could not be carried on without incurring obligations to pay the wages of employes and the cost of materials; and it can make no difference whether the indemnity company's obligation is for materials and wages, or for money with which to pay for materials and wages. If the use of the defendant's credit was practically indispensable to the accomplishment of this object of the agency, the authority to pledge it is implied. "The principle is elementary that, whenever a power to do an act for the principal is given by one person to another, that everything necessary to make the execution of the power effectual to attain the end in view is impliedly conferred." *Benninghoff v. Insurance Co.*, 93 N. Y. 505.

It is contended, further, that the court erred in refusing to give an instruction requested by the defendant, which was in fact given, but with a qualification added by the court. The instruction is as follows:

"I charge you that third parties dealing with an agent are put upon their guard by the very fact, and must do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the powers before them, and must at their peril observe that the act done by the agent is legally identical with the act authorized by the power. Therefore, if Ladd & Tilton, the plaintiffs, loaned the ninety-five hundred dollars (\$9,500.00) sued for in this action, or any part thereof, to Clemens & O'Bryan, as agents for the defendant, and if you find that Clemens & O'Bryan did not

have authority to borrow money for the defendant, then your verdict must be for the defendant."

The court supplemented this instruction with the following:

"It was the duty of Clemens & O'Bryan to protect the interest, so far as they were able, of the defendant company. Whether, in the discharge of this duty, they were warranted in borrowing the money, for the recovery of which this action is brought, in order to prevent default on a contract guarantied by the company, and thus save the company from liability, is a question submitted to you."

I assume that the defendant's objection to this qualification of the instruction is not because of the statement therein that it was the duty of the agents to protect the interests of the defendant so far as they were able, but to the fact that the court, instead of determining the question of the agents' authority for itself, submitted that question to the jury. And this is, after all, the question upon which the case turns. Is it necessary that the authority to borrow money should be expressly conferred, or can it be implied from the circumstances of the case; and if the latter, do the facts in evidence warrant the implication of such authority?

The testimony in the case, as already appears, tended to show that, in guarantying the contracts of the Hardy Shipbuilding Company, the defendant became a co-contractor with that company, with the right, in the event of a default by the contractor, to step in and complete the work which it guarantied. The right thus secured was for the protection of the insurance company. It was within the contemplation of the agreement of indemnity that the defendant would, in such event, undertake the completion of the contracts which it had guarantied; and the testimony tended further to show that, in assuming such work and in carrying it on, Clemens & O'Bryan would act as the representatives of the indemnity company. When the shipbuilding company defaulted on its contracts, Clemens & O'Bryan, acting in defendant's behalf, took possession of the plant of the shipbuilding company, and proceeded with the work for which their principal was responsible. The testimony tends to show that the acts of Clemens & O'Bryan in taking possession of the shipbuilding plant for such purpose were known to the defendant; that it intervened in a suit between other parties to obtain possession of said plant, in virtue of the acts of its said agents. The testimony tends to show that, in the carrying on of the work so assumed for the defendant by its said agents, it became necessary to borrow the money for the recovery of which this action is brought; that the money was borrowed in good faith, and was used in the carrying on of the work so assumed; and that one of the contracts—that for the construction of the barge—was in fact completed by this means. Upon these facts, the question of the agents' authority to borrow money was properly submitted to the jury. And, if it was, there was no error in respect to the instructions given or those refused. The Supreme Court of the state of Washington, upon a full consideration of the questions involved in a case against this defendant, arising on a similar bond executed by one of these agents, held that the agent was acting within the scope of his authority in the execution of the bond. *Pacific Natl. Bank v. Ætna Indemnity Co.*, 74 Pac. 590. That case

decides the identical question involved in this case—that Clemens was authorized to borrow money to complete the defaulted contracts of the Hardy Shipbuilding Company, for which this defendant was liable on its bond of indemnity.

The motion for a new trial is denied.

HOADLEY v. DAY et al.

(Circuit Court, N. D. Illinois, N. D.)

No. 25,192.

1. FEDERAL COURTS—JURISDICTION—SUIT TO COLLECT NOTES.

A suit to foreclose trust deeds securing notes, with relief incidental thereto, is one to collect the money due on the notes, within Act March 3, 1887, c. 373, 24 Stat. 552, and Act August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], relative to jurisdiction of federal courts.

2. SAME—ACCOMMODATION NOTES.

K. sold lots to D., taking back notes executed by D. to his own order, and by him indorsed, secured by trust deed on the lots. On the same day D. gave K. a quitclaim of the lots. S., the trusted agent of K., without K.'s knowledge, put up the notes with J. as collateral for a \$1,000 note of which complainant was guarantor. The \$1,000 note not being paid, M. caused the collateral notes to be sold, and complainant bought them. *Held*, that Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], providing that no federal court shall have jurisdiction of an action on a promissory note by an assignee thereof, unless the action might have been maintained in such court if no assignment or transfer had been made, do not deprive the court of jurisdiction of a suit by complainant to foreclose the trust deed; the notes secured thereby being accommodation notes, and K. being in legal effect the maker thereof; he also, in effect, having put them up as collateral; and complainant's title to the note of which she was guarantor being considered to have vested when the collateral was put up, so that the collateral notes are to be treated as made by K. to complainant.

Stillman & Martyn, for plaintiff.

Castle, Williams & Smith, for defendants.

KOHLSAAT, District Judge. One Friederick Kolze, who was the owner of certain lots in Cook county, Ill., sold the same to a man named Day through the agency of one Stade, his nephew, and took back as part of the purchase price nine notes for \$600 each, secured by deed of trust upon said lots, in groups, viz., three groups of notes, each group including three of said notes, due respectively in one, two, and three years from November 17, 1897, secured by a separate deed of trust dated November 17, 1897, and acknowledged November 23, 1897, on a third of said lots, or \$1,800 in each incumbrance. Some time afterwards Stade caused Day to execute and deliver to him duplicates of said notes, or at least secured from Day copies thereof. The notes were executed by Day to the order of himself, and by him indorsed and delivered to Kolze, or to Stade for Kolze. Stade then took one set of the notes, and deposited them in the safety deposit box for Kolze, and proceeded to negotiate the other set. He placed the nine notes aforesaid on February 17, 1898,

with the Chandler Mortgage Company, as collateral security for the performance of a contract entered into by Stade with one Smith, under which Smith loaned Stade \$1,000. Stade failed to pay the note according to its terms, and, also having failed to carry out the other provisions of the contract, Smith caused the said notes to be sold under the terms of his collateral note, and the same were bid in by complainant herein for \$2,190, being the sum due Smith from Stade. There is nothing to show that Kolze had any knowledge of Stade's action, nor that Smith or Hoadley knew, or had any reason to suspect, the illegal character thereof. The master finds that the transaction on the part of Smith and Hoadley was in good faith. It further appears that on the same day in which Day executed the said notes and copies he reconveyed said lots by quitclaim deed to Kolze, who had been in possession of the farm continuously. Afterwards, Stade having disappeared, Kolze secured what he supposed to be the notes executed as aforesaid, through a third person, representing Stade, together with a release of the trust deed securing the same, which was recorded. Subsequently Kolze sold the premises to his daughter, taking from her notes secured on this land as part purchase price, and then died. These last-named notes are now held by his administrator.

Complainant, a citizen of Massachusetts, filed her three bills on May 29, 1899, to foreclose said three trust deeds. These suits were consolidated, and the cause was referred to the master, who found the issues for the complainant. Afterwards, and on exceptions to the master's report, the same were overruled, and the report confirmed. The matter comes on now to be heard upon the motion of defendants to dismiss the cause for want of jurisdiction, on the ground that Kolze and Day were both citizens and residents of this district at the time of the said transactions, and complainant, claiming as assignee of said notes, cannot maintain her suit here under clause 1 of the acts of 1887 and 1888 (Acts March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], in regard to jurisdiction of federal courts, which provide that neither the Circuit nor District Courts of the United States shall have jurisdiction "of any suit, except in foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made." Some attempt is made by complainant to show that this is not a suit for the collection of the contents of the notes. It is a suit to foreclose the trust deeds. The other relief sought is incidental to that end, and so must be held to be a suit to collect the money due on the notes. *Shoecraft v. Bloxham*, 124 U. S. 730, 8 Sup. Ct. 686, 31 L. Ed. 574; *Laird v. Indemnity Mut. Marine Assurance Co. (C. C.)* 44 Fed. 712; *Mexican National R. R. Co. v. Davidson*, 157 U. S. 206, 15 Sup. Ct. 563, 39 L. Ed. 672. This being so, could Hoadley maintain this suit in this court, both Day and Kolze being citizens of Illinois? The courts have held in analogous cases that the act above set out would divest this

court of jurisdiction to entertain such a suit. In *Shoecraft v. Bloxham*, supra, suit was brought to enforce the performance of a contract. The court holds the term "contents" in the act covers the rights conferred by the instrument, which are capable of enforcement by suit. In *Corbin v. County of Black Hawk*, 105 U. S. 659, 26 L. Ed. 1136, the court held a suit to compel specific performance of a contract, or to enforce its other provisions, to be a suit to recover the contents of a chose in action, and therefore not enforceable by an assignee in the federal court. In the case of *Sheldon et al. v. Sill*, 8 How. 441, 12 L. Ed. 1147, the complainant, a resident of the state of New York, filed his bill in the Circuit Court of the United States for the state of Michigan against the defendant to recover the amount of a bond and mortgage which had been assigned to him by the mortgagee, a resident of the state of Michigan. The court held that a debt secured by bond and mortgage was a chose in action, and that, therefore, where the mortgagor and mortgagee resided in the same state, and the mortgagee assigned the mortgage to the citizen of another state, this assignee could not file his bill of foreclosure in the Circuit Court of the United States. The 11th section of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 78) applies. The case of *Deshler v. Dodge*, 16 How. 622, 14 L. Ed. 1084, holds that the statute applies where suit is brought to enforce the contract contained in the instrument assigned. In *Sere v. Pitot*, 6 Cranch, 332, 3 L. Ed. 240, the court holds that an assignment by operation of law does not take the case out of the statute. There are, however, exceptions to the rule. In *Young v. Bryan*, 6 Wheat. 146, 5 L. Ed. 228, and *Mollan v. Torrance*, 9 Wheat. 937, 6 L. Ed. 154, the Supreme Court hold that an indorsee could maintain a suit against an indorser, provided the necessary diversity of citizenship existed, whether or not suit could have been brought against the maker. To the same effect is *City of Superior v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914. These cases proceed upon the theory that the indorsee does not claim through an assignment, but upon a new contract. In *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736, it is stated that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. This is approved in *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118. This was a case based upon the following facts: Holmes and others executed and delivered to Owen their joint note for \$10,000. On the day of its date Owen indorsed the note, and delivered it to Goldsmith, and received the money upon it. The complainant alleged that it was a loan from Goldsmith to Owen; that the makers executed the note in order that Owen could procure the loan; and that Owen was in fact a maker thereof to Goldsmith, and never had any cause of action thereon against the makers. The court holds that the true meaning of the restriction in the acts of 1887 and 1888 was not disturbed by permitting Goldsmith to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers. It was held in *Bank v. Sioux City Stone Works (C. C.)* 56 Fed. 321, that where the maker

executed notes to the payee, who immediately indorsed the same over to a party who advanced the money to the indorser therefor, which money the indorser thereupon paid over to the maker, the indorser held as assignee under the strict letter of the act, but, inasmuch as the transaction was really between the maker and the indorsee, the court had jurisdiction, following the Goldsmith Case. There was, says the court, no intermediate party between the plaintiff and the defendant; i. e., the maker and the indorsee. There is in the decisions some general reference to the doctrine that the reason of the restriction of the statute was to prevent parties from transferring notes and choses in action to nonresidents for the purpose of giving federal courts jurisdiction, and that in cases where the reason no longer exists perhaps the strict rule should be modified, but the courts do not go to the extent of so holding, and the rule must be considered as rigidly adhered to in all cases coming within its terms. It will be noticed that the acts of 1887 and 1888 were passed for the purpose of narrowing the jurisdiction of federal courts, and this provision should be construed with that tendency in view.

Restating the facts in this case, we find that the notes were indorsed in blank; that on the day they were executed and delivered—November 23, 1897—the maker, Day, reconveyed the real estate on which they were secured, and which constituted the consideration for them, to the payee, Kolze, who had remained in possession of the land. On October 27, 1898, the trust deeds securing said notes were released, and the notes of Day (not the genuine notes, however, for the purposes of this proceeding) canceled. The notes in suit were on February 17, 1898, put up as collateral to the \$1,000 note made by Stade. April 21, 1899, complainant, who was guarantor of said \$1,000 note, bought the said collateral, being the nine notes in suit. No question is now before the court as to the validity of her title thereby acquired. Thus at the time this suit was begun, Kolze was the owner of the land. It must be borne in mind that the notes in suit were used as collateral by Stade, Kolze's trusted agent, and that, for the purposes of this proceeding are to be dealt with as though Kolze himself had put them up as collateral. If this be so, then the transaction was between Kolze and complainant's assignor. The fact that the notes were placed as collateral to Stade's note for \$1,000, upon which note complainant was an indorser or guarantor, would give complainant the right to be protected to the extent of her liability as indorser, so that under the circumstances of the case her title to the note should vest as of the date when the notes were put up as collateral. This being so, the deal was between her and Kolze.

Under the decisions above quoted, I am of the opinion that the circumstances of this case give jurisdiction to this court to entertain the cause. The subsequent conveyances of the lots could have no effect upon complainant's right to have the release set aside, since it was obtained in fraud.

HARTWELL LUMBER CO. et al. v. UNITED STATES.

(Circuit Court, N. D. Illinois, N. D. February 8, 1904.)

No. 26,858.

1. CUSTOMS DUTIES—"PORT OF CHICAGO" DEFINED—ARRIVAL IN PORT.

Section 2767, Rev. St. [U. S. Comp. St. 1901, p. 1861], defines "port" as including "any place from which merchandise can be shipped for importation or at which merchandise can be imported." The statutes of Illinois provide that the city of Chicago shall have jurisdiction over Lake Michigan for a distance of three miles beyond the city limits, and the ordinances of that city give the city harbor master control over lake water outwardly for the same distance, between the north and south lines of the city. *Held*, as to certain barges in tow, which had reached a place within these limits, within the outer harbor works, where it was usual for such a tow to be broken up so the barges might be taken to their separate docks, that they should be considered as in the port of Chicago, for the purpose of fixing the time their cargoes became dutiable, though the arrival had not been reported at the barge office.

2. SAME—ENTRY—VALIDITY OF TENDER.

Entry of certain merchandise had repeatedly been tendered by the agent of the importers before its arrival in port, and was rejected by the customs officials for the expressed reason that the vessels carrying the merchandise had not reported at the custom house. The vessels reached port shortly before a change in the tariff laws, but were not reported to the customs officials until after the change had taken place; and the agent did not renew the tender between the time of the vessels' arrival and the time of the change of law, though remaining at the customhouse for the purpose of making entry as soon as he should be permitted to do so. *Held*, that entry could properly have been made under the old law as soon as the vessels reached port, and before they had reported, and that the reasons given by the customs officers for rejecting the entry when previously tendered justified the agent in supposing further tender to be useless until the vessels reported, and the tender was therefore not vitiated by the failure to renew it during the period between the arrival of the vessels in port and the change in the law.

3. SAME—ARRIVAL IN COLLECTION DISTRICT.

A tender of entry of merchandise after its arrival within a customs collection district, but before it reaches port, is invalid, and a collector of customs may properly reject it.

4. SAME—OPERATION OF SECTION 33, TARIFF ACT OF 1897—DATE OF IMPORTATION.

Section 33, Tariff Act July 24, 1897, c. 11, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], provides that, "on and after the date this act shall

go into effect," imported merchandise should be subjected to the duties imposed by said act. *Held*, that this applies only to importations made prior to said date.

Application to Review a Decision of the Board of General Appraisers.

These proceedings were brought by the Hartwell Lumber Company and the Spry Lumber Company, importers, to review a decision of the Board of General Appraisers (In re John Spry Lumber Company, G. A. 5,365, T. D. 24,535) which affirmed the assessment of duty by the collector of customs at the port of Chicago.

Jacob Newman (Chester E. Cleveland, on the brief), for appellants.
Albert H. Washburn, for the United States.

KOHLSAAT, District Judge. This cause comes before the court on appeal from the decision of the Board of United States General Appraisers made June 26, 1903, overruling said lumber company's protest against the action of the collector, holding that certain importations of lumber came under the so-called Dingley bill, which went into force on July 24, 1897, at 4:06 p. m., Washington time. From the evidence it appears that the propeller *Maine*, having in tow the barges *Pendell* and *Buckhout*, consigned to the Hartwell Lumber Company, of Chicago, and the barge *Exile*, consigned to the Spry Lumber Company, of Chicago, all loaded with lumber brought from Canada, were lying to at a point somewhere between the two-mile waterworks crib and the entrance to the Chicago river. One witness says he saw them later casting their lines to the tugs, which are required in such cases to take the vessels to their several docks. He says that he could not understand why they were so long in taking their lines. They were, he says, having some trouble about whether they would be towed by the *Dunham* or *Barry* tugs. The barges did not reach the barge office, which is a little more than a quarter of a mile from the mouth of the river westerly, until 6 p. m. July 24th. The agent of the owner and consignee of these vessels made tenders of entry of the same the day before they arrived, and on the day of arrival, up to 12 o'clock m., which were refused for the expressed reason "that the vessels had not reported at the customhouse." The statutes of Illinois provide that the city of Chicago shall have jurisdiction over Lake Michigan for a distance of three miles beyond the city limits. By ordinance of the city of Chicago it is provided that the city harbor master shall have control over lake water between the north and south lines of the city for a distance of three miles out. The vessels in question were within that district. They were also within this collection district.

There are two questions which must determine the rights of the parties herein: (1) Had the *Maine* and her tow arrived at the port of Chicago before the Dingley bill went into effect? (2) If so, was a proper tender of entry made?

With regard to the first, the Board of General Appraisers held that the vessels had not arrived in the port. There are circumstances peculiar to this port which made it difficult to determine what constitutes the port. Section 2767 of the Revised Statutes [U. S. Comp. St. 1901, p. 1861] defines a "port" as follows: "The word 'port' as used in this title, may include any place from which merchandise can be shipped for importation or at which merchandise can be imported." Section 2601 of the Revised Statutes [U. S. Comp. St. 1901, p. 1794] provides that the district of Chicago comprises all the waters and shores of Lake Michigan within the states of Indiana and Illinois; that Chicago shall be the port of entry, and Waukegan and Michigan City ports of delivery. There is nowhere a determination of what constitutes the port of Chicago. There exist in the harbor what are termed the "Government Pier" and the "North Pier." These, or some of them, are sometimes spoken of as the "Outer Pier." The usual method of bringing a tow such as accompanied the *Maine* within this outer breakwater or pier is to break up the tow, and cause each one to be taken in by a tug, and thence on up the river to its own dock. It appears that vessels

frequently anchor in the vicinity of the place where these vessels were located at about 2:30 p. m. July 24th, waiting for tugs. In the case at bar the task of the propeller was at an end. It remained only to tow the cargoes by means of tugs to their several docks. There are various book definitions of the word "port." In the nature of the case, they cannot be more definite than the statute. What constitutes a port for the purposes of the revenue act must of necessity be a matter of proof in each case. That the word is broader than the word "harbor" is apparent. That it may mean more in one connection than in another would seem to be probable. In *Ayers v. Thacker*, 3 Mason, 155, Fed. Cas. No. 684, Justice Story says, "In our revenue laws, 'port' and 'district' are often used as of the same import in cases where the limits of the port and district are the same." It may well be that a place where cargoes are taken or discharged should be more circumscribed than a place within which duties are collected. *Hunter v. Ins. Co.*, L. R. 13 Appeal Cases, 724; *In re Wharf Case*, 3 Bland, 369. In commerce there must be an actual bringing of the vessel and its cargoes into contact, with facilities required for its further advance along commercial lines. "Port," as used in the revenue act, rests somewhat in theory, and involves intention (see *Waring v. The Mayor*, 8 Wall. 110, 19 L. Ed. 342, where "intent" is considered), and perhaps subsequent acts, to make its operation effectual. The language of the statute is that it may include places where cargoes are received and discharged, thus indicating a distinction between a commercial and a fiscal port. It cannot be the intention of the law that a vessel must report at the barge office before it can be considered in port, since there are several piers or docks between that office and the mouth of the river. It seems to me clear that the four vessels were in Chicago, at Chicago, and in port, for the purposes of the Dingley act, at the time it went into effect. This view is supported by the evidence of Capt. Keith and other lake and river navigators. If this be so, did the acts of Hartwell Lumber Company in the premises amount to a compliance with the law as to a tender of entry? The Hartwell Company, by its agent, began making tender of entry on the day before the vessels arrived in port, asserting that they were in American waters at that time. This tender was kept up until about noon of the day on which the vessels arrived in port. This tender the customs officials rejected on the ground that the vessels had not reported at the customhouse. It is fair to assume, for the purposes of tender, that this was such a refusal to permit entry to be made as justified the agent of the Hartwell Lumber Company in considering all attempt to make the tender until the vessels had reported useless. It does appear that he was at the collector's office until 4 o'clock, looking after the matter, and could have tendered entry after the vessels had arrived, and before 3:06 p. m., had he not accepted the dictum of the custom officials as final.

The only remaining question is whether, having failed to tender entry within that half hour, the Dingley law took effect as to the importation. Tariff Act July 27, 1897, c. 11, § 33, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], provides that, "on and after the day when this act shall go into effect, all goods, wares and merchandise previously imported for which no entry has been made * * * shall be subjected to

the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." Section 2774 of the Revised Statutes [U. S. Comp. St. 1901, p. 1862] provides that the master of a vessel shall report to the chief officer (customs) the arrival of his vessel within 24 hours after arrival, if the hours of business permit, or as soon thereafter as such hours permit. Section 2785 [U. S. Comp. St. 1901, p. 1867] allows the owner or consignee of merchandise to make entry of the merchandise within 15 days after the report of the master to the collector. A fair construction of section 33 makes it apply only to importation made prior to July 24. To hold otherwise would practically be deciding that no importations could be made under the 1894 act on the day the new act took effect, even though they arrived at the port previous to the hour when the act became a law, since the law might have become effectual after the customhouse had closed, while yet there was plenty of time to have tendered entry and reported the vessel. The mere closing of the customhouse would not affect the right of entry. Neither can the refusal of the customs officers to receive tender of entry affect the importer's right to tender entry. *Campbell v. U. S.*, 107 U. S. 407, 27 L. Ed. 592; *United States v. Legg*, 105 Fed. 930, 45 C. C. A. 134. If, however, the tender of the entry was not extended to 3:06 o'clock by the refusal of collector as aforesaid, yet, if the vessels were actually in port, why were the owners not entitled to the 15 days provided by section 2785? In either case the Hartwell Lumber Company has complied with the law, and is entitled to enter the lumber cargo under the act of 1894. The same ruling is made with reference to the appeal of the Spry Lumber Company in the case of *The Exile*.

The claim made in cases of the *Toltec*, a propeller, and her tow, the barge *Miztec*, cannot be sustained. These two were loaded with lumber imported from Canada, and consigned to the Spry Lumber Company. From the record, it appears they were within the collection district, but not within the port. It is held in *U. S. v. Vowell*, 5 Cranch, 368, 3 L. Ed. 128, and *Arnold v. U. S.*, 9 Cranch, 104, 3 L. Ed. 671, and *U. S. v. Legg*, supra, that there would be an arrival within some port of entry, in order to constitute an importation. It is insisted that an arrival within the collection district and the tender of entry, combined, take the present case out of the rule. With this contention I do not agree. If such acts as amounted to tender of entry were not at the time an obligation, the attempt at tender cannot make them so.

The finding of the Board of General Appraisers with regard to the *Maine*, the *Pendell*, and *Buckhout* is reversed, and it is ordered that the Hartwell Lumber Company have and recover from the collector the sum of money so by him collected from it. See section 989, Rev. St. [U. S. Comp. St. 1901, p. 708]. The same order will be entered in the case of the barge *Exile* in favor of the Spry Lumber Company. The appeal of the Spry Lumber Company with reference to the propeller *Toltec* and the barge *Miztec* is dismissed.

BROWN et al. v. KINNEY, Revenue Collector.

(Circuit Court, D. Connecticut. March 10, 1904.)

No. 540.

1. INTERNAL REVENUE—WAR REVENUE ACT—LEGACY TAX.

Under a will by which the residuary personal estate of the testator was left in trust to the use of his infant son, but to become absolutely vested only in case he should live to attain the age of 25 years, the son took a vested and not a contingent beneficial interest, the only contingency being as to the extent of the actual enjoyment, and the bequest was subject to the legacy tax imposed by section 29 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307], and was unaffected by the amendment of June 27, 1902, c. 1160, § 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, p. 282], which directs the refunding of the tax paid on "contingent beneficial interests which shall not have become vested prior to July 1, 1902," the testator having died in 1900.

2. SAME—ASSESSMENT OF LEGACY TAX—DEBTS OF TESTATOR.

Where, prior to his death, a testator had purchased real estate, and assumed and agreed to pay as a part of the purchase price certain mortgages for which his grantors were liable, such mortgages constituted a debt of his estate, and the amount paid by his executors in satisfaction thereof is to be deducted from the amount of a residuary legacy in assessing the legacy tax thereon under the war revenue act of 1898.

Suit to Recover Legacy Taxes Paid. Sur demurrers.

Tillinghast & Tillinghast and Perkins & Perkins, for plaintiffs.

F. H. Parker, U. S. Atty., for defendant.

PLATT, District Judge. John Nicholas Brown, of Newport, R. I., died May 1, 1900, leaving a will which has been duly probated, and the plaintiffs are the executors. In July, 1902, the defendant, on behalf of the United States, assessed, under section 29 of the war revenue act of June 13, 1898, as amended, chapter 448, 30 Stat. 464, Act March 2, 1901, c. 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], a tax of \$29,791.87. The essential part of that section is as follows:

"That any person or persons having in charge or trust, as executors, * * * any legacies * * * arising from personal property * * * passing after the passage of this act from any person possessed of such property * * * by will * * * to any person or persons * * * in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States."

The act was again amended June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, p. 282]. Section 3, which by its last provision is supposed to affect the present contention, is as follows:

"That in all cases where an executor * * * shall have paid, or shall hereafter pay any tax upon a legacy, * * * the Secretary of the Treasury be * * * authorized and directed to refund * * * so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed * * * upon or in respect of any contingent beneficial interest, which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The plaintiffs, having complied with all the requisite formalities, bring suit to recover the moneys collected.

Section 24 of the testator's will gives the residue of the estate to trustees who are to "stand seized of my said trust estate to the use of my child or children living at my death, and of the lawfully begotten issue then living of the body of any child of mine who then shall have deceased; but so that the interest or interests of such my child, children and issue respectively shall only become absolutely vested in such of them as shall then have attained, or as shall thereafter live to attain, the age of twenty-five (25) years." The testator left surviving him, as his only child, an infant son a few months old, John Nicholas Brown, Jr. This provision of the will is the storm center around which the contention rages.

The plaintiffs insist, in accordance with their purpose indicated in their return to the collector, which read, "Not vested, \$1,224,083.79,—Beneficial interest contingent," that it was and is entirely uncertain whether the boy will ever live to become entitled to this residue, or whether it will not pass, under the later provisions of the will, to other and more remote relatives of the testator, or possibly to charities; that no interest in this residue is vested in young Brown, and a fortiori he has no interest now vested in possession, as required by the third section of the act of June 27, 1902, before it can be taxed. The defendant contends that under the provisions of section 29 of the act of June 13, 1898, the personal property included in residue of the estate of John Nicholas Brown passed from said Brown, the person absolutely possessed thereof at his death, by his will, to Harold Brown and George W. R. Matteson, as joint tenants, in trust, primarily, to the use and benefit of the testator's son and only child, John Nicholas Brown, Jr., whose beneficial interest immediately attached, and said personal property vested immediately and absolutely, upon the death of the testator, in said trustees, in trust, unaffected by any contingency whatever, and so is not within the provisions of the act of June 27, 1902; that it is the passing of this personal property from the testator to these trustees, in trust, which is subjected to the tax or duty imposed by the statute in behalf of the United States, and this passing is absolute and not contingent. It insists that the residuary legacy of over \$1,000,000 is a legacy arising from personal property passing after the passage of this act (June 13, 1898) from a person (the testator) possessed of such property, by will, to any persons (the trustees) in trust or otherwise, where the person entitled to the beneficial interest is the lineal issue (son of the testator), and where the amount or value of the property exceeds \$1,000,000; that the passing is the essence of the transaction, which gives the government a right to reach in its hand and extract the tax; that this passing is direct from the testator to the trustees, and the only question is whether the beneficiary takes a vested interest at once, or must wait until he attains the prescribed age of 25 years.

The courts always vest a legacy at once if it can reasonably be done. "Nature abhors a vacuum," and, on a like principle, it is very unsatisfactory to see the beneficial interest reaching out its feelers in all directions, hoping to find some secure resting place and finding none

within reach. The question is whether the beneficial interest given by the testator to his infant son became at the testator's death a vested interest, subject to being divested by his death before reaching the age of 25 years, or whether it became a contingent interest which could only become vested by reaching that age. After a thoughtful examination of the whole matter, I am clearly of the opinion that, from every viewpoint, both authority and reason sustain the former construction.

As to the effect of the act of June 27, 1902, it is perhaps enough to say that section 3 of that act only assumes to deal with contingent interests; and, since the entire interests under consideration, both legal and beneficial, became vested instantaneously upon the death of the testator, it is not apparent that it can in any way be deemed important. It is clear that, by the vesting of the personal estate in the living child, at the testator's death that child became in right entitled to the enjoyment of the trust estate. It is true that the extent of the actual enjoyment for a time is subject to the sound discretion of the trustees, but that discretion is one subject to control by the courts, and that "sound discretion" avails no one except the infant son. In every way the estate must be cared for in his behalf. The provisions of the will vested in right the entire beneficial interest or estate in the residuum in John Nicholas Brown, Jr., with a partial suspension and control of enjoyment, and a suspension of possession as to the principal, until he reached the age of 25 years. Such suspension does not make the legacy a contingent one. No contingency attaches to the right of enjoyment; the only contingency is as to the extent of the actual enjoyment. It is the uncertainty of the right of enjoyment which renders a legacy contingent, not the uncertainty of its actual enjoyment. The law does not favor a construction which suspends the title. The only suggestion of contingency in this case is found in the time of payment, not in the right to the estate itself, and, if the language affords ground for a doubt, the courts will, if it is reasonable to do so, construe such to have been the intent of the testator. The words "absolutely vested," in the circumstances surrounding the situation, should be taken to mean "indefeasibly vested."

This case has been elaborately argued and briefed. In this opinion there is a noticeable absence of elaboration or citation. In truth, however, the entire matter has been studied with exhaustive care. Every contention of the plaintiffs has been faithfully examined. The discussion was of great interest, and I feel personally well repaid for my researches, in spite of the occasional weariness which they have induced.

The demurrer to the first count must be sustained.

The gist of the second count is this: The testator, in taking conveyances of certain real estate in Minneapolis, assumed and agreed to pay, as part of the purchase price, that portion of the mortgage thereon for which his grantors were each liable, to wit, \$50,000. The plaintiffs have paid the \$100,000 as a debt of the estate. The Internal Revenue Department included that amount in the legacy, and collected the tax, and the plaintiffs seek it back. It seems clear that the \$100,000 was a debt which had to be paid, just as much as rents, charitable sub-

scriptions, or amounts due on building contracts. The personalty left after paying debts made up the legacy which passed. Just that, and nothing more. The law of Minnesota and Rhode Island is such as to remove even a vestige of doubt on this point.

The demurrer to the second count is overruled.

PECK v. KINNEY, Revenue Collector.

(Circuit Court, D. Connecticut. March 10, 1904.)

No. 541.

1. INTERNAL REVENUE—LEGACY TAXES—NATURE OF ESTATE.

A testator by his will left a fund in trust to be invested by the trustee, and provided that from such fund and its accumulations a certain sum should be paid each year to his wife and his three daughters, one-fourth to the wife and one-fourth to each daughter, or, in case of the death of a daughter, to her issue, if any, living at the time of such payment. In case a daughter should die and not be represented by living issue, the shares of the wife and other daughters were to be proportionately increased. After the wife's death the payments previously payable to her were to be divided in accordance with the law of inheritance, the daughters being his only children. *Held*, that for the purpose of assessing legacy taxes thereon under the war revenue act of June 13, 1898, c. 448, 30 Stat. 464, 2 Supp. Rev. St. 798 [U. S. Comp. St. 1901, p. 2307], as amended in Act March 2, 1901, c. 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], each of the daughters should be treated as vested with a life estate in one-fourth of the fund and a life estate in remainder subject to the mother's life use, in one-third of the remaining fourth.

Suit to Recover Legacy Taxes Paid. Sur demurrer.

Tillinghast & Tillinghast and Perkins & Perkins, for plaintiff.

Francis H. Parker, U. S. Atty., for defendant.

PLATT, District Judge. Walter A. Peck, of Providence, R. I., died May 31, 1901, leaving a will in which he appointed the plaintiff executrix, which was duly probated. The defendant then was, and still is, collector of internal revenue for the district of Connecticut and Rhode Island. The said Kinney, in the performance of his official duties, and claiming to act pursuant to the war revenue act of June 13, 1898, c. 448, 30 Stat. 464, 2 Supp. Rev. St. 798 [U. S. Comp. St. 1901, p. 2307], and the amendments thereof, Act March 2, 1901, c. 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], and Act June 27, 1902, c. 1160, § 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, p. 282], collected from the plaintiff as executrix, on or about November 12, 1902, the sum of \$2,679.57, as the duty or tax payable to the United States under said statutes. The second and third clauses of the will provide for legacies passing in trust to different trust companies, amounting to \$200,000 each. The issue can be simplified by presenting the essential portions of the second clause, and assuming that the amount to be dealt with is \$400,000. The trust is created in these words: "I give, devise and bequeath to the Rhode Island Hospital Trust Company * * * \$200,000 or property of that value in trust, and with the powers and for the purposes hereinafter set forth, namely," in brief, to invest the same,

collect the income out of the trust estate, pay the charges, including all taxes, assessments, repairs, etc., and a reasonable compensation for trustees' services, minute suggestions and directions being made as to these duties, and then the will proceeds:

"The trustee for the time being shall from time to time as often as once in each six months during the continuance of this trust, pay out from the then trust funds and property (including accumulations of income as well as the then corpus of the estate) at the rate of \$7,000 per year until the principal or corpus of said trust estate and property as well as all accumulations of income, have been exhausted. During the lifetime of my wife, if she survives me, she is to receive the same fractional share of each of said payments as would be payable to her upon an equal division of said payments between herself and my children living or represented by living issue at the time of such payments respectively. For example if my family consists of its present members, one-fourth to her, but if at my death or at any time during the term of her life either of my children should die leaving no issue surviving, or the issue of any deceased child should all die, the fractional part of my wife is to be increased, from and after such occurrence to make her payment equal that of each of my children then living, and if my wife survives me, and at my death or at any time during her life neither of my children nor any issue of theirs is surviving, the whole of said payments shall be made to her as they respectively become due and payable during the term of her life."

In the event which happened, one-fourth of said payments go to his wife during her life, and one-fourth to each of the daughters during the life of the wife. The testator provides that, if during the wife's life either of the daughters die without leaving living issue, the payments shall be increased to one-third each to the surviving daughters and the mother, and so on in case others die, and that, if all the daughters die without issue, then all the payments shall be made to the wife during her life, and, if any daughter dies leaving surviving issue, the issue to take per stirpes the share of the parent. From and after the decease of the wife the residue of the payments prior thereto payable to the wife are to be paid to the same persons that would inherit real estate from the testator under the present laws of Rhode Island had he then died intestate, and in the same proportions, i. e., equally to his daughters while the daughters live. By clause 6 he gives the residue of his estate to his wife. The defendant holds that each of the three daughters took under the two trusts a life estate in \$100,000, and a remainder (subject to the life use of the wife) in one-third of \$100,000 in addition, and assessed and collected taxes on that basis; while the plaintiff contended that each daughter took only an annuity of \$3,500 per year for life, the taxes or duties on which would amount to \$2,201.90, and that the daughters' interests in the residue of their mother's share were contingent, and hence not taxable, and that the sum of \$477.66 was wrongfully exacted and should be refunded.

The time when the trust is to terminate is not definitely stated in the will, but the plaintiff and defendant, in computing the tax on the interests of the testator's daughters, alike assume that the trusts terminate with the decease of the last survivor of the daughters, and for the purpose of this case that date is to be regarded as the time when the trusts terminate. The plaintiff duly protested against the disputed collections, and filed a claim for the abatement and repayment of same, which was not allowed by the commissioner of internal revenue. Walter A. Peck, at the time of his death, was the absolute owner, duly

seized and possessed, of the property disposed of as above in trust, and said estate passed by his will to the trustees named, in trust for the benefit of the cestuis que trust, and the executrix duly qualified, assumed charge of the testator's estate, and performed her duties in connection therewith. That the testator left, him surviving, his wife, Louise L. Peck, aged 45 years, and three daughters, Louise L. Peck, Jr., aged 20, Margaret, aged 18 years, and Carolyn, aged 17 years. That at the death of the testator, when said taxes were collected, and at the present time, there were no persons presently entitled to any beneficial interest in the remainder interest in said trust fund after the death of Louise L. Peck, except the three daughters. The legality of the assessment of \$163.11 is determined, so far as this court controls, by the considerations in *Brown v. Kinney*, Collector, 128 Fed. 310.

It only remains to decide whether the collector should have treated the legacies to the daughters as a life estate in \$100,000 each, as he did, or as annuities of \$3,500 each; in other words, whether he has collected an excess of \$314.55. The will fails to contain words which can be so translated as to provide for annuities. The spirit of the will is against it. The testator evidently doubted the power of the legacies to yield $3\frac{1}{2}$ per cent. With parental care he arranged that such a percentage should be found, even if it became necessary to disturb the corpus. The common sense of the situation is against it. Why should the testator have intended annuities when it was a simple matter to purchase them at a very large saving? Furthermore, the essential earmarks of an annuity are woefully lacking. The only element which smacks of annuity is the possibility of decreasing the corpus in making the \$14,000 payments. The provisions as to time and manner of payments are strongly indicative of a life estate, and in no sense resemble the principles which apply to annuities. Whenever the class to which payments are to be made decreases, an increase in the amount payable to each member is provided for. The death of the widow will diminish the class one-fourth, without possibility of restoration. It is very clear to my mind that the intent of the testator was to care for the daughters by a life estate in at least \$100,000 each, going to the extent of providing that a fair income therefrom should be guaranteed them by dipping into the corpus, if it should become necessary to do so.

The demurrer should be sustained. So ordered.

In re MACHIN et al.

(District Court, E. D. Pennsylvania. February 12, 1904.)

No. 1,808.

1. BANKRUPTCY—SELECTION OF TRUSTEE—VOTES FOR INELIGIBLE CANDIDATE.

Votes voluntarily cast for a trustee by creditors of a bankrupt acting in their own behalf cannot be rejected and ignored because the person voted for was one who could not be approved by the court, because of his previous relation to the bankrupt; and where the counting of such votes results in a failure to select a trustee by the requisite number of creditors and amount of claims, and no request for a second election is made, the referee is authorized to make the selection himself.

In Bankruptcy. On certificate from referee.

Charles F. Van Horn, for trustee.

Edward L. Perkins, M. Hampton Todd, and Charles H. Pile, for creditors.

J. B. McPHERSON, District Judge. The report of the learned referee sufficiently vindicates his conclusions. The votes cast upon proxies that had been solicited by the bankrupts were properly rejected, but I agree with the referee in thinking that the votes of certain other creditors were not void, and could not be rejected, merely because they were offered in favor of a candidate who had formerly been the attorney of the bankrupts. Conceding for present purposes that he could not be approved, because of his previous relation, it does not follow that the votes voluntarily cast for him are not to be regarded at all. The creditors who cast them were exercising "a legal right in a legal and proper manner," to use the language of the referee; and, even if they were voting for a candidate who could not be approved by the court, this did not make their votes a nullity, so that the opposing candidate must be declared elected. The bankrupts' former attorney had a majority in number, while his opponent had a majority in amount, and it therefore appeared that the creditors were not sufficiently united to make a choice. No request for a second election was made, and the referee was right in selecting the trustee himself. The cases of *Falter v. Reinhard*, 106 Fed. 57, 45 C. C. A. 218, *Re Rekersdres* (D. C.) 108 Fed. 206, and *Re Henschel* (D. C.) 109 Fed. 861, are not in point, as will at once appear when the materially different fact is considered that the votes now complained of were not procured by the bankrupt, or in his interest, but were voluntarily cast by the creditors themselves. In *Falter v. Reinhard* the votes rejected were procured by the active intervention of the bankrupts or their agents. In *Re Rekersdres* the court sustained the referee in refusing to appoint a trustee who had been elected by proxies voted upon by an attorney who represented the bankrupt at the meeting, and occupied an office with her attorney. And in *Re Henschel* votes were rejected because complicity with the bankrupt was charged against the attorney who offered to cast them, and he refused to answer any questions on the subject. In each of these cases the bankrupt's interference either appeared, or was believed to exist, and the votes were rejected on that ground, whereas in the case now under consideration there is no evidence to show that the votes cast for the former attorney of the bankrupts were in any degree procured or influenced by them, or by any one else in their behalf.

The order of the referee is affirmed.

In re PAGE.

(Circuit Court, D. Washington, N. D. February 18, 1904.)

No. 1,074.

1. CUSTOMS DUTIES—LIVE STOCK—ANIMALS IMPORTED FOR BREEDING PURPOSES.

Paragraph 473 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]), placing on the free list "any animal imported specially for breeding purposes," if pure bred, of a recognized breed, and duly registered, does not limit such right of free importation to citizens of the United States, nor restrict it to animals imported for the personal use of the importer, and not for sale; and, in view of the manifest policy of the provision to encourage improvement in the breeds of live stock by farmers and stock raisers, neither the administrative officers nor the courts are authorized to read such restriction into the law.

Petition for review of a decision of the Board of General Appraisers denying free importation of ten Percheron horses, to be sold in the United States for breeding purposes. G. A. 5,247, T. D. 24,112. Reversed.

See U. S. v. 196 Mares (C. C.) 29 Fed. 139, and U. S. v. 11 Horses (C. C.) 30 Fed. 916.

William J. Gibson and W. H. Bogle, for petitioner.
Edward E. Cushman, Asst. U. S. Atty.

HANFORD, District Judge. The material facts in this case are that the appellant, Hubert F. Page, resides in British Columbia, where he has a stock-breeding farm, and is engaged in raising horses for sale. On October 18, 1901, he imported into the United States, at Sumas, in the collection district of Puget Sound, four Percheron stallions, invoiced and appraised at \$500 each, and six Percheron mares, invoiced and appraised at \$300 each. Said animals were pure bred, of a recognized breed, and duly registered. They were raised by the importer on his farm, and were brought into this state to be sold for breeding purposes, and eight of them were sold, bringing an average price of \$394 each; and the owner, being unable to obtain a satisfactory price for the other two, took them back to his farm in British Columbia.

It is claimed that these animals should have been admitted into the United States free of duty, under paragraph 473 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]), which is as follows:

"Any animal imported specially for breeding purposes shall be admitted free: provided, that no such animal shall be admitted free unless pure bred of a recognized breed, and duly registered in the book of record established for that breed: and provided further, that certificate of such record, and of the pedigree of such animal shall be produced and submitted to the customs officer, duly authenticated by the proper custodian of such book of record, together with the affidavit of the owner, agent, or importer, that such animal is the identical animal described in said certificate of record and pedigree: and provided further, that the Secretary of Agriculture shall determine and certify to the Secretary of the Treasury what are recognized breeds and pure bred animals under the provisions of this paragraph. The Secretary of the

Treasury may prescribe such additional regulations as may be required for the strict enforcement of this provision. Cattle, horses, sheep, or other domestic animals straying across the boundary line into any foreign country, or driven across such boundary line by the owner for temporary pasturage purposes only, together with their offspring, may be brought back to the United States within six months free of duty, under regulations to be prescribed by the Secretary of the Treasury."

All of the requirements of this statute, and of departmental regulations with respect to the importation of live animals for breeding purposes free of duty, were fully complied with, but the collector of customs exacted payment of a duty tax of 25 per cent. ad valorem, which the importer paid under protest. Upon a review of the case, the Board of General Appraisers confirmed the exaction of the collector of customs, and, to reverse that decision, the importer has made an application to this court. The case has been heard and submitted upon the record and facts certified by the board.

It is an undisputed fact that the animals were each suitable and valuable for breeding purposes, and were intended to be used for that purpose, and, after being imported, were bought for that purpose at prices considerably higher than would have been paid for such animals intended for general utility; and there is no question of fraud or want of good faith on the part of the importer involved. The only grounds upon which the Board of General Appraisers refused to admit these horses free of duty are that the importer does not live in the United States, and the animals were not imported by him for his own personal use for breeding purposes within the United States, but to be sold.

The statute applicable to the facts in this case which was in force at the time of the importation in question does not in terms, nor by implication, restrict the importation of animals for breeding purposes so as to confer any special privilege in that respect upon citizens or inhabitants of the United States; nor does it prohibit the sale of such animals after being imported free. The manifest object of the law is to assist farmers and stock raisers in the United States in the production within the United States of the best breeds of live stock. Except in the comparatively few instances of wealthy stock fanciers, those who require breeding animals cannot afford to import them. They must buy of others who can make a profit by importing animals for sale, and Congress, by omitting words expressing an intent to restrict the right of free importation to the few who can afford to import animals for their personal use, acted advisedly. The words used by Congress were well chosen to express accurately the legislative intent, the law does not require construction to make it intelligible, and there is no authority given to the courts, nor to administrative officers of the government, to add words or phrases to a statute in order to change its meaning or restrict its application. *Newhall v. Sanger*, 92 U. S. 765, 23 L. Ed. 769; *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267.

The appellant is entitled to recover from the United States the amount paid as duty upon the animals referred to, and I direct that a judgment be entered reversing the decision of the Board of General Appraisers.

In re YEW BING HI.

(District Court, D. Massachusetts. January 27, 1904.)

No. 1,533.

1. CHINESE EXCLUSION ACTS—PERSONS ENTERING LAWFULLY—CHANGE OF OCCUPATION.

A Chinaman, who has lawfully entered the United States as a merchant, and has lawfully practiced his calling here for some time thereafter, but who is not a merchant at the time of his arrest, is not subject to deportation under existing statutes.

William H. Garland, Asst. U. S. Atty.
John L. Dyer, for defendant.

LOWELL, District Judge. The commissioner has found that the respondent entered the United States lawfully as a bona fide merchant in 1897, having a consular certificate issued in pursuance of section 6 of Act July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307]. As he saw and examined the witnesses, I accept this finding, and also his further finding that the respondent has since ceased to be a merchant. It seems that he was a merchant for some time after his arrival in the United States, but that he had ceased to be a merchant, and probably had become a laborer, months, if not years, before he was arrested. The question presented is one of law. Is a Chinaman, who has lawfully entered the country as a merchant, and has lawfully practiced his calling here for some time thereafter, but who is not a merchant at the time of his arrest, subject to deportation under the treaties and statutes? Speaking generally, the Chinese exclusion acts are directed to prevent the unlawful coming of Chinese into the United States, and to remove those who have come in unlawfully. Though the Treaty of 1880, art. 1 (22 Stat. 826), gives the United States the right to regulate, limit, or suspend "such coming or residence," yet the acts of 1882 (Act May 6, 1882, c. 126, § 1, 22 Stat. 58 [U. S. Comp. St. 1901, p. 1305]) and 1884 affected only "coming." So the act of September, 1888 (Act Sept. 13, 1888, c. 1015, § 2, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1312]), by its title, and the act of October, 1888 (Act Oct. 1, 1888, c. 1064, § 1, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318]), by its provisions, are limited in their prohibitions to Chinamen unlawfully coming into the United States. Section 1 of the latter forbids to remain in the United States only those Chinese laborers who shall have returned to the United States after the passage of the act. Thus far no indication appears that a Chinaman who has lawfully entered the United States may not change his occupation after entry without risk of deportation. The acts of 1892 (Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1321]) and 1893 (Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321]) by their titles prohibit only "the coming of Chinese persons into the United States." It is true that section 6, both in its original and amended form, provides for the deportation of any Chinese laborer who

¶ 1. Citizenship of Chinese, see notes to 1 C. C. A. 212, 35 C. C. A. 332.

shall be found within the United States without a certificate of registration; but in the case of *Fong Yue Ting v. United States*, 149 U. S. 698, 725, 13 Sup. Ct. 1016, 37 L. Ed. 905, the court said that the act "deals with two classes of Chinese persons: First, those 'not lawfully entitled to be or remain in the United States'; and, second, those 'entitled to remain in the United States.' These words of description neither confer nor take away any right; but simply designate the Chinese persons who were not or who were authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of this act, but subject, nevertheless, to the power of the United States absolutely or conditionally to withdraw the permission and to terminate the authority to remain." The act is thus held to concern only those Chinamen who were in the United States at the time of its passage. The substantive rights of these persons were not affected. Those who were entitled to remain before the passage of the act were entitled to remain thereafter, although in some cases registration was made the necessary evidence of their right to remain. Those not required to register were unaffected by the act, except that new procedure and new rules of evidence were established applicable to all proceedings for deportation. If those Chinamen who were not required to register (such as merchants, during the registration period—*In re Chin Ark Wing* [D. C.] 115 Fed. 412—and Chinamen born in the United States) may not be deported, though found as Chinese laborers without certificates, it seems that those who lawfully entered the United States as merchants after the period of registration, and later became laborers, are also without the purview of the exclusion acts. This conclusion is not affected by Act April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1903, p. 188]. Taken as a whole, the legislation appears not to intend the deportation of any Chinaman who lawfully entered the United States, and, since his entry, has complied with every applicable provision of statute. That the intent of Congress is thus correctly interpreted the court cannot pretend to be sure, so numerous and confused are the existing statutes, but the construction given is that which appears most generally consistent with the language and intent of the several acts and treaties. It may be urged that this construction tends to encourage fraudulent entry, the Chinese immigrant asserting that he is a merchant, though in reality a laborer. The observation has weight, and the courts will scrutinize with care evidence tending to show that a Chinaman who is a laborer at the time of his arrest was a merchant at the time of his entry into the country. *U. S. v. Yong Yew* (D. C.) 83 Fed. 832, 838. The learned commissioner has given this careful scrutiny to the evidence in the case at bar, and in accordance with his findings of fact the respondent must be discharged.

GREAT WESTERN MIN. & MFG. CO. v. HARRIS et al.

(Circuit Court of Appeals, Second Circuit. December 16, 1903.)

No. 12.

1. CORPORATIONS—RIGHTS OF CREDITORS—WRONGFUL DIVERSION OF ASSETS.

A corporation, which had endeavored without success to sell an issue of bonds at 60 per cent. of their par value, received an offer of 85 per cent. for the bonds with a bonus of stock equal to 50 per cent. of the bond issue. It accepted such offer, making an agreement with its stockholders by which they furnished the stock pro rata, and received therefor 25 cents out of every 85 paid by the bond purchasers. At the same time the corporation issued to them additional stock equal to a part of the amount sold, reciting as consideration therefor the previous making of permanent betterments on its property from net profits. *Held*, that such stock transaction did not affect the corporation, or the value of its assets, so as to entitle it or its bondholders or creditors to recover from the old stockholders the amounts so received by them as assets wrongfully withdrawn from the corporation; its effect, so far as creditors were concerned, being the same as though it had sold its bonds at 60 per cent.

2. RECEIVER—RIGHT TO SUE IN FOREIGN JURISDICTION.

A receiver of the property and assets of an insolvent corporation, appointed by a court in the exercise of its general equity powers, cannot maintain a suit to collect moneys in another jurisdiction, either in his own name or that of the corporation, nor can he be authorized by the court to do so, unless in the exercise of a power given it by statute or otherwise it has vested title in the receiver, or where the corporation, acting within its corporate powers, has vested him with such title or authorized him to sue in its name.

3. CORPORATIONS—CONTRACT WITH STOCKHOLDERS—SUIT TO ANNUL.

Neither a corporation nor a receiver suing in its name and behalf can maintain a suit to set aside a contract made between the corporation and all its stockholders. Such a contract can only be attacked by or on behalf of creditors who are shown to have been defrauded thereby.

4. SAME—DIVIDENDS RECEIVED BY STOCKHOLDER—LIABILITY FOR REPAYMENT.

A stockholder is not liable to the corporation for dividends received by him in good faith while the corporation was a going concern and solvent.

Appeal from the Circuit Court of the United States for the District of Vermont.

For opinion below, see III Fed. 38.

This cause comes here by cross-appeals from a decree of the United States Court for the District of Vermont in favor of the complainant for \$15,000, and dismissing all the other claims made in a bill brought in the name of the Great Western Mining & Manufacturing Company, a citizen of Kentucky, by L. C. Black, its receiver, by virtue of the authority vested in him under an order of the United States Circuit Court for the District of Kentucky, appointing him receiver of the property and assets of said company, and directing him to institute suits against the shareholders and directors of said company for the recovery of sums lost to said company by the withdrawal of certain moneys by its stockholders and officers by the issuance of stock to them with-

¶1. Stockholders' liability to creditors in equity, see note to *Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.

¶2. Suits by and against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.

¶4. See *Corporations*, vol. 12, Cent. Dig. § 869.

out consideration, and through negligence and mismanagement of its board of directors.

Harlan Cleveland, for complainant.

Brainerd Tolles, for defendants.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The complainant, a Kentucky corporation, by this bill asks for an accounting and damages from the estate of defendants' testator, B. D. Harris, who was a resident of Vermont, and was an officer, director, and stockholder in said corporation from 1883 to 1892. Other parties were named defendants in the bill, but no process was issued against them, and no other defendant appeared.

As found by the court below:

"This suit is not brought upon any statute of Kentucky, but, like *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 862, is founded upon the common-law liability for misfeasance and negligence in the performance by the testator of his duties as a director and president of the corporation about withdrawing and allowing the withdrawal of these moneys from the corporation."

At the close of the hearing the complainant claimed that the estate of B. D. Harris was liable as follows:

"(1) For the sum of \$75,000 as a joint and several liability of the directors and officers of the company, with interest thereon from January 11, 1890, the first date shown by the record that the \$75,000 had been taken from the company.

"(2) For \$45,000 as a several liability as stockholder, on account of the issue to himself, without consideration, on January 11, 1888, of one hundred and fifty shares, or \$15,000, of stock, and on April 22, 1889, three hundred shares, or \$30,000, of stock, to be accounted for, \$15,000 as of January 11, 1888, and \$30,000 as of April 22, 1889.

"(3) For the damages suffered by the company by reason of the issue to the other stockholders of the Great Western Mining & Manufacturing Company by B. D. Harris and the other officers and directors of the company on January 18, 1888, of three hundred and fifty shares, or \$35,000, of stock, and on April 22, 1889, of seven hundred shares, or \$70,000, of stock, without consideration, to determine which said damages and injury a reference should be had to a master.

"(4) For the dividends wrongfully paid out of capital stock between April, 1889, and July, 1892, as a joint and several liability of the directors and officers of the company so paying said dividends, and for the dividends paid B. D. Harris individually as a several liability of his estate."

As to these claims the court below finds as follows:

"All claims except as to the issues of \$50,000 of stock in April, 1888, and of \$100,000 of stock in 1889, and the \$75,000 received by the stockholders from the bond and stock transaction, have, on the argument, been waived."

Thus it appears that, while the action is bottomed on a common-law right, and, as to the claims insisted on in the court below, is for money damages only, the bill is in form one for equitable relief. The opinion of the court below accurately and succinctly states the facts concerning these transactions, as follows:

"The Great Western Mining & Manufacturing Company was a corporation of Kentucky, with a capital stock of \$200,000 in shares of \$100 each, of which the defendant's testator, a citizen of Vermont, held 600, and a brother of the

testator 600, bought in 1883 at \$30 per share, another person 440, another 300, another 52, and two others 4 each. The five largest stockholders were the directors, and the testator was the president. It had lands, mines, and transportation facilities in Kentucky, and largely produced and sold coal. It issued \$50,000 of new stock ratably to the stockholders in January, 1888, and it owed \$131,585.03 December 31, 1888. Negotiations for placing \$300,000 of mortgage bonds had been going on, and offers had been made for the sale of them at 60 per cent., without finding purchasers. A proposition was made by brokers to the directors April 18, 1889, for putting them on sale at 85 per cent., with a bonus of half as much stock as of bonds. At the annual meeting April 22d—

"The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and, after consideration, was adopted, to wit:

"Whereas, there have been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than \$160,000.00, all of which sum has been furnished from the net earnings of the company and fairly belongs to the stockholders of the company,

"Therefore resolved, that the directors of this company be, and hereby are, authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company, to be divided pro rata among the present stockholders of this company, as follows:

To B. D. Harris	300 shares
G. D. Harris	300 shares
John Carlisle	220 shares
G. W. Carlisle	150 shares
George S. Richardson	26 shares
James C. Holden	2 shares
L. Hinsdale	2 shares

"The matter of negotiating a loan for the benefit of the company was also taken up, and a resolution authorizing the loan to the amount of \$300,000, for which bonds were to be issued, was approved."

"On the same day the directors voted: 'That the president and secretary of the company shall arrange for the sale of the \$300,000 bonds, aforesaid, in their discretion, at the best price obtainable, and the proceeds thereof shall be applied to the cancellation and retirement of \$60,000 first mortgage 7 per cent. bonds, dated January 1, 1884, now outstanding; also to the payment of all floating indebtedness incurred up to the date hereof for materials and construction, and the balance shall be used by the directors for the best interests of the company.' They also passed the following resolutions: 'Whereas, at the annual meeting of the stockholders of this company a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount of \$100,000.00, to be divided pro rata among the present stockholders, and based upon the fact that during the last five years more than \$160,000.00 of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company which belong to the stockholders of the company: Therefore resolved, that the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them, respectively.'

"A transaction took place among the stockholders as such and the directors as such, as shown by the following extracts from the records of the company:

"'Proposition of Stockholders of the Great
 "'Western Mining and Manufacturing Company
 "'to the Directors of said Company.

"'Whereas, the directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of \$300,000, to be used in payment of existing indebtedness of the company and to provide additional working capital, etc., and have authorized the President and Secretary to execute

bonds for said amount, and to negotiate the same at the best price obtainable; and

"Whereas, we are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided that stock of the company, to the extent of fifty per cent. of the par value of the said bonds shall also be transferred to the several purchasers of said bonds; and

"Whereas, it is deemed to be inexpedient to issue any new stock of the company for such purpose, and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds:

"We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of said bonds, to wit:

"We will sell to the several purchasers of said bonds of the company stock of the company belonging to us in the amounts set opposite our names, respectively, and will furnish to the Secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement that we are to receive the sum of \$50 for each share of stock so sold by us out of the money paid for bonds, and said Secretary shall act as our agent in receiving said amounts, and shall pay us the same before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

"This action is not to be construed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the Secretary of this company for said bonds shall be regarded as a payment to us for said stock to the extent necessary to pay us therefor upon the terms above stated.

"In testimony whereof, we have hereunto set our hands, on this third day of May, 1889.

B. D. Harris	450 shares
G. D. Harris	450 shares
John Carlisle	336 shares
Geo. S. Richardson	89 shares
G. W. Carlisle	225 shares

Total 1,500 shares

"After full consideration of the proposition, the same was accepted, and the secretary was authorized to act as the agent for said stockholders in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasury of the company."

"A mortgage was made, and \$300,000 of bonds bearing 6 per cent. semiannual interest were issued, dated June 1, 1889, and sold in several various amounts, with half as much stock transferred in blank, and deposited ratably by the stockholders with the treasurer, who delivered it with the bonds to the takers of them respectively. The stock of the testator was transferred at various times between September 7, 1887, and March 7, 1890. Of the money received by the treasurer for the bonds and stock, 25 per cent., being 50 per cent. of the stock, was paid by the treasurer to the several stockholders furnishing the stock. The testator furnished 450 shares of the stock, and received \$22,500 of the proceeds of the bonds and stock in that manner. All the stockholders received \$75,000, and the corporation retained \$180,000. The avails of the loan, \$225,000, were entered as such on the books of the corporation, and the \$75,000 paid to the stockholders was entered as an expense of the loan. The \$22,500 was sent to and received by the testator, and this bond transaction was closed in 1890. The business of the corporation was continued, debts were created, dividends were declared, and paid to those holding the stock that went with the bonds, but none to the testator upon his original stock after January 1, 1891; and interest coupons from the bonds were paid till 1892, when the receiver was appointed, on a creditors' bill, by the Circuit Court of the United States for the District of Kentucky. The mortgage was foreclosed

by intervention in that suit, and the property covered by the mortgage was sold for \$70,000, and the other property for \$5,666.67. The avails of the mortgaged property, after deducting expenses, were applied on the mortgage debt, leaving the remainder thereof, amounting to more than the face of the bonds still due. The other debts amounted to \$122,221.32."

The reasoning of the court, upon which it reached its conclusion, is as follows:

"The substance of the plaintiff's claim is for the withdrawal of the money received for the mortgage bonds, and not for the increases of stock, and the question of solvency would refer to the situation at the time of the withdrawal. The prior debts had been then, or soon were, paid, but the mortgage bonds were outstanding, and the avails of them were what paid the prior debts. They were debts of the corporation, and in view of the whole situation, as shown by the evidence, they amounted to as much at least as the corporation could at most pay, and the depletion of any part of the \$75,000 that came from the corporation would be more than it could spare. The increases of stock were far within the limits of the power of the corporation, and these issues of it ratably to the stockholders would in themselves work no harm. The stockholders would, as between themselves, own the corporate property in the same proportions as before. Outsiders would not be affected till reached. Then they would be entitled to stand upon their rights to protect themselves. The first increase of stock was made more than a year before there appears to have been any suggestion of using stock to effect a loan, and to have been entirely separate from the bond transaction. When made and ratably divided, it would not of itself affect at all the stockholders as between themselves or outsiders. If sold to others, whether it was valuable or not, or at a fair or unfair price, the corporation would not be peculiarly affected. If it brought 25 cents of the 85 cents on the dollar of the face of the bonds that the stock and bonds brought, that part would belong to the stockholder furnishing the stock, and not to the corporation; and the receiving of that by the stockholders would not be depleting the assets of the corporation. The bonds would not float at 60. The bonds and stock would at 85. The inference follows that the bonds brought 60 and the stock 25. The stockholders and directors agreed to this among themselves each with the others, and that would confirm the division, for, although directors may not contract away to any of themselves more than to others the property of the corporation to the detriment of creditors, they are not precluded from dealing fairly with any of their number in respect to what is his own. This deal may not have been fair to the takers of the bonds and stock for want of value to the stock, but the point here is whether there was a fair division between the corporation and the stockholders of the avails of the transaction as it was, fair or unfair, according to the proportion of the consideration furnished by each. The amount received for this issue of stock, in this view, was \$25,000, of which the defendant's testator received \$7,500 as the price of the stock furnished by him that did not come from the last issue, but had been divided to and became his before any negotiation of the bonds as well as any of his prior stock had. The last issue of stock was concurrent with the issue and negotiation of the bonds and stock, and that stock moved as much from the corporation to the new bondholders as if it had been issued directly to them, instead of through the prior stockholders to the bondholders. Neither the statement in the vote of this stock that it was based upon the expenditure of net earnings for permanent improvements, nor the provision in the proposal of the stockholders that the secretary should act as their agent in transferring the stock and receiving the money, nor the protest that the action should not be construed as a sale of the stock to the company, but should be regarded as a sale to the purchasers of the bonds, could alter the nature of the transaction, or its source, or its place, as a part of the consideration for the money received from the bondholders. The whole moved from the corporation, and the transaction wrought a depletion of assets of the corporation needed to make the bonds good, and to which the bondholders were entitled, if necessary, for the payment or security of the bonds. There was no agreement between the stockholders and the bondholders as to the price of the

stock nor otherwise, except among the stockholders themselves. As to the bondholders, according to the evidence, it was a mere bonus to float the bonds. The stockholders receiving the money took it with the risk of its being required to make the bonds good. It is so required, and the plaintiff, as receiver, represents the rights of the bondholders as creditors in respect to it. *Briggs v. Spaulding*, 141 U. S. 132 [11 Sup. Ct. 924, 35 L. Ed. 662]. The avails of this increase were \$50,000, of which the testator received \$15,000."

Great Western Mining & Mfg. Co. v. Harris' Estate (C. C.) 111 Fed. 38.

The court thereupon held that the testator's estate was liable for the amount of \$15,000 received by the testator through the last issue of stock. The court reached this conclusion upon the theory that the stock issue of 1889 was in so far a part of the bond transaction that the legal effect was the same as though the stock had been issued directly by the corporation to the purchasers, and that, therefore, to that extent, said issue operated as a withdrawal of the assets of the corporation. But this arrangement was made in fact as well as in form by the stockholders for the sale not of the capital stock of the corporation, but of the capital stock issued to and owned by them, respectively, as a method of disposing of the bonds. It would seem that, inasmuch as before said stock issue the stockholders owned the entire equity in the assets of the corporation, and all received their proportionate shares of additional capital stock, that the only reduction in value was the reduction in value of the shares previously owned by them. As is said by counsel for defendant in his brief:

"After the issue they [the stockholders] owned the same thing. They gained nothing and the corporation parted with nothing by the issue of additional stock. It merely placed in the hands of the stockholders an instrument whereby they could conveniently detract from the value of the shares of stock which they formerly held, in order to vest new and equal rights in the persons to whom they might transfer the new shares. Whatever of value passed to the purchasers of those shares was withdrawn, not from the assets of the company, but from the antecedent equity or interest which was vested in the stockholders making the sale. Taking the stock transaction by itself, it did not affect the company in any way. It merely diminished the relative interest in the corporation of those stockholders who engaged in it."

The People ex rel. The Union Trust Company v. Michael Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762.

But, irrespective of these considerations, the controlling question herein is as to the right of the receiver to bring this suit. The Kentucky court, in the exercise of its general equity powers, appointed him receiver of the property and assets of said corporation to hold and keep its property, and directed him to institute suit for the advantage of said company in his own name as receiver or in the name of the company.

In *Hale v. Allinson*, 188 U. S. 56, 68, 23 Sup. Ct. 244, 47 L. Ed. 380, Mr. Justice Peckham, referring to *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, says:

"It was there held that an ordinary receiver could not sue in a foreign jurisdiction, and an elaborate examination was made by Mr. Justice Wayne of the principles upon which the decision was founded. In speaking of the right of a receiver appointed under a creditors' bill in New York to bring an action in a foreign state, it was said, in the course of the opinion, as to such a receiver: 'Whether appointed as this receiver was, under the statute of

New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation under his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extraterritorial power of official action; none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done where his debtor may be amenable to the tribunal which the creditor may seek.' This statement has not been overruled or explained away by any subsequent decision of this court to which our attention has been called."

See, also, *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173; *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839.

The order appointing the receiver herein did not, in terms, authorize him to institute suits in a foreign jurisdiction. Had it done so, his position would be like that of the receiver in *Hilliker v. Hale*, 117 Fed. 220, 55 C. C. A. 252, where this court said:

"He was made an arm of the court, with which the court attempted to reach outside its territorial jurisdiction; and the attempt, it seems to us, was futile. The court could not reach beyond the limits of its jurisdiction, through a receiver, any more than it could through a marshal or a sheriff."

It is clear, therefore, that this receiver cannot maintain this suit in this court as receiver. But it is urged that, irrespective of his right to sue as receiver in a foreign jurisdiction, he may maintain such suit in the name of the corporation. The preliminary question before us is not as to the right of the corporation to bring a suit in its own name, within or without the state of Kentucky. In *Glenn v. Marbury*, 145 U. S. 499, 511, 12 Sup. Ct. 914, 36 L. Ed. 790, the Supreme Court said:

"As this corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to those ends remained unimpaired."

The question before the court in that case was the technical one as to whether an assignee of a chose in action should sue in his own name or in that of the assignor, and the court held that under the common law prevailing in the District of Columbia said trustee could not maintain an action at law in his own name for a call or assessment of stock, but that such suit could have been maintained by him in the name of the company. The court states the rule to be "that a demand upon the stockholder to meet a call or assessment, by competent authority, must be enforced in the name of the person or corporation holding the legal title to the stock subscription, and to whom the promise of the stockholder was made." There the company had assigned by deed to trustees, for whom this plaintiff had been substituted, all its estate, including moneys payable, "whether on calls or assessments on the stock of the company" or otherwise, and the court had confirmed said deed, and entered an order for a call and assessment, and authorized said trustee to bring suit to collect said calls. The court,

therefore, in accordance with the rule laid down in *Booth v. Clark*, supra, and *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, held that the trustee, being vested with title by the voluntary act of the corporation itself by virtue of said assignment and the orders of the court pursuant thereto, was entitled to institute such suit in its name.

In *Hilliker v. Hale*, supra, this court considered the distinction between a receiver or trustee vested with a title which may be asserted anywhere and one who, as in this case, is a mere agent or officer of the court. Referring to the status of the receiver therein, we said as follows:

"We are further of the opinion that the plaintiff cannot maintain this action. He sues as receiver. His rights, if any, rest wholly upon the order and decree in the *Rogers Case*. Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim otherwise than through such order and decree. He is not the assignee of all or any of the creditors. He has no title to anything, so far as appears, except to his office as receiver. The order and decree, in terms, make him a mere agent of the Minnesota court. That court undertook to authorize him to sue nonresidents in other jurisdictions; moneys collected to be 'held by him subject to the further order of this court [the Minnesota court] in the premises.' The Minnesota court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and to bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired, and sue upon such claim here, in accordance with the principles stated in *Association v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. Apparently the court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order."

We think these considerations apply with equal force to the right of the receiver to maintain this suit in the name of the corporation. It does not appear that it has exercised its corporate powers so as to vest any title in the receiver or otherwise to authorize him to sue in its name. In the absence of such proof, the presumption is that he is acting without such authority. The sole authority shown by the bill is alleged as follows:

"That in proceedings in the United States Circuit Court for the District of Kentucky, L. C. Black, of Cincinnati, state of Ohio, was appointed receiver of the assets of your orator for the purpose of realizing upon the same for the benefit of its creditors, and by special order of said United States Circuit Court for the District of Kentucky he has been directed to prosecute this suit either in his own name or the name of your orator, as may be proper."

But if said court cannot send such an agent outside of its territorial limits to collect moneys as receiver, its attempt to exercise extraterritorial powers by directing such agent to proceed in the name of the corporation must be equally futile, except where the court by statute or otherwise is empowered to vest title in the receiver, or where the corporation, or the court, acting within its powers on behalf of the corporation or as the successor of its officers, has authorized such act. *Hilliker v. Hale*, supra; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986.

But even if it be assumed that this receiver, by thus bringing suit in the name of this corporation by himself as receiver, can maintain an action on its behalf which he could not maintain as receiver only, it

is not clear how this assumption would help the complainant corporation. It is, in any event, bound by the rules of law regulating the relations of a corporation to its officers, and, between it and its stockholders and directors, by its contract and the acts done in pursuance thereof.

A creditor, on the other hand, may by appropriate legal proceedings avail himself of every existing legal right against the corporate officers or stockholders. A contract between a corporation and its stockholders that they should not be called on to pay therefor in full is good between the corporation and its stockholders. The creditor defrauded by such a transaction may have such contract set aside. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Clark v. Bever*, 139 U. S. 96, 111, 11 Sup. Ct. 468, 35 L. Ed. 88, and cases cited. "An agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, but it has been uniformly held by this court not to be binding upon its creditors." *Handley v. Stutz*, 139 U. S. 417, 428, 11 Sup. Ct. 530, 35 L. Ed. 227; *Evans v. Nellis*, *supra*. So, too, a receiver, if duly authorized to institute such a suit, is the representative of all parties interested therein. He is appointed in behalf of all parties who may establish rights in the cause. *Booth v. Clark*, *supra*. He may, as the representative of creditors, disaffirm acts of the corporation, and sue to set aside transactions entered into in fraud of their rights. *In re Wilcox & Howe Company*, 70 Conn. 220, 39 Atl. 163.

It may be that the acts and misrepresentations of Carlisle, the manager of said corporation, or of the brokers through whom the bond transaction was carried out, were in fraud of persons who became creditors upon the strength of said representations, and that an appropriate suit may be brought by such creditors to recover therefor. But this right is one existing not in favor of all creditors of a corporation, but in favor of a particular class of creditors only, namely, those creditors who were defrauded by said transaction. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Cook on Corporations* (5th Ed.) §§ 42, 46. This suit cannot be treated as one brought to annul the contract whereby said transaction was carried out by creditors who may have been defrauded thereby. Neither the bill filed in the Kentucky court nor the bill herein charges that any purchaser of bonds or stocks was deceived by said action of the corporation, and there is no evidence to that effect.

The complainant is bound by the allegations of the bill, and the contention on which it is based that this is a suit only in the right of the corporation independent of its creditors, and to which neither the receiver nor the creditors are parties. We are of the opinion that such a suit cannot be maintained by this corporation. In *Handley v. Stutz*, *supra*, the bill was filed by certain judgment creditors against a Kentucky corporation for a stock assessment against certain creditors, in circumstances similar to those in the case at bar. Referring to the claims of the bondholders who were to receive a certain amount of stock as bonus, the court holds that such transactions can only be impeached for fraud, and that only subsequent creditors who were en-

titled to enforce their claims against these stockholders, and trusted the company upon the faith of said increase of stock, could enforce their claims against such stockholders, and that no such equity exists in favor of creditors whose debts were contracted prior to such authorization. So, in *Coit v. Gold Amalgamating Co.*, supra, in a suit by a judgment creditor to enforce an alleged personal liability of the stockholders for fraud in issuance of unpaid stock, Mr. Justice Field, speaking for the court, said:

"The plaintiff had placed no reliance upon the supposed paid-up capital of the company on the increased shares, and therefore has no cause of complaint by reason of their subsequent recall. Had a new indebtedness been created by the company after the issue of the stock and before its recall, a different question would have arisen. The creditor in that case, relying on the faith of the stock being fully paid, might have insisted upon its full payment. But no such new indebtedness was created, and we think, therefore, that the stockholders cannot be called upon, at the suit of the plaintiff, to pay in the amount of the stock, which, though issued, was soon afterwards recalled and canceled."

It would seem that, inasmuch as it was agreed as part of the contract between the corporation and its stockholders that the stock should be deemed full paid, the stockholder could not be held liable in a suit by the corporation wherein it seeks to annul its contract as a fraud upon the general creditors of the corporation. The language of Mr. Justice Peckham in *Hale v. Allinson*, supra, referring to a contract of subscription, is illustrative of the relation of the parties. The court says:

"Assuming the contractual character of the subscription to the stock of the corporation, the right of the receiver to maintain this suit is not thereby made plainer. The contract may have been to pay, in the event of its insolvency, to the creditors of the corporation, the amount for which the shareholder might be liable up to the par value of his stock. That was a contract in behalf of the creditor, with which the corporation had nothing to do, and the statute did not make this liability assets of the corporation or confer upon the receiver appointed in the case the right to proceed to enforce it."

We have, then, in this case, a suit brought in the name of a corporation, wherein it seeks to repudiate, on the ground of fraud, certain contracts made by it with its officers and stockholders, which, so far as the record shows, was lawful in its inception. Whether it could in any case disaffirm its contract, and seek to recover the fruits thereof, without restoring the parties to their original status, it is not material to inquire. *Scovill v. Thayer*, supra. It is clear that it is not the proper party to maintain this suit. The corporation was a party to the contract, whereby it was agreed that no payment should be required upon said issues of stock. The evidence shows that the bonds could not be floated without a stock bonus, and, there being no stock in the treasury of the company, the stockholders contracted with said company to sell to the bond purchasers directly their own stock, pro rata, in order to provide such bonus. It may be noted in this connection that there is some evidence tending to show that the officers of the company made this contract in good faith, believing it to be for the benefit of the company. So far as these defendants' testator is concerned, while there are some expressions in his letters which are capable of being interpreted as evidence of an intent to secure a bene-

fit to himself as stockholder at the expense of the corporation, yet the evidence, taken as a whole, falls far short of proving that he was a party to any unlawful scheme, or believed that the plan which was adopted for floating the bonds and selling his stock to the purchasers of bonds was either actively or constructively fraudulent.

In *Foster v. Seymour* (C. C.) 23 Fed. 65, 23 Blatchf. 107, Judge Wallace, upon a demurrer to a bill, had occasion to consider a claim made by a stockholder against a corporation and its trustees to require the latter to account to the corporation for a disposition of its capital stock alleged to have been fraudulent. The allegations of the bill presented a state of facts quite similar to those established by the evidence herein, so far as the issue of capital stock and its sale to the public operated as a fraud upon the public and future purchasers of the stock. He says:

"The transaction, as alleged, was a fraud upon the public. It was equivalent to an overissue of stock by a corporation to its stockholders. It was calculated to lead parties dealing with the corporation in ignorance of the facts to believe that it had a paid-up capital stock of \$10,000,000, and representing a corporate fund of that amount invested in mining property. By putting out the scrip, the trustees represented to the public, who have no means of knowing of the private contracts made between a corporation and its stockholders, that the capital stock had been subscribed for and paid in. It was not a fraud upon the stockholders, however, because there were none; nor necessarily upon persons subsequently becoming stockholders, because the stock was full-paid stock, and not liable to any further calls in the hands of those who might purchase it. *Scovill v. Thayer*, 105 U. S. 143 [26 L. Ed. 968]. A purchaser of the stock would not be injured by the transaction unless he paid more for it than it was worth; and every purchaser would stand upon the particular circumstances of his purchase. If the original transaction, in connection with the special facts of a purchase of stock, should operate as a fraud upon a purchaser, the cause of action would be his, and not that of the corporation. The fraudulent character of the transaction was imparted to it by the corporation itself; that is, by those who represented all there was of the corporation. The remedy of the complainant, if he has been deceived into the purchase of stock by false representations as to its value, is against those who have misled him. Even if he could recover against the corporation or against the trustees (see *Fosdick v. Sturges* [Fed. Cas. No. 4,956] 1 Biss. 255), the corporation has no cause of action against the trustees."

See, also, *Flagler Engraving Machine Co. v. Flagler* (C. C.) 19 Fed. 468, 470.

We have thus fully discussed the point because the brief of complainant's counsel asserts that, even if the stock had had some value, "the transaction would nevertheless have been a fraud upon the prospective bondholders and stockholders whom they were inducing to enter the company," and further contends that the prospective bondholders and purchasers were led by resolutions, representations, and reports of the officers of the company to believe that the money which they were about to pay for the bonds and stock would, after payment of the debts, be devoted to the interests of the company and the improvement of the plant.

In stating these conclusions we do not wish to be understood as holding that the transactions complained of may not have been grossly fraudulent, to the prejudice of certain creditors of the corporation; nor do we question the doctrine that the assets of an insolvent corporation are impressed with a trust for the payment of its debts, and can-

not be withdrawn by the stockholders without providing for such debts, as held by the court below. Assuming the facts found by the court below, we think the receiver has misconceived his right, and acted beyond the scope of his authority in thus bringing this suit in the name of the corporation.

The bill further alleges that the defendant Harris "permitted and directed him [Carlisle] to pay dividends on all of the shares of stock in said company, except those standing in the names of said John Carlisle and George W. Carlisle, his brother, and accordingly such dividends were paid by said John Carlisle to sundry persons, but the names of said persons and the amount paid to each of them are to your orator unknown." The claim that the estate of B. D. Harris is liable therefore appears to have been abandoned in the court below. The admission and contention of the receiver in this court is stated in his brief as follows: "For the amount that B. D. Harris actually received, his estate should be made to account. For what he paid others the action has probably abated." The bill does not charge that Carlisle paid any dividends to Harris between 1889 and 1892. It is admitted that no dividends were received by Harris after January 1, 1891. Even if dividends were received by him between 1889 and 1891—a question as to which the evidence is indefinite—such dividends were paid at a time when the company was a going concern, and without any open present evidence of insolvency. Furthermore it is not alleged nor shown that Harris knew that such dividends, if paid, were not paid out of the earnings of said corporation, or that he did not receive them in perfect good faith. The date of insolvency alleged in the bill was 1892, and it appears that in 1889 all outstanding debts had been paid. In these circumstances the estate of B. D. Harris is not liable in this suit by the corporation. *McDonald v. Williams*, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022; *New Hampshire Savings Bank v. Richie*, 121 Fed. 956, 58 C. C. A. 294.

The decree of the Circuit Court that the complainant is entitled to the sum of \$15,000 is reversed, with costs, and the cause remanded to said court, with instructions to dismiss the bill with costs.

L. BUCKI & SON LUMBER CO. et al. v. ATLANTIC LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1904.)

No. 1,815.

1. ABATEMENT—WAIVER OF GROUNDS—DELAY IN FILING PLEA.

Where a corporation plaintiff was dissolved before the action was tried, the defendant cannot proceed to trial, and, after waiting until a judgment in its favor has been reversed on a writ of error and the cause remanded for a new trial, file a plea setting up such dissolution in abatement.

2. SAME—DISSOLUTION OF CORPORATION PLAINTIFF—NEW JERSEY STATUTE.

Under the corporation laws of New Jersey (P. L. 1896, p. 295, § 53), which provide that corporations after their dissolution shall be continued bodies

¶ 2. Dissolution of foreign corporations, see note to *Republican Mountain Silver Mines v. Brown*, 7 C. C. A. 421.

See *Abatement and Revival*, vol. 1, Cent. Dig. §§ 194, 196, 197; *Corporations*, vol. 12, Cent. Dig. §§ 2454, 2589.

corporate for the purpose of prosecuting and defending suits by or against them, the dissolution of a corporation does not abate an action brought by such corporation in Florida to recover damages to its estate, business, and credit by reason of an alleged wrongful attachment of its property; the cause of action being one which survives under the laws of Florida.

3. EXECUTION—GROUNDS FOR STAY.

A judgment defendant is not entitled to a stay of execution on the ground that an unsatisfied judgment previously obtained by it against the plaintiff, but which it assigned to a third party, may in a certain contingency be re-assigned so as to enable defendant to set it off against the present judgment.

4. JUDGMENTS—RIGHT OF SET-OFF—EFFECT OF ASSIGNMENT OF DEMAND BEFORE JUDGMENT.

The assignment of a demand in suit by the plaintiff to his attorney, who has a statutory lien thereon, prevents the accruing of any right to the defendant to set-off, against a judgment subsequently rendered thereon, a judgment previously recovered against the plaintiff.

5. MANDAMUS—ENFORCING OBEDIENCE TO MANDATE—SCOPE OF RELIEF.

A judgment for defendant in a Circuit Court was reversed on a writ of error, and the cause remanded with directions to award a new trial and to issue execution against the defendant for the costs of the appellate court. The Circuit Court, without sufficient cause, granted a stay of execution, and also erroneously sustained a plea in the nature of a plea in abatement filed by defendant, but without entering any final order or judgment in the case from which a writ of error would lie. Plaintiff applied to the Circuit Court of Appeals for a writ of mandamus to compel the Circuit Court to set aside the staying order and to proceed with the new trial. *Held* that, the remedy by mandamus being undoubtedly appropriate to enforce obedience to the court's mandate for execution, and the court having the full record before it relating to the ruling on the plea, it would treat the proceeding as in effect one on a writ of error, and deal with the whole case, instead of compelling the plaintiff to await the future action of the Circuit, and to again bring up the same record by writ of error.

Petition for a Writ of Mandamus to the Circuit Court of the United States for the Southern District of Florida.

The proceedings in this case were commenced by the following petition:

"Your petitioners, L. Bucki & Son Lumber Company and Horatio Bisbee, respectfully allege that in action at law brought in the Circuit Court of the United States for the Southern District of Florida, wherein said L. Bucki & Son Lumber Company was the plaintiff, and the Atlantic Lumber Company, Arthur Meigs, Daniel G. Ambler, and Richard H. Liggett were the defendants, such proceedings were had that on the 16th day of January, A. D. 1902, a final judgment therein was rendered in and by the said court for the said defendants. That thereupon the said plaintiff sued out from the United States Circuit Court of Appeals for the Fifth Circuit, and prosecuted, a writ of error to reverse the said judgment, and such proceedings were had upon the said writ of error that afterwards, to wit, on the 10th day of March, A. D. 1903, the said United States Circuit Court of Appeals rendered its judgment, whereby the said judgment of the Circuit Court was reversed. And the said Circuit Court of Appeals, by its mandate duly issued in the said action, ordered and commanded the said Circuit Court to enter up in the said court a judgment for costs on the said writ of error against the said defendants, and to issue an execution for which costs, to which mandate reference is here made. Your petitioners allege that, in obedience to said mandate, the said Circuit Court did enter a judgment against the defendants in the said court for the said costs, to the amount of fourteen hundred and twenty-four and $\frac{24}{100}$ dollars (\$1,424.24), as appears from the records of said court, and that afterwards, to wit, on the 23d day of April, A. D. 1903, execution in due form was issued out of the said court upon the said judgment against the said defendants for the said sum of \$1,424.24, and that the said execution was duly delivered to the United States marshal, who duly levied the same upon the lands and tenements of the said defendant

Richard H. Liggett, for the purpose of obeying the commands to him in the said execution contained, and of collecting the amount of the said judgment for the said costs. And your petitioners aver that afterwards, to wit, on the — day of June, A. D. 1903, the said Circuit Court, on the application of the said defendants, without any legal excuse or judicial power, ordered an indefinite stay of the said execution, and the said marshal, John F. Horr, not to further execute the said execution until the further order of the said Circuit Court, and that no further order has ever been made. And your petitioners allege that the said Horatio Bisbee was the attorney for the plaintiff in the said action, and prosecuted for the said plaintiff the said action and the said writ of error, and that the amount of the fees earned by the said attorney for his services in the premises greatly exceed the amount of the said judgment, and that the necessary costs and disbursements actually made by the said attorney in the said action, and which were paid by the said attorney out of his own pocket and from his own moneys, greatly exceed the amount of said judgment. And that the said fees, costs, and disbursements are, under the laws of the state of Florida, a lien upon the said judgment, superior to all other liens and all other rights. Your petitioners allege that the said Circuit Court has refused and still refuses to obey the commands of the said mandate in the said action. And your petitioners further allege that the said mandate commanded the said Circuit Court to grant a new trial in the said action, and thereafter to proceed according to law, and in accordance with the views and opinions of the said United States Circuit Court of Appeals; and the said Circuit Court, in obedience to the said mandate, did enter an order in the said action granting a new trial therein. But your petitioners aver that afterwards, to wit, on the — day of June, A. D. 1903, the said court, against the objection of the said plaintiff, duly made by its counsel in open court, did grant leave to the said defendants to file, and the said defendants did file, in pursuance of such leave, in the month of June aforesaid, a certain document which defendants soon after amended, and which, as amended, was intended as a plea in abatement of the further prosecution of the said action, and is in the words and figures as follows, to wit:

“In the United States Circuit Court, Southern District of Florida.

“L. Buckl & Son Lumber Company v. The Atlantic Lumber Company,
Richard H. Liggett, Daniel G. Ambler, and Arthur Meigs.

“Now come the defendants herein, by their attorney, and for the purpose of meeting the ground of demurrer to their plea filed herein on the — day of June, 1903, amend said plea so as to read as follows: That the L. Buckl & Son Lumber Company, plaintiff herein, was duly incorporated under the laws of the state of New Jersey on the first day of October, 1892, with an authorized capital stock of \$250,000, and that thereafter, prior to January 1, 1897, it issued the full amount of its capital stock of \$250,000. And a copy of the charter of said company is herewith filed and made part hereof. That the L. Buckl & Son Lumber Company was organized for the purpose of manufacturing and dealing in lumber, and that over fifty per cent. of its capital stock was invested in a sawmill plant situated at Jacksonville, Florida, and continued so to be from January 1, 1894, to January 1, 1898, and that no appreciable part of its property was at any time physically located in the state of New Jersey during the year of 1897. That on June 7, 1897, the State Board of Assessors for the state of New Jersey certified and reported to the Comptroller of the State of New Jersey that the amount of the capital stock of the said L. Buckl & Son Lumber Company was \$250,000, and that the tax due thereon was the sum of \$250.00; and that thereupon there became due to the state of New Jersey from the said L. Buckl & Son Lumber Company the said sum of \$250 for the taxes of 1897; that said tax has never been paid; and that on May 2, 1900, the Comptroller of the State of New Jersey reported the fact of the nonpayment of said tax to the Governor of the State of New Jersey, who did thereupon, on the said 2d day of May, 1900, and since the last pleading in this action, issue a proclamation declaring the charter of said L. Buckl & Son Lumber Company void, a copy of which proclamation is herewith filed, and is prayed to be read and taken as part of this plea; that said proclamation was duly filed in the office of the Secretary of State for the

state of New Jersey, and that said proclamation was duly published for one week in the newspapers specified in said proclamation, as provided for therein.

"R. H. Liggett, Defendants' Attorney."

"And the said document was verified. Your petitioners aver that afterwards, in the month of June aforesaid, the said plaintiff filed in the said action a demurrer and motion to the aforesaid document, in the words and figures following, to wit:

"In the Circuit Court of the United States, Southern District of Florida.

"L. Bucki & Son Lumber Company, Plaintiff, v. The Atlantic Lumber Company, Richard H. Liggett and others, Defendants.

"Comes now the plaintiff by its attorneys, Bisbee & Bedell, and demurs to the amended plea of defendants, intended as a plea in abatement, upon the following grounds: First. That the plea states no fact constituting a ground for a dismissal of said suit. Second. That, under the statutes of New Jersey, the plaintiff corporation continued in existence for the purpose of prosecuting and defending suits, and winding up its business and affairs, even though the proclamation of the Governor was effective to dissolve the plaintiff corporation. And no other grounds appearing on the face of said amended plea.

"I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

[Signed] H. Bisbee."

"Motion.

"Now comes the plaintiff in the above-entitled action, and moves the court to strike the amended plea, intended as a plea in abatement in above action, on the following ground: That the court has no authority to allow the said plea to be filed, and on the ground that the defendants, long after they knew of the said proclamation of the Governor, voluntarily submitted themselves to the jurisdiction of the United States Court of Appeals, and submitted the merits of the said action to the said court, and thereby the said defendants are estopped and have waived their right to interpose the said plea in abatement."

"That the said demurrer was duly verified, and the same and the said motion were duly signed by the plaintiff's attorney; and soon thereafter, to wit, 'in the month of June aforesaid, the said court, by its orders of record, denied the said motion and overruled the said demurrer; and your petitioner avers that the said court has not made and entered any formal judgment dismissing the said action, which must necessarily follow from the said orders made and entered as aforesaid.' Your petitioner avers that the said proceedings of the said officers of the state of New Jersey in the aforesaid document filed by the defendants, stated and intended as a bar to the prosecution of this action, were all had and were all performed, as shown therein and by the record of this action, and about twenty months prior to the trial of the said action in the said Circuit Court, and nearly three years prior to the trial and judgment in said action in the said United States Circuit Court of Appeals; and your petitioner avers that the said defendants were and are chargeable with a knowledge of the said proceedings by the said officers of the state of New Jersey, and that a petition was filed in the said action by the defendants on May 23, A. D. 1903, for the purpose of obtaining a stay of the said execution which contains the following averment, to wit: 'That your petitioner the Atlantic Lumber Company was wholly ignorant of the dissolution of the L. Bucki & Son Lumber Company until the — day of —, 1902, and your petitioners Daniel G. Ambles and Richard H. Liggett were wholly ignorant of the dissolution of the said L. Bucki & Son Lumber Company until after October 1, 1902.' And your petitioner avers that, having the knowledge aforesaid, the said defendants were silent, and voluntarily submitted themselves to the jurisdiction of the said courts, and each of them, for a judgment upon the merits of the said action, after having said knowledge of the said proceedings of the said officers of the state of New Jersey, and said defendants were and are estopped from setting up the said proceedings as a bar to the further prosecution of the said suit. And your petitioners aver that on or before the 26th day of July, A. D. 1898, the plaintiff, for value received, duly assigned by contract in writing all its claims in suit in the said

action against all and each of the said defendants to the said Horatio Bisbee to secure the payment to the latter for his professional services before the date aforesaid rendered, and thereafter to be rendered, in the said and other actions for and against the said plaintiff, and the said assignment expressly provided that the said assignee should have the right to prosecute the said action against the said defendants, and collect the proceeds thereof, which said assignment, and its nature and character, as herein alleged, was duly set up in the said action by a replication to the said document intended as a plea in abatement by defendants in said action, and said replication was demurred to, and said demurrer sustained by the said Circuit Court. And your petitioners, in support of their petition, refer to the printed transcript of the record of said action, and to copies thereof on file in the said Court of Appeals, and pray the said court to refer to the same as often as may be necessary. And your petitioner avers that the aforesaid orders of the said Circuit Court, made and entered in the said action as aforesaid, are in violation of the legal rights of the plaintiff under the said mandate, and that it has no adequate legal remedy, except by a writ of mandamus. Wherefore your petitioner prays for a writ of mandamus from this honorable court, directed to the said Circuit Court, and to the judges thereof, commanding them to vacate the aforesaid order staying the said execution for costs, and commanding them to strike from the files of the said action the aforesaid document filed by the defendants in the month of June, A. D. 1903, setting up the said proceedings of the said officers of the state of New Jersey, stated in the said document, and commanding them to proceed to execute the said mandate in the said action, and to grant such other and different relief as petitioners are entitled to. And your petitioner will ever pray," etc.

An alternative writ having been ordered, the judge of the Circuit Court made return as follows:

"To their Honors the Judges of the Circuit Court of Appeals for the Fifth Circuit of the United States, James W. Locke, Judge, shows cause against the issuance of a writ of mandamus herein as follows:

"(1) That on March 10, 1903, your honors entered a judgment herein reversing the judgment of the Circuit Court, and held and decided that certain evidence introduced at a former trial of the action at law tended to sustain the allegations of the declarations that the writs of attachment therein described had been sued out by the defendants therein maliciously and without probable cause, and your honors did reverse the finding of the Circuit Court on that point, and at the same time your honors did review and revise certain decisions of the Circuit Court made in connection with the admission and rejection of evidence in said action. That your honors remitted the cause to the Circuit Court, with instructions to give a new trial and to proceed according to law and the opinion of your honorable court, duly rendered and filed in said cause. That your honors did not render a final judgment on said action, or give any judgment in said cause to which this respondent could refer for guidance, other than those referred to, which would have required this respondent, in another trial of the action, to conform the rulings of the Circuit Court to the decisions rendered by your honorable court. That the respondent has duly entered an order granting a new trial of the action. That on June 18, 1903, the defendants in the action presented to the Circuit Court the following plea, and applied for leave to file the same, to wit: 'Now come the defendants, the Atlantic Lumber Company, Daniel G. Ambler, Arthur Meigs, and Richard H. Liggett, by their attorney, and, for a plea to the declaration herein, say that after the last pleading herein, to wit, on the 2d day of May, 1900, the L. Buckl & Son Lumber Company, plaintiff herein, was dissolved, and its charter became null and void, as will appear from the proclamation of the Governor of the State of New Jersey, a copy of which is hereto attached and made a part of this plea.' Which plea was duly signed and verified according to the practice and statutes of Florida, and a copy of the proclamation referred to is hereto attached, marked 'Exhibit A,' and is to be read as part of said plea. In the opinion of respondent, the plea alleged facts which, if true, presented a substantial defense to the action; and respondent, in the exercise of the discretionary powers vested in the judge

of the Circuit Court, gave leave to the defendants to file said plea, and caused an order to be entered accordingly. That on the same day the plaintiff filed the following demurrer to said plea: 'Comes now the plaintiff, by Bisbee & Bedell, its attorneys, and demurs to the plea of defendants' abatement, filed by leave of court on June 18, 1903, upon the following grounds: First. It states no facts establishing that the plaintiff has not, in law or in fact, a legal existence; second, that, under the laws of New Jersey, the plaintiff did have, at the date of the plea, and has now, a legal existence, and is competent to prosecute the said action; third, that, as shown by the alleged proclamation of the Governor of New Jersey, it was issued without giving any notice to the plaintiff, and is null and void.' That said demurrer was duly certified to by counsel, and duly verified. That on June 20, 1903, the plaintiff filed the following replication to the said plea: 'That all the claims and demands embraced in suit in said action, and declared on therein, heretofore, to wit, on the 26th day of July, 1898, were, for value received, duly assigned and transferred by the plaintiff to Horatio Bisbee, which said assignment was in writing, and is made part hereof, and is in the words and figures following, to wit: [A copy of said assignment is attached hereto, marked 'Exhibit B,' and is to be read as part hereof.] And the plaintiff says that at the time of such assignment the plaintiff was indebted to Horatio Bisbee, the said assignee, in a sum of money exceeding \$15,000 for professional services before then rendered, and retainers then due and unpaid, and that at the date of the said plea in abatement the plaintiff was indebted to the said Horatio Bisbee for professional services, covered and intended to be secured by the said assignment, in a sum exceeding \$35,000, which said several sums of money at the time aforesaid remained, and still remain, unpaid. That afterwards, on June 24, 1903, the defendants filed the amended plea recited on pages 4 and 5 of the petition, and on the same day the plaintiff filed the demurrer and motion recited on pages 6 and 7 of the petition. That on June 24, 1903, the defendants filed a demurrer to the said replication, setting up an assignment of the cause of action to H. Bisbee, Esq., on the grounds following: 'First, because it avers no facts that constitute a good and sufficient reply to the said plea to which it is pleaded; second, because said assignment mentioned in said replication is null and void; third, because the said cause of action determined and terminated upon the dissolution of the L. Bucki & Son Lumber Company.' That the demurrer to the amended plea, the motion to strike said plea, and the demurrer to the second replication afterwards came on to be heard before the Circuit Court, and were elaborately argued by counsel. The regularity of the taxation proceedings in the state of New Jersey were not contested by the replications thereto, but it was insisted by counsel for plaintiff that the plaintiff corporation could not have been legally dissolved, save through the judgment of a court of competent jurisdiction in a judicial proceeding instituted for that purpose, and that the provisions contained in the law of New Jersey under which it was claimed the plaintiff corporation had been dissolved did not constitute due process of law, and that, assuming the corporation to have been legally dissolved, the action might still be maintained by the corporation by virtue of sections 53, 54, 55, and 56 of chapter 185, Laws of the State of New Jersey, approved April 21, 1896, or else said action might be maintained in the name of the corporation by virtue of the assignment of the cause of action to H. Bisbee, Esq., set up in the second replication to the plea. Upon an inspection of the laws of New Jersey, it appeared to this respondent that this charter was granted subject to the right of amendment, alteration, and repeal at the pleasure of the state, and that an express statute in force at the time of the allowance of the charter provided that, upon the failure of a corporation for two consecutive years to pay any tax which should be assessed against it under any law of the state, the charter should be void, and all powers conferred by law upon such corporation were thereby declared inoperative and void, etc.; and it further appearing that said statute was re-enacted, in substance, on April 21, 1896, and has been in force from March, 1891, to this time, this respondent became convinced that the occurrence of the facts stated in the plea had dissolved the plaintiff corporation. From examination of sections 53, 54, 55, and 56 of chapter 185, Act of April 21, 1896, this respondent came to the conclusion that such act

was designed to furnish a convenient means of administering the assets of a dissolved corporation, and that the assets contemplated by the statute were of the same character as a court of equity habitually preserves to the creditors and stockholders of a dissolved corporation, or such as pass to an assignee in bankruptcy or insolvency, or to a receiver, or such as survive to the personal representative of a deceased person, and that while the statutory trustees of a dissolved corporation might sue and be sued in the name thereof, or in their own names, such suits were expressly confined to property rights, and to rights arising out of contract, expressed or implied. Being of the opinion, on the whole, that, upon the admitted facts, the corporation had been dissolved, and that the cause of action sued on had been extinguished thereby, this respondent gave judgment accordingly, and entered an order overruling the demurrer to the plea; and further being of the opinion that the defense had been seasonably presented, and that all the questions involved in said plea had been left open by the mandate of your honors, this respondent also overruled the motion to strike the said plea from the record. Upon consideration of the demurrer to the replication setting up an assignment of the cause of action, the respondent was of the opinion that this cause of action was not assignable, and also that an assignee could not, after the dissolution of a corporation, continue to maintain in its name a suit on a cause of action which did not pass to its statutory trustees, and which they could not have maintained an action upon, and this respondent gave judgment in accordance with this view, and entered an order sustaining the demurrer to the replication setting up the assignment of the cause of action. That, at the time of entering the orders mentioned, the Circuit Court gave the plaintiff leave to file additional pleadings as it might be advised, and that subsequently, on the 25th day of July, 1903, the plaintiff filed two replications to said plea, and that the defendants demurred to one of said replications, and moved to strike the other, and that said demurrer and motion were submitted by the parties to the Circuit Court for decision on or about December 6, 1903, and that action thereon has been delayed pending the decision by your honors of the petition for mandamus.

"(2) This respondent further shows unto your honors that on April 22, 1903, an execution issued out of the Circuit Court, on the mandate of the Circuit Court of Appeals, for the costs of prosecuting the writ of error in this action, and was delivered to the marshal to be levied. That on June 22, 1903, the defendants filed a petition in the Circuit Court praying that an order might be entered staying the enforcement of said execution, a copy of which petition is hereunto attached, marked exhibit 'C' and it is prayed that the same may be taken and read as part of this return; that, upon consideration of the said petition, this respondent was of the opinion that such a state of circumstances existed as entitled the defendants to a temporary stay of execution, and that irreparable injury might be suffered by the defendants from the collection of the execution, while plaintiff's rights could be fully protected by the execution of security, and that the respondent accordingly entered an order on June 27, 1903, staying the enforcement of the execution until the first day of the next term of the court (December term, 1903), upon condition that the Atlantic Lumber Company gave bond in the sum of \$2,000 to abide the final order of the court, and that the respondent embodied his reasons for granting that order therein, a copy of which is hereunto attached as Exhibit D, and it is prayed that the same may be read as part hereof.

"The above narrative recites the circumstances under which the orders complained of were entered, and this respondent's reasons for making said orders, and respondent submits the same to your honors for your consideration, and judgment whether or not a writ of mandamus should issue. And now, having fully answered, this respondent prays to be hence dismissed."

To the return petitioners demur and reply as follows:

"Come now the said petitioners, by Bisbee & Bedell, their attorneys, and demur to the several parts of the respondent's return to the rule to show cause, hereinafter stated, upon the following grounds:

"First. Said return admits the truth of every material fact stated in the petition, and alleges no material facts in the first five pages thereof sufficient to defeat the petitioners' right to a mandamus to compel a new trial.

"Second. So much of said return as attempts to state what this court decided on a writ of error is immaterial, because this court knows best what it decided.

"Third. So much of said return as sets up certain proceedings by the officers of the state of New Jersey under certain statutes thereof, even though they were effective to dissolve the corporation petitioner, constitute no reason for abating the suit: (a) Because the statutes of said state specified in the said return expressly continued the existence of the corporation for all purposes of prosecuting and defending all suits by or against it; (b) and because, under those statutes, it was the duty of the said corporation 'to sue for and recover' all debts and property thereof (sections 53, 54, and 55), and the claims and choses in action declared on in the said action are the property of said company; (c) and because the question of what choses in action survive the death of a natural person has no application in the case; (d) because the claim for damages to property, business, and credit of the corporation declared on in the action was assignable under the laws of Florida, where said assignment was executed.

"Fourth. The said respondent had no power or jurisdiction to allow the said plea in abatement to be filed.

"And petitioners demur to so much of said return as is contained in the sixth page thereof, stating respondent's reasons for staying the execution of this court, upon the following grounds:

"First. The said respondent had no power or jurisdiction to entertain said petition for such stay, nor to stay said execution.

"Second. Upon the facts averred in the said petition, and especially the facts showing an attorney's lien on the judgment of this court, upon which the execution issued for all the costs and disbursements which were paid by the said attorney, for which said judgment was rendered, and for his services in said action, defeats and precludes, both in law and equity, any right of set-off set up in return, in Exhibits C and D thereof.

"Third. Because the said assignment, not denied by any pleading in the said action, nor by the said return, which assignment was made over eighteen months before judgment versus the Fidelity & Deposit Company on the claims so assigned was in part recovered, and four years before the alleged assignment by the Atlantic Lumber Company to the said Fidelity Company of the alleged judgment versus the Bucki Company, defeats any such set-off, and no consideration was paid for the said assignment.

"Fourth. Because the said respondent utterly ignored the rights of the said attorney and the said assignee, whereas it was his duty to protect them.

"Fifth. Because the torts and unlawful acts of the Atlantic Lumber Company in improperly suing out the said attachments caused the very damage to and the diminution of the estate of the Bucki Company for which said judgment versus the Fidelity Company was recovered, and neither the said Atlantic Lumber Company, nor its said assignee, have any standing in law or equity to take those damages, to pay, by way of set-off or otherwise, the said judgment of this court versus the Atlantic Lumber Company, to the exclusion of the attorney and creditor of the Bucki Company whose services and disbursements obtained the said judgment.

"Sixth. Because the Atlantic Lumber Company cannot take advantage of its own torts and unlawful acts, or raise any equity thereon for a set-off, even against the said Bucki Company.

"Seventh. Because the Atlantic Lumber Company never executed the said attachment bonds, and was not an obligor thereon, and the relation of principal and surety upon the bonds between the said company and the said Fidelity Company never existed, as will appear from the inspection thereof in the records of the said action in his court.

"Eighth. And for other reasons appearing from the face of the said return of respondent.

"And these petitioners, replying to so much of the said return, on page 5 thereof, as sets up two replications to the said plea in abatement not disposed of by the said Circuit Court, say that there were three replications, and that they raised the same questions of law in another form of pleading, which had previously been decided adversely to the plaintiff; that demurrers

were filed to two of the said replications, and a motion to strike the other was filed, and that, since the said respondent's return was served upon your petitioners, the said respondent has sustained the said demurrer and the said motion; and that thereby all pleadings to the said plea in abatement have been disposed adversely to petitioners. And your petitioners aver that stay of execution on the judgment versus the Buckl Company, referred to on page 13 of the respondent's return, was ordered in July, 1898, about eighteen months before the recovery of the judgment versus the Fidelity Company, and consequently the statement in said return, on page 13 thereof, that 'the enforcement of such execution has now been stayed for upwards of six years because the L. Buckl & Son Lumber Company did recover a judgment against the Fidelity & Deposit Company of Maryland as surety on the bond of the Atlantic Lumber Company,' is obviously incorrect. Said stay of execution was made on the ground that the Buckl Company had pending against the Atlantic Company sundry suits, claiming large damages."

Horatio Bisbee and Geo. C. Bedell, for petitioners.

R. H. Liggett, for respondents.

- Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. Conceding the regularity and validity of the proceedings in the state of New Jersey under Pub. Laws April 21, 1896, c. 187 (P. L. 1896, p. 319), as set forth in the quasi plea in abatement, still we think said plea comes too late, and is bad in substance. It is not a plea to the merits, but sets up facts which were in existence long before the trial of the action on the merits in the Circuit Court. The Atlantic Lumber Company was charged with knowledge of such facts, and admits actual knowledge before hearing on error in this court. To allow the plea now is to put the Atlantic Lumber Company in the attitude of successfully experimenting with the court.

Section 53 of the Pamphlet Laws of New Jersey of 1896 (P. L. p. 295) is as follows:

"All corporations, whether they expire by their own limitation or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

The word "suits" is a very comprehensive term, and includes all actions at law, *ex contractu* and *ex delicto*, and all actions in equity. See *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Bouv. Law Dict. verbo "Suits."* This section 53, therefore, in terms, fully provides for the continuation of suits by or against the dissolved corporation, notwithstanding the dissolution, and such is the construction of the New Jersey courts. *Grey v. Newark Plankroad Co.*, 65 N. J. Law, 603, 48 Atl. 557. See *American Surety Company v. Great White Spirit Company*, 58 N. J. Eq. 526, 43 Atl. 579. The same construction has been given in the Fourth Circuit in *Boyd v. Hankinson et al.*, 92 Fed. 49, 34 C. C. A. 197.

The sections succeeding section 53, Pamphlet Laws aforesaid—54 to 60—do not, in any opinion, in any wise limit the scope of section 53, but, in line therewith, relate to proceedings to be had in the matter of winding up dissolved corporations.

It is suggested that, as the New Jersey proceedings dissolved the corporation, the present suit must abate, notwithstanding section 53, because it is a personal action for malicious prosecution, and therefore cannot survive dissolution. The first answer to this is that the New Jersey proceedings did not dissolve the corporation, quoad the prosecution of suits, and that statute is controlling in the matter. See sections 53, 59, New Jersey Laws, *supra*. The second answer is that this suit is not one of those actions for personal injuries which, under section 989 of the Revised Statutes of Florida, of 1892, die with the person. While, in a general way, it would be called an action for malicious prosecution, it is really an action to recover damages for trespass upon property; or, as otherwise stated, it is an action to recover damages to the estate, business, and credit of the Bucki & Son Lumber Company. The distinction is recognized by the Supreme Court of Florida in *Jacksonville St. Ry. Co. v. Chappell*, 22 Fla. 616, 1 South. 10, and we think sound reason requires the holding that where the damages from a tort are to the estate of the plaintiff, as distinguished from damages to the person, the right of action survives. For authorities on the subject, see 25 Ency. Pl. & Pr. p. 328.

The order of the Circuit Court staying the execution issued under the judgment of this court for costs appears to be based upon the following state of facts: The Atlantic Lumber Company had recovered a judgment in the Circuit Court, afterwards affirmed by this court, against the Bucki & Son Lumber Company. Subsequently the Bucki & Son Lumber Company obtained a judgment in the Circuit Court, rendered on mandate from this court, against the Fidelity & Deposit Company of Maryland, growing out of matters wherein the Fidelity Company was a surety for the Atlantic Lumber Company. Thereupon the Atlantic Lumber Company assigned its judgment against the Bucki & Son Lumber Company to the Fidelity Company to be used as a partial set-off, and proceedings to compel such set-off were instituted, and are still pending. Now the Atlantic Lumber Company claims that the execution issued against itself under the mandate of this court in the instant case, and in favor of the Bucki & Son Lumber Company, should be stayed to await the event—the success or failure of the Fidelity Company to obtain the set-off above referred to—with the view that, if the Fidelity Company fails to establish its right to set off the judgment in favor of the Atlantic Lumber Company and against the Bucki & Son Lumber Company against the judgment in favor of the Bucki & Son Lumber Company against itself, then a reassignment of the judgment obtained by the Atlantic Lumber Company against the Bucki & Son Lumber Company will enable the Atlantic Lumber Company to plead the same as a set-off against the judgment and execution for costs rendered under our mandate in the instant case. On this state of facts, it seems that the order staying the execution was improvident. The Fidelity Company is no party to the present suit, the Atlantic Lumber Company owns no judgment against the Bucki & Son Lumber Company, and is not entitled to have execution against itself stayed to await a possibility that it may some time have a judgment which it may be able to plead as a set-off.

This seems to dispose of the order staying execution, but there is a further answer: Prior to the obtaining of judgment in the instant case against the Atlantic Lumber Company, the Bucki & Son Lumber Company had assigned the cause of action to petitioner H. Bisbee, who, at the time judgment was rendered, was the owner of the same. It seems to be reasonably well settled that "an assignment of a demand before the entry of judgment upon it gives to the assignee a superior equity to that of a party claiming a right to set off a judgment previously recovered against the assignor, and prevents the right of set-off from accruing, since there can be no right of set-off under judgments until both exist." 25 Ency. Law, p. 618, note 5. We do not think that the Atlantic Lumber Company is in any position to question the assignment to Bisbee. It appears to have been in consideration of professional services rendered and to be rendered, and for moneys, costs, and expenses of litigation advanced. Outside of the assignment, Bisbee, as attorney recovering the judgment, has a lien on the same, not to be divested by any set-off of judgment recovered on prior independent transaction. *Carter v. Bennett*, 6 Fla. 214, 258, 259; *Carter v. Davis*, 8 Fla. 183. See *In re Paschall*, 10 Wall. 483, 496, 19 L. Ed. 992; *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U. S. 117, 127, 5 Sup. Ct. 387, 28 L. Ed. 915.

From what we have said, it follows that in our opinion the quasi plea in abatement should not have been permitted filed, and, if filed, should have been promptly overruled, and that the order staying the execution for costs, as directed in our mandate, should not have been granted. It was granted without authority, and upon an insufficient case.

And that brings us to what we think is the real question, to wit, what, if any, relief can be granted petitioner in the present proceedings? There is no question that the rulings upon the plea and the order staying execution directly tended to hinder and delay, if not entirely defeat, the execution of our mandate. It may be admitted that, if the Circuit Court had finally ruled adversely to petitioner upon either the plea or the right to a stay of execution, the petitioner could have prosecuted a writ of error; and it may be that, if relief should be denied petitioner in the present proceedings, eventually a ruling will be had upon those questions in the Circuit Court, and from such ruling, if adverse, he can prosecute a writ of error. But the case shows that the Circuit Court has not finally ruled on either proposition, and that a ruling at any day certain is not to be expected; and to compel petitioner to await such indefinite ruling, and then possibly be driven to a writ of error, will cause irreparable injury to petitioner. In regard to the ruling staying the execution issued under the mandate of this court, we think that, in accordance with the undisputed authorities, a mandamus may issue, and that being the case, and as the full record of the proceedings upon the alleged plea are now before us, and nothing but delay and injury can result from driving petitioner to await a ruling thereon and then sue out a writ of error, we are disposed to deal with the case on the whole record as though properly before us upon a writ of error. We think such ruling is supported by sound reason. To deny relief at this time, with the full record before us, with a view that

some time in the hereafter the petitioner may bring again before us on writ of error, is to stickle for forms rather than merit and substance. This long drawn out litigation will never have an end if we ignore adjudicated rights and encourage the continued wrestling with technicalities. The case of *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432, recognizes the right of the appellate court to deal with obstructions to its mandate by mandamus, and we consider it decidedly in point.

A mandamus will issue as prayed for.

BUCKI & SON LUMBER CO. v. ATLANTIC LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,298.

1. JUDGMENT—RELIEF AGAINST IN EQUITY—MISTAKE.

The undisputed evidence adduced in an action at law in support of a set-off claiming damages for breach of a contract for a sale of logs to defendant held, under the instructions of the court as to the measure of damages, to have established definitely and certainly the amount of the damages to which the defendant was entitled as a set-off, for the purpose of a subsequent suit in equity by such defendant to have the judgment corrected on the ground that a clerical mistake was made by the court in computing the amount of such set-off, in requiring a remittitur of the amount thereof from the judgment for plaintiff.

Shelby, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

H. Bisbee and George C. Bedell, for appellant.

R. H. Liggett, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The original transactions and the resulting controversies between the parties to this suit, and to which this suit is somewhat related, have been, in different phases, several times before this court, and our reported decisions may be found in 92 Fed. 864, 35 C. C. A. 59; 93 Fed. 765, 35 C. C. A. 590; 109 Fed. 411; and 121 Fed. 233. This case was before us on appeal at our November term, 1901, and our opinions disposing of the case on that appeal, announced May 20, 1902, are reported in 116 Fed. 1. The averments of the bill in this case are briefly, but sufficiently, set out in the opinion of this court on the former appeal. Therein it also appears that the appellee had submitted a demurrer, specifying grounds, the first of which was, "Because the said bill does not set up such facts as entitled the complainant to any relief in a court of equity against this defendant," and that on the hearing of the demurrer the Circuit Court "ordered that said demurrer be, and the same is hereby, sustained upon the ground alleged therein; and, it further appearing that the insufficiency of the bill is such that it cannot be cured by amendment, it is ordered that it

be dismissed." This decree of the Circuit Court was reversed by this court, and the cause was remanded to that court, with direction to overrule the demurrer. It will be seen, with reference to our opinion announcing the result just stated, that it was to the effect that the facts averred in the bill entitled the plaintiff to the relief prayed for. Agreeably to the mandate of this court, the Circuit Court overruled the demurrer, and the defendant answered, and much proof was taken before an examiner, and the case came on for trial. The learned judge of the Circuit Court, in announcing his decision, discussed at some length the twenty-ninth article of the bill, but does not formulate his finding in reference to it in such way as favors quotation. After that discussion, he refers to the opinion of this court on the former appeal, and says:

"One important point in the decision of the Circuit Court of Appeals in overruling the demurrer herein seems to be based upon the allegation of the bill that the amount to which the defendant was entitled was unquestioned and conclusively proven. This was the only strongly contested point in the trial below, and the amount directed to be remitted was approximately the amount due under the measures of damages which had been determined by the trial court for the time for which the question had been withdrawn from the jury, and has since been sustained by the Court of Appeals, while the amount which the complainant herein demands was an amount which on every ruling of the court was refused and denied, and which in the entire litigation, so far as shown, was not proven. The court therefore finds that the allegations of the twenty-third and twenty-fourth articles of complainant's bill are not sustained, and the measures of damages found and determined in that suit has been fully adjudicated and determined upon appeal. It also finds that there was no undertaking of the court to change the measure of damages which had been given to the jury, but only to correct the error which possibly may have been committed in instructing the jury that payment and settlement between the parties for the logs up to the 15th of August, 1897, was final; that such order could in no way adjudicate any rights between the parties; and that no adjudication of the amount claimed in the bill was made."

After a full and very careful examination of all of the evidence brought up on this appeal, we find ourselves unable to concur in the findings of the Circuit Court as just above expressed. The twenty-third article of the bill charged that, on the trial at law to which the bill referred, the court, at the request of the defendant therein, instructed the jury that the difference between the contract price of the logs contracted to be delivered, and the market price of the logs actually delivered, was the legal measure and rule of damages to be allowed and awarded to the defendant in that action, on and under its pleas of set-off; and the court submitted to the jury at that trial the question of the amount of said damages and set-off to be allowed the defendant under the said pleas in respect to, and only in respect to, the logs delivered between the 14th day of August, 1897, and the 1st day of October. In the judgment minute, signed by the trial judge June 30, 1898, it is shown that the jury had been instructed that the payment and settlement had between the parties for the logs up to the 15th of August, 1897, was final; thus withdrawing from the jury all consideration of the pleas of set-off on account of the transactions had during the months of June, July, and the first half of August. And we think that the evidence which has come up to us on this appeal conclusively shows that, as to the pleas relating to the transactions between August 14th and

October 1st, the trial judge had, at the request of the defendant, instructed the jury as follows:

"Under the defendant's pleas of set-off in this case, you are instructed to allow the defendant, in making up your verdict, the difference in the value of the logs delivered in June, July, August, and September, on account of such logs being less in size than required by the contract, and the price of those contracted for; and you will determine this difference by deducting the market value in Jacksonville of logs of the sizes delivered in said months from the price of logs required by the contract; that is, logs $3\frac{1}{2}$ to the thousand. This will be the loss the defendant sustained for deficiency in size of logs, if the heart of the logs had not been injured by the worms."

It is not disputed, as we have already shown, that this instruction was restricted in its application to the pleas which covered the period between the 14th of August and the 1st of October. The judgment minute made in disposing of the motion for new trial, already alluded to, in addition to what has already been quoted in substance, recites further thus:

"Although it might appear that the size of the logs for that time was smaller than the average size guaranteed, and that, according to a custom of the market, the price of such logs in the market, on account of such smaller size, was \$583.07 less than the amount paid."

It is undisputed that the amount paid for this period was the contract price of the logs contracted to be delivered, and it is shown beyond dispute that, according to the custom of the market, the price of such logs as were in fact delivered was, on account of the smaller size referred to, not \$583.07 less than the amount which had actually been paid, but was \$3,422.10, without interest. Adding interest from the date when the payments were made, respectively, to the date of the verdict, which interest aggregates \$210, gives the amount of \$3,632.10, which the adjudication made as to the rights of the parties clearly required should have been deducted from the amount of the verdict, instead of the amount of \$583.07 mentioned by the judge. The remittitur actually made (\$613.37) shows that, in the judgment of the plaintiff in that action, the figures specified by the judge in the order signed by him were too small. It is not necessary for us to speculate as to the basis on which these calculations were made. In our opinion, the record clearly shows the true basis on which the calculation should have been made, and, if thus made, the difference as we have stated it is developed. It may appear to be large. That feature tends only and strongly to show the mistake on which the plaintiff in this suit bases his claim for relief. As we have suggested, the mistake is so considerable in its proportions as perhaps to render it inexplicable; but, from our observation of and experience with the litigation between these parties, the fact that such a mistake was made is not calculated to cast any reflection on the most experienced, enlightened, and upright judge.

As the law of the case was sufficiently discussed in our opinions rendered on the former appeal, and settled so far as it relates to this suit, and as all of the evidence is now before us, and the parties have been fully heard, orally and by printed briefs, there is no good reason why we should remand the case for further proceedings in the Circuit Court. The decree of the Circuit Court is reversed, and we here and now render the decree which the Circuit Court should have rendered, as follows:

It is now ordered, adjudged, and decreed that the judgment for \$8,988.-37 rendered in the Circuit Court May 7, 1898, in favor of the Atlantic Lumber Company against the L. Bucki & Son Lumber Company, be, and it is hereby, credited with the sum of \$3,632.10, as of the date of its rendition, so that the said judgment shall stand for, and be in the amount of, \$5,356.27, to enforce which execution shall issue in favor of the plaintiff in that judgment, and against the defendant therein. It is further ordered that the appellee herein pay all the costs in this suit incurred, in this court and in the Circuit Court, to enforce which execution may issue. Reversed and rendered.

SHELBY, Circuit Judge (dissenting). For reasons heretofore given (116 Fed. 8), I respectfully dissent from the judgment of this court in this case.

BROMBERGER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 61.

1. POSTAL OFFENSES—LARCENY AND EMBEZZLEMENT FROM THE MAILS—INDICTMENT.

An indictment under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], contained two counts, the first charging that defendant did unlawfully and willfully secrete, embezzle, and destroy a certain letter intended to be conveyed by mail, which came into defendant's possession by virtue of his office and employment as a letter carrier, and which contained articles of value described, and the second charging that defendant did steal, take, and carry away such articles of value described therein. *Held*, that such counts were not repugnant to each other as charging both embezzlement and theft of the same article, the one being for the embezzlement of the letter and the other for stealing its valuable contents.

2. SAME.

A silver certificate issued by the United States is a "pecuniary obligation or security of the government," and "an article of value," within the meaning of Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], and the secreting or destroying of a letter containing such a certificate, and the taking of such certificate from the letter, by a mail carrier, constitute embezzlement and larceny under said section.

3. SAME—DESCRIPTION OF CONTENTS OF LETTER.

An indictment under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], charging a mail carrier with embezzlement of a letter containing an article of value, and with stealing such article, is sufficiently specific where it describes the letter and describes the article contained therein as a silver certificate of the United States, giving its denomination, without setting out specifically the marks and numbers thereon.

4. CRIMINAL LAW—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

On the trial of a mail carrier for embezzling a letter and stealing an inclosure there was evidence tending to show that two decoy letters, one of which was the one defendant was charged with taking, were by mistake placed in the pigeonhole of another carrier, who, when sorting his letters, said to defendant, "I have got two letters for your route, and I am going to misbox them," and added loud enough for defendant to hear, "These fellows must take me for Hanlon." *Held*, that the exclusion and striking out of evidence offered by defendant to show that Hanlon was a former carrier on defendant's route, who had been convicted through decoy letters addressed like the two intended for defendant, on the theory

that defendant, being so warned, would not have been likely to take either of such letters, was without prejudice, even conceding that evidence of such collateral character was admissible, there being sufficient in the previous testimony to advise the jury in a general way who Hanlon was.

5. POSTAL OFFENSES—EMBEZZLEMENT OF LETTERS—DECOY LETTERS.

A letter properly stamped, with the receiving stamp of the office thereon, and placed in a carrier's pigeonhole at a postal station with other letters, addressed to a real person on his route, is "intended to be conveyed by mail," and its abstraction by the carrier and the taking of money therefrom constitutes an offense under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], although it was placed there by a postal inspector for the purpose of testing the carrier's honesty.

6. CRIMINAL LAW—REFUSAL TO EXCLUDE WITNESS.

The refusal of the court to exclude a witness during the trial of a criminal case is discretionary, and will only be reviewed for abuse of discretion.

7. SAME—EVIDENCE.

On the trial of a mail carrier for embezzling a letter and stealing a bill therefrom, the letter being one of two decoy letters bearing a printed address to the same person, a witness for the government testified that he placed both the decoy letters in defendant's pigeonhole, with others, for delivery. Another carrier, as a witness for defendant, testified that he found two letters so addressed in his own pigeonhole, and placed them in the "misbox." *Held* that, to prevent an inference by the jury that they were the decoy letters, and that the one embezzled may have been retained by the last witness, it was competent for the government to show in rebuttal by a clerk in the office that he found two such letters in the misbox, and redistributed them into defendant's pigeonhole.

Wallace, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York. The plaintiff in error was convicted, after trial, upon an indictment under section 5467, U. S. Rev. St. [U. S. Comp. St. 1901, p. 3691], for larceny and embezzlement from the mails. He was a letter carrier employed in the postal department at the city of New York. The facts sufficiently appear in the opinion.

Max J. Kohler, for plaintiff in error.

Clarence S. Haughton, for the United States.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The accused's route was known as "No. 21," and included the rectory of the Church of the Most Holy Redeemer. In order to make a test of the faithfulness of the carrier on that route, two post-office inspectors prepared two decoy letters. Each of them contained two \$1 bills, of the variety known as "silver certificates," specially marked by the inspectors, and folded up in a double sheet of note paper, on which was written a request to be admitted to membership in some church society, and the statement that the money was for the same, signed with a fictitious name and address, the whole inclosed in an envelope, addressed "Rev. Father Rector,

¶ 5. See Post Office, vol. 40, Cent. Dig. § 61.

Church of the Most Holy Redeemer, 173 East Third Street, Bet. Avenues A and B, New York City." One of these decoy letters also bore the notice, "If not called for in ten days, return to Dora Lynch, 22 Myrtle Ave., Bridgeport, Conn." The address was printed, apparently indicating that the envelope was one of a number prepared by the church for distribution among persons from whom some return was expected, and the testimony indicated that the coming into Station D of similar printed envelopes for the rectory was a not infrequent occurrence. On October 8, 1902, the inspectors, having sealed both envelopes, put a stamp on each, and postmarked them "Bridgeport, Conn., and "Montgomery, N. Y.," respectively. They then gave them to Rothman, superintendent of Station D, where defendant was employed. Rothman gave them to his chief clerk, Brucher, who had the receiving stamp put on—what is called the "back stamp," showing the date of their arrival at the office—and who then deposited them in the carriers' separation cases. Rothman saw him stamp them, and saw him deposit them in the cases, "one in the first case and one in the second case." There were seven of these separation cases, each consisting of 22 pigeonholes, representing 22 routes. In each case the pigeonholes for the respective routes were similarly located, so that Bromberger's pigeonhole, 21, was next the pigeonhole of the carrier on route 22, one Kiechlin. These decoy letters were placed in the pigeonholes shortly before 12 o'clock. The several carriers for the 22 routes, according to usual routine, took the letters out of their respective pigeonholes (an operation known as "skinning"), making several trips to the cases for that purpose, and carried them to their desks, where they sorted and bunched the letters for their delivery trip. About 12:30 they left the station, and about an hour thereafter the accused delivered one of the letters (the one postmarked "Montgomery") at the correct address. Within a few minutes thereafter he purchased a paper of tobacco at a store No. 108 Avenue B, and paid for it out of a dollar bill. About an hour later, upon being questioned by the inspector about the undelivered letter, he disclaimed all knowledge of it; and shortly thereafter one of the marked bills, which had been enclosed in the missing letter, was found in the cash register of the store at which the accused had purchased the tobacco. None of the above-recited facts were in dispute upon the proofs.

The testimony left it doubtful whether the two letters were originally placed in the pigeonhole assigned to the accused or the adjoining one assigned to Kiechlin. Brucher testified with great positiveness that he put them in Bromberger's boxes. "I went there," said he, "with that intention, and am positive that I put one of those two letters in the box marked 21 in the first distributing case to the right, and the other in the box or pigeonhole marked 21 in the second distributing case to the right. * * * I am positive I did not put them in Kiechlin's box. There can't be any doubt about it." He further testified that from some convenient position he thereafter stood and uninterruptedly watched the boxes in which he had placed the letters for about 20 minutes, until he saw the accused come to the cases and "skin" those two boxes. On the other hand, Kiechlin

testified that about noon of the same day, just after he made a "skinning" of his boxes, and while he was sorting their contents at his desk, he found two letters similarly addressed in print to the Rev. Father Rector; that, seeing they were not for his route, he put them in the misbox case; that he said to the accused, "I have got two letters for your route, and I am going to misbox them;" and he remarked at about the same time, loud enough for accused to hear, "These fellows must take me for Hanlon," or "Here is a nice fat one for Hanlon." According to the usual course of the office, letters misboxed are immediately placed in the pigeonhole of the carrier for whom they are intended, and one of the clerks (Hoyler) testified that at about a quarter past 12 he found two letters similarly addressed in print to the Rev. Father Rector in the misbox case, and placed them in the pigeonhole of the accused. Inasmuch as the addresses on the decoy letters were printed, and similar printed addresses on letters for the rectory had been received at the station before, it is apparent that the identity of the two which were found in the misbox with the two decoys is not necessarily established by the evidence of Hoyler and Kiechlin. In the not improbable event that there were received at Station D on that forenoon two genuine printed rectory letters, the testimony of Brucher, Kiechlin, and Hoyler would be reconciled.

The accused testified that he received one letter only, the one he delivered at its address. He also introduced testimony to show that about 1 o'clock on the day in question a letter carrier other than himself, but who could not be identified, paid with a \$1 bill for a purchase of tobacco at store No. 108 Avenue B, and that a number of letter carriers come to that store every day to make purchases. When the person in charge at the store, at the request of the inspector, searched in his cash register for and found the marked bill, there were other dollar bills in such register.

The evidence pointing to the conclusion that the accused received a letter which he did not deliver, and that he appropriated one of the dollar bills contained therein to the purchase of the tobacco within a couple of hours after receiving it, although circumstantial, fully warranted the verdict of the jury, and we find no force in the contention of plaintiff in error that the court should have advised the jury to acquit upon the theory that the evidence was insufficient to establish guilt.

Of the 23 assignments of error it will not be necessary to refer to any which were not relied upon in the brief and not discussed on the argument. The brief presents the usual contention that both counts of the indictment are bad because the subject-matter of the alleged larceny is not described in the language of the statute. Eliminating unnecessary clauses, the statute (Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691]) reads:

"Any person employed in any department of the postal service, who shall secrete, embezzle, or destroy any letter * * * intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, * * * and which shall contain any note, bond, draft, check, warrant, * * * certificate of stock, or other pecuniary obligation or security of the government, or of any officer

or fiscal agent thereof, of any description whatsoever, * * * or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter * * * which shall have come into his possession, either in the regular course of his official duties or in any other manner whatsoever, * * * shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

The indictment charges that the accused "being then and there employed in a department of the postal service, to wit, as a letter carrier attached to Station D," etc., "did unlawfully and willfully secrete, embezzle, and destroy a certain letter, which was intended to be conveyed by mail, the same letter having been intrusted to him and had come into his possession as such letter carrier by virtue of his said office and employment, and was then and there addressed and directed as follows: [setting it forth]. And the same letter then and there contained articles of value; that is to say, two silver certificates of the United States, each of the denomination and value of one dollar," etc. In a second count the indictment charges that the accused, being then and there employed, etc. (repeating the description given in the first count), "did unlawfully and feloniously steal, take, and carry away certain money, to wit, a silver certificate of the United States of the denomination and value of one dollar, the property of one William T. Mayer [the inspector who prepared the decoy letters], * * * from and out of a certain letter which then and there had come into his possession as such letter carrier, and by virtue of his said office and employment"—setting forth the address on the letter. The pleader has manifestly carefully conformed to the language of the statute. Cases are cited to the effect that bank notes are not the subjects of larceny at common law, and that under a federal statute of 1790 (Act April 30, 1790, 1 Stat. 114), making it a crime to take and carry away the "personal goods" of another, "bonds, bills, and notes, which are choses in action," cannot be held to be personal goods. All of which is interesting, but irrelevant. It is contended that the second part of the section "applies only to cases where postal clerks take valuable contents from mail matter which did not come lawfully in the first instance into their possession"—a most glaring misreading, for the language of the statute is, "either in the regular course of his official duties or in any other manner whatever." It is insisted that there is an irreconcilable repugnancy between the terms "theft" and "embezzlement"; that, therefore, both counts cannot stand, and that acquittal should have been directed on the second one; that the first count is itself defective because inconsistent and repugnant in charging in the same count a destruction as well as an embezzlement and secretion of the same letter. Much argument is presented in support of these propositions and authorities are cited, which, although they have no reference to the statute under consideration, abundantly show that courts have frequently gone to the extremest verge of casuistry in finding technical defects on which to reverse criminal convictions. See particularly *U. S. v. Dow, Taney*, 34, Fed. Cas. No. 14,990. The sufficient answer to all this, however, is that we are dealing not with the common law, but with a specific statute; that such statute provides for

two different things, viz., the letter or package which contains the valuable article and the valuable article which is contained in the letter or package. We must confess that we are wholly at a loss to understand why a person who embezzles a letter may not also secrete it till he reaches a convenient place, and may not then also destroy it; nor why he may not at the same time "take" from it whatever valuable contents it may inclose, nor why all these acts may not take place at substantially the same time and as part of the same transaction. Moreover, it seems to us that mere inspection of a United States silver certificate should be sufficient to satisfy any one that it is a "pecuniary obligation or security of the government," and certainly on October 8, 1902, it was an "article of value." The accused was in no way misled by the pleader in calling such certificate "money" in the second count, for the charge was specific that he took and carried away a silver certificate of the United States of the denomination and value of \$1.

It is further contended that both counts are bad because "the marks, numbers, and particulars on the certificates * * * were not set forth." Of the numerous cases cited in support of this proposition, some have no application. See *Moore v. U. S.*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422, where an indictment charging a postal clerk with embezzlement of \$1,652 in money of the United States, the property of the United States, was held defective because it failed to aver that the same came into his possession in his capacity of postal clerk. Others support the contention, but are wholly unpersuasive. See *U. S. v. Fisler*, 4 Biss. 59, Fed. Cas. No. 15,105, where an indictment for forgery of United States postal currency was held bad because it did not set out an exact copy of the thing forged, although, after the averment that it was "in substance as follows," the actual forgery itself was pasted on the face of the indictment. Others again hold that the indictment is good if it contains a substantive description of the subject-matter, sufficient to inform the accused of what he was charged with taking, and to protect him from being again put in jeopardy for the same taking. *Jones v. U. S. (C. C.)* 27 Fed. 447. This seems to be the correct rule, and it is conformed to when the indictment gives the particular kind of obligation of the United States and the denomination of such obligation, coupled with a specific description of the letter in which it was inclosed. The suggestion that the jury may have supposed that some letter or letters other than the "Dora Lynch" one were what the grand jury intended to charge the defendant with embezzling is absurd.

Among the errors assigned are those to the rulings which led to the exclusion of the evidence offered by the accused to show who Hanlon, the person mentioned by the witness Kiechlin, was. The evidence was offered for the purpose of showing that Hanlon was a former letter carrier on the route of the accused, who had been convicted through decoy letters addressed like the two intended for the accused. It is contended that Kiechlin's remark suggested that the two letters placed by him in the misbox were decoy letters, such as had been used to entrap Hanlon; that, since it was made in the hearing of the accused, it was a remark likely to arouse his suspi-

cions also, and to put him on his guard against temptation, so that he would be unlikely to embezzle the letters, and more wary in disposing of their contents. Everything that was said in the presence of the accused prior to his starting out upon the occasion in question was admitted in evidence. The only bearing which Hanlon's identity could have upon the controversy was to furnish some support for the argument that the accused would not have embezzled letters to which his attention was called in so public a manner, under circumstances which might lead him to suppose he was being "tested" at the time. It may well be doubted whether, in any circumstances, matters so obviously collateral may be inquired into; but the majority of the court are satisfied that in the exclusion of the evidence offered as to Hanlon's identity there was no harmful error. The evidence of guilt was so convincing that the argument as to the accused's resisting the temptation because he was forewarned has little weight. It may equally well be argued that his knowledge that others knew from Kiechlin's statement that the latter had test letters in his hands might lead defendant to suppose that his chance was good to convert one of them and cast suspicion on his fellow employé. But it is not necessary thus to speculate. Hanlon's identity was sufficiently established to admit of the argument being made. The jury in fact knew who Hanlon was. In response to a question put by defendant's counsel, Kiechlin testified that Hanlon was "the man who was robbing the church on that route ahead of Bromberger." That answer was stricken out (it would perhaps have been wiser to have left it in), and, although the jury were not instructed to disregard it, we may assume that they understood they were to discharge their minds of it as completely as if they had not heard it. Possibly this is a violent assumption in a criminal trial, if the evidence thus stricken out is favorable to the accused, but the case must be decided as if it were not present in the jurors' minds. It did appear that Hanlon was the letter carrier who formerly had the defendant's route, and who was no longer in the service; that Kiechlin, after sorting what he had taken out of his boxes, said to the defendant that he had two letters for his (Bromberger's) route, and was going to "misbox" them (the defendant's story is that he said, "I have something for you for the church, and am going to misbox it"); that thereupon Kiechlin rose, and walked over towards the misbox, and on his way said in a voice loud enough for the clerks and for Bromberger to hear, "They are taking me for Hanlon;" that he (Kiechlin) thus "gave them all a hint that I wasn't taking any letters of that sort, of any kind," because, as he added, "I thought some one was trying me to see if I would keep those letters." Later he said there "wasn't anything suspicious about those letters," but it matters little what he really thought about them. His public announcement challenged the attention of Bromberger, to whom he had just said he had letters for route 21, which he was going to misbox; that there was something about them which induced him to proclaim aloud that he wasn't a Hanlon. It is difficult to understand how any intelligent juror, in the light of all the testimony, could have escaped the conviction that there was something about Hanlon's methods

that made a letter carrier solicitous to avoid repeating them, and that the defendant's attention was challenged to the fact that the letter or letters for his own route, formerly Hanlon's, which Kiechlin was then about to misbox, had something about them which induced Kiechlin thus loudly to proclaim the difference between himself and Hanlon. We utterly fail to see how any argument in favor of the defendant's innocence, or any suggestion that Kiechlin was the guilty party, could have been at all fortified by the retention in the record of the testimony which was stricken out.

It is contended that an acquittal should have been directed because the proof showed that the letter in question was not "intended to be conveyed by mail," but was a test letter, intended to be intercepted. This suggestion is wholly without merit. The letter, with the "back stamp" of the station on it, was placed in the carrier's pigeonhole with the other letters there placed for him to take, sort, and deliver to the proper addresses. The expectation that it might be intercepted by a dishonest carrier or clerk in no way destroyed its character when once regularly deposited in the mail, so stamped and addressed as to make it the duty of honest clerks and carriers to pass it forward to its destination. Section 5468 provides that the fact that any letter has been deposited in any post office or in any other authorized depository for mail matter shall be evidence that the same was "intended to be conveyed by mail" within the meaning of section 5467. The case cited, *U. S. v. Hall* (D. C.) 76 Fed. 566, does not apply. There the letter was addressed to a fictitious person at a fictitious address, and the officers who had placed it on the table where the accused clerk found it intended, if he did not take it, to themselves remove it from the mails, since "it could not be delivered to any such person at any such address."

It is further contended that the government failed to make out a case because it did not show that no two silver certificates bear the same number, and the brief states that the "bill in question is identified through its serial number alone." This, again, is a gross misstatement of the evidence. The post-office inspector who prepared the decoy letters testified that he copied the serial number and the date of each of the bills inclosed, and also made a private mark on each bill, viz., an ink dot on the letter O in the word "One" on the face of each bill. The other inspector corroborated him. The bill obtained from the store where the accused got the tobacco was produced on the trial, and the inspector testified that it was "one of the one-dollar bills that was placed in the letter postmarked 'Bridgeport.'" He didn't say how he identified it. No one asked him any such question on either direct or cross examination. Presumably such question was thought to be an idle one when the bill was present, and every one—counsel, witnesses, and jury—could tell from mere inspection whether the three earmarks, number, date, and ink dot, were collectively present. If they were, identity would seem to be established beyond any reasonable doubt.

At the opening of the cause counsel for the accused asked to have the witness Kiechlin excluded during the trial. The only ground assigned was that he was a hostile witness subpoenaed by the defense. This re-

quest was refused. Such refusal is discretionary with the trial judge, and will not be reviewed when no abuse of discretion is shown. See cases cited in 21 Encycl. Pleading & Practice, pp. 982-986. No such abuse is shown here. Certain errors assigned to the admission in evidence of the silver certificate, and of a copy of the contents of the missing letter may be disposed of in like manner. They deal with the order of proof only, and that is discretionary with the trial judge. The same may be said of the checking of defendant's counsel when upon his opening, after stating that the defense proposed to call among other witnesses one Kiechlin, who was a hostile witness, and that his hostility was evidenced by what took place regarding him before the commissioner, he was about to state in detail what did occur before the commissioner. Indeed, the matters referred to were of such doubtful relevancy that it might be expected that a careful trial judge would have kept them from the jury till it could be seen as the testimony developed whether there was any possible theory on which evidence of what took place regarding the witness before the commissioner could be admitted.

It is assigned as error that the court allowed the government, on rebuttal, to call Hoyler, and show by him that he found two printed "Rev. Father Rector" letters in the misbox, and placed them in the pigeonholes of the accused. The prima facie case, by the testimony of Brucher, traced the decoy letters direct from Bromberger's boxes to his hands. Then the defendant called Kiechlin to show that he found two similar printed letters in his boxes, and that he misboxed them. This made an apparent conflict with Brucher, and might have warranted the jury in finding that Brucher made a mistake by putting the decoys in box 22 instead of 21, and that Kiechlin, getting them out of that box, kept one and misboxed the other, which came to the accused, and was by him delivered. The prosecution was clearly entitled on rebuttal to show that somebody (the jury might infer it was Kiechlin) misboxed two printed envelopes. The circumstance that, when this evidence came in, there was an easy explanation harmonizing the testimony of Brucher, Kiechlin, and Hoyler on the theory that genuine printed rectory letters were in the station that day besides the decoys, did not warrant its exclusion.

The District Attorney, in his summing up, commented sharply on the attempt to show that Kiechlin was the guilty person, and on the possibility of two genuine letters having been made way with at the same time as the Bridgeport decoy. That did not necessarily follow, for, if the two rectory letters which Hoyler found in the misbox were genuine, they may not have reached the carriers' separation cases in time for Bromberger to get them before he started. The exceptions to refusal of the court to check counsel for the prosecution when summing up are without merit. Necessarily that part of the trial must be left largely to the discretion of the trial judge, and the above statement indicates that there was no abuse of discretion in this case.

Some additional assignments of error do not call for any extended discussion. It is sufficient to say that they are, in our opinion, unsound.

The judgment is affirmed.

WALLACE, Circuit Judge (dissenting). I agree with the majority of the court that the evidence upon the trial fully warranted the verdict of guilty. Nevertheless, the question of the defendant's guilt was one for the jury, and, if he was deprived of introducing evidence, however slight its value might be, tending to show the possibility of his innocence, his exceptions to the rulings should entitle him to a new trial. I think he should have been permitted to show that Hanlon, the person mentioned by the witness Kiechlin, was a former letter carrier on the route of the defendant, who had been convicted of embezzlement and of larceny through decoy letters addressed like the two intended for the defendant. Kiechlin's remarks suggested his suspicion that the two letters placed by him in the misbox were decoy letters, such as had been used to entrap Hanlon. They were made in the hearing of the defendant, and were likely to excite his suspicion also, and lead him to exercise unwonted caution to avoid being detected. The argument that, after his attention had been called to the character of the letters, he would be unlikely to embezzle them, or more wary in disposing of their contents, was one which could have been legitimately addressed to the jury; and, in view of the evidence introduced in his behalf tending to throw doubt upon his guilt, might have influenced their verdict. The exclusion of the evidence cannot be disregarded because the evidence may have been of trifling value. For this reason I think the defendant is entitled to a reversal of judgment and a new trial.

GIDDINGS et al. v. FREEDLEY et al.

(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

No. 53.

1. **FIXTURES—BELTING IN MILL.**

A leather belt, which transmits the power from a stationary engine to a main shaft for the operation of the machinery of a marble mill, is a part of the realty, and is not subject to attachment and removal as personal property.

2. **TRIAL—EXCEPTIONS TO CHARGE.**

Where a single exception to a charge covers several distinct propositions, it is inoperative if any one of the propositions is sound.

3. **WRONGFUL ATTACHMENT—EXEMPLARY DAMAGES—MALICE IMPUTABLE TO OFFICER.**

Where officers, having in their hands for service a writ of attachment for \$12,000, at the instance of the attachment plaintiff seized and removed only the main belt in a marble mill, worth not to exceed \$20, but the effect of which was to stop the operation of the mill, when there was unincumbered real and personal property belonging to the defendant and subject to attachment sufficient in value to satisfy the writ, a jury is justified in imputing to them the malicious intent of the attaching plaintiff, and in awarding exemplary damages against them in an action for the trespass.

4. **SAME.**

Officers who, by the wrongful and illegal execution of a writ of attachment, stop the operation of machines, may be subjected to the payment

¶ 4. See Sheriffs and Constables, vol. 43, Cent. Dig. § 307.

of damages for the loss of use of such machines, and it is no defense that in the lawful execution of the writ they might have seized and removed the machines.

In Error to the Circuit Court of the United States for the District of Vermont.

This cause comes here upon writ of error to review a judgment of the Circuit Court, district of Vermont, against the plaintiffs in error, who were defendants below. The action is for trespass, and the judgment was entered upon verdict of a jury in favor of defendants in error for \$996. The facts sufficiently appear in the opinion.

For opinion below, see 119 Fed. 438.

James L. Martin, for plaintiffs in error.

F. M. Butler, for defendants in error.

Before LACOMBE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

LACOMBE, Circuit Judge. The plaintiffs, citizens and residents of Pennsylvania, owned a marble mill operated by steam, and a quarry connected therewith, all in Dorset, Vt. On April 8, 1902, a writ of attachment in favor of one Gilman B. Wilson, of Dorset, against the senior plaintiff, William G. Freedley, was duly issued, in which the ad damnum was \$12,000. This writ was seasonably placed in the hands of defendant Giddings, of Manchester, a constable having authority to serve the same. Under the laws of Vermont, such an attachment can be served upon real property only by delivering a true and attested copy of such attachment, with a description of the estate attached, to the party whose estate is so attached (or leaving same at his place of abode), and by filing the same in the office where by law a deed of such real estate is required to be recorded. In Dorset such office would be that of the town clerk. In the case of personal property the writ of attachment may be executed in either of two ways. The officer serving the process may lodge a copy of the same, with his return, in the town clerk's office, "which lodgement shall hold the property against all subsequent sales, attachments, or executions, as if it had been actually removed and taken into the possession of the officer." Or the officer "may remove the [personal property attached] and take it into his possession, in which case he need not leave a copy of the attachment in the * * * clerk's office." Vt. St. 1101, 1103, 1108. On April 10th Giddings went to the mill, found one Nadeau, plaintiffs' superintendent, in charge, explained to him what his business was, and showed him the writ. He told Nadeau that in order to make said attachment upon the personal property it was necessary to take possession of the mill, and asked Nadeau to assist him in getting things into shape, as he wished to take possession some time during that day. To this Nadeau assented. A memorandum was made by Giddings of the property to be attached. He made a copy of the writ, and indorsed upon it a list of the property attached by him—derricks, movable machinery, finished and unfinished marble, etc.—and arranged with Nadeau for the latter to act for him as keeper of said property. No effort was made to remove any of the personal property.

On Saturday, April 12th, Nadeau telegraphed Giddings that he wanted to be released as keeper of said property, and on the following day declined to continue as keeper, and surrendered the keys to Giddings, who had come to Dorset in response to the telegram. The latter fastened up the doors of the mill, including engine house and boiler house, by nailing strips of board across them. He removed none of the property, put no one in charge, and left it boarded up as described.

On the next day plaintiffs, without Giddings' knowledge or consent, knocked off the strips of board, entered the premises, and proceeded to operate the mill, which fact was at once made known to Giddings by Gilman S. Wilson. Giddings went again to the mill on Tuesday, April 15th, and had an interview with Nadeau. Giddings' version of the interview is that Nadeau stated he intended to hold the property by force, that he had help enough to defend it, and would throw Giddings into the brook if necessary. Nadeau denies that he said anything of the sort, although he admitted that he refused to give Giddings possession of the mill. Our attention is called to no provision of law which authorized the attaching officer to take possession of the real estate. Under the verdict of the jury, all disputed questions of fact are to be considered in this court as resolved against the defendants. The next day Giddings called on the defendant Henry S. Wilson, of Arlington, high sheriff of the county, to assist him in executing the attachment. Having consulted with a firm of lawyers, the two defendants went to the mill on April 17th, and it is their joint action on that day which is the subject of this action. Freedley and Nadeau were both present, and the mill was in operation. Giddings testified that he repeatedly requested that the mill should be shut down, and the attached property surrendered to him as attaching officer, and that upon Nadeau's continued refusal he notified him that he would shut down the mill and the main belt. Nadeau's story is that he never objected to the officers taking away or moving or taking hold of any of the personal property that was on the list, and that he told them "if they took the main belt they would have to take it by force; they would have to use force, and stop the engine themselves." Evidently the jury believed Nadeau's version to be the correct one; not unnaturally, since both officers admitted they entered the premises with the intention to remove the main belt, well knowing that would have the effect of shutting down the mill. Upon Nadeau's refusal to shut down the mill and deliver up the main belt, Giddings broke open the doors that led into the boiler room and into the engine room, and the defendant Wilson, under the direction of Giddings, then cut the lacing of the belt, and Giddings caused it to be carried away. Thereupon the officers left without removing or undertaking to remove a single item of the personal property they claimed to have attached.

The first question raised on this appeal is whether the main belt was personal property. If it were, defendants were protected by their writ; if it were not, they were trespassers.

The plant was operated by an 80 horse power steam engine and two boilers, which were located in a room attached to the mill building. The engine was set on a solid foundation of masonry, composed of

stone and brick, three or four feet high, which was called the engine bed. Underneath this bed, and resting on the earth, were anchor stones to which the engine was fastened by iron rods running through the bed, and through the anchor stones, for the purpose of holding the engine immovable on its bed. The engine was connected with the main line shaft by the main belt, above referred to. This was a double leather belt, 24 inches in width and several feet in length. It extended from the drive wheel of the engine to a pulley on the main line shaft. The engine had no fly wheel or balance wheel. The belt is the sole means by which power generated on the engine shaft is transmitted to the main shaft, which latter is the immediate source of power on which the various and steam-driven machines and working devices are entirely dependent for their operation.

The question is to be determined not as it would be under the rules which public policy requires to be laid down when a tenant, for the use of his own business, has put mechanical appliances in his landlord's building, but under the rules which apply as between vendor and purchaser. In *Newhall v. Kinney*, 36 Vt. 591, the court held that "a levying creditor, in the eye of the law, is a purchaser of the property set off to him in satisfaction of his debt against the judgment debtor," and that an attachment of the debtor's real estate, followed by a levy upon a "sawmill," includes a circular sawmill, which is in and constitutes a part of the sawmill. The court says:

"The simple fact that the circular sawmill might be removed, and another substituted in its place, without material injury to other parts of the building, is not determinative of whether it was intended to pass to the purchaser, or to a party who stands in the relation of a purchaser, upon a conveyance of the property. Such removal and substitution can be made of almost any other part of a sawmill, of the doors, windows, water wheel, sills, ridge pole even. But when once fitted up with these, or with a circular sawmill, the removal thereof without a substitution takes away an essential part of the sawmill, and the purchaser * * * would fail to receive the property he bargained for under the description 'sawmill.'"

The case of *Kendall v. Hathaway*, 67 Vt. 122, 30 Atl. 859, where a circular sawmill so attached that it could be readily removed was held to be personal property, is not in conflict with *Newhall v. Kinney*, because in the later case the circular sawmill was put in a building which had been erected on land already covered by a mortgage, under circumstances which the court found evidenced an intention to keep it in the building "only so long as the owners might desire." In *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306, 38 Am. Dec. 368, the court held that a steam engine and boilers, and all the engines and frames adapted to be moved and used by the steam engine, by means of connecting wheels, bands, or other gearing, as between mortgagor and mortgagee, are fixtures or in the nature of fixtures, and constitute a part of the realty. After pointing out that the mode of attachment is "far from constituting the criterion" by which to dispose of the question, the court says:

"The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged, as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the waterworks

or steamworks which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, * * * they are parts of [the mill], and pass with it by a conveyance, mortgage, or attachment."

This case is cited with approval in *Hill v. Wentworth*, 28 Vt. 428, where the court says:

"The iron shafting put up in the building for the purpose of turning and putting in motion the machinery * * * we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the motive power to the machinery, and should be regarded as a part of the mill as much as a water wheel by which a water power is called into existence."

To the same effect is the following excerpt from *Harris v. Haynes*, 34 Vt. 220: "Understanding the object and purpose of the annexation of the engine and its adjuncts to the realty to have been the furnishing of motive power to the machinery of the shop, and having reference to the manner in which they were fitted and adapted to the shop and the business carried on there, we are of opinion that" the engine and boilers, arch mouth and grate, and certain shafting and pulleys were fixtures. In *Keeler v. Keeler*, 31 N. J. Eq. 190, it was held that the "machinery and apparatus for furnishing motive power" were a part of the realty. "The steam engine is securely and permanently bolted to a foundation, * * * and was put in for permanent use. It, with its appurtenances, is part of the realty, and so are the boilers, which are a necessary adjunct to it; also the shafting, belting, coupling, and pulleys to communicate the power; and also the water wheels and water wheel governor." The precise question now presented was considered in *Burnside v. Twitchell*, 43 N. H. 394, where the court says:

"The belting also of a mill runs from the large wheel connected with the motive power over a drum upon the main horizontal shaft, upon which are various other drums, upon which are belts connected with the various distinct portions and parts of the machinery. Whether the belting could be removed whole without removing any of the machinery, or whether, as is the case ordinarily, it could not be disengaged from the drums and shafts altogether, without removing some of the permanent parts or attachments of the mill, or by disuniting the belts by removing the thongs by which the ends are usually fastened together, the case does not show. But when a mill of any kind is constructed so as to make belts necessary, in order to run the mill, they would seem to be a part and as essential a part as any other of the mill. Some gristmills are constructed in this way, with a belt attached to the main shaft and connected with each run of stones, another to the belt, another to the smutmill, etc.; others are constructed with a large cogwheel, with other smaller cogwheels, that can be thrown into it or upon it, to carry each of the other several parts of the machinery. In one case the drums and belts perform the same office that the wheels and gearing do in the other. The belting is as necessary as the drums, and both are as necessary in one case as the cogwheels are in the other, one of which might be removed, perhaps, with as little trouble as the other. Why, then, should the cogwheels be considered as a part of the mill, and the belting not be so considered?"

We are entirely in accord with these propositions, and do not find anything in the cases cited to us from the Vermont Reports which would prevent their application in the case at bar. It is conceded by defendants that the engine which supplies the motive power for the mill is real estate, and the belting by means of which such power is transmitted from the engine to the main shaft is certainly an adjunct of the engine. Without it or its equivalent the engine would

not discharge the function for which it was erected—it would not supply motive power to the mill. It would hardly be contended that if the power were transmitted by cranks, or by a pitman, or by a train of gearing, such devices were not fixtures, and there is no sound reason for reaching a different conclusion when the transmitting device is a leather belt. We conclude, therefore, that defendants had no right to seize and remove the main belt as personal property under the writ.

Defendants next assign as error that "the court did not correctly instruct the jury on the subject of exemplary damages." Reference to the brief shows that it is contended that two propositions should have been called to the attention of the jury, viz.: (a) That, "when defendant acts on the advice of counsel in the commission of the act complained of, such fact should be considered on the question of exemplary damages"; and (b) that, "where the only evidence of malice is the presumption which arises from the mere doing of an unlawful act, if it is shown that the defendant acted in good faith, and on the advice of counsel, exemplary damages are not recoverable." The trial judge was not requested to charge either of these propositions, nor, indeed, did defendants ask for any instructions whatever on that branch of the case. The court charged the jury at some length on the subject of exemplary damages, telling them that if they found the purpose was to shut down the mill instead of making a fair attachment; to oppress Freedley & Son by taking an unfair advantage of them; if defendants' action was high-handed and oppressive, and done with a wrong purpose to do damage unlawfully—the jury might add what was right to the damages by way of example. The only exception reserved to this part of the charge was "to the instructions on the question of exemplary damages, and to the instruction that exemplary damages may be recovered in this case against both defendants." The first part of this exception is too indefinite. It is not contended that the charge on this branch of the case was wholly erroneous. Manifestly no such contention could be made, for the doing of an illegal act with a wrong purpose to do damage unlawfully would certainly support a claim for exemplary damage. Where a single exception covers several distinct propositions collectively it is inoperative, if one of the propositions is sound. The defendants should have called the court's attention to the particular propositions complained of, and, if it were thought the instructions should be made fuller, have stated precisely what they wished to have charged. The exception, however, sufficiently raises the question whether the evidence warranted the jury in giving exemplary damages.

It appears that defendants had no personal acquaintance with Freedley, and had no ill will towards him. Nevertheless, if they willingly and knowingly allowed themselves to become the tools of another person, whose object was apparently malicious, and carried out an unlawful act in a high-handed and oppressive way, the jury would be entitled to find their conduct malicious, and to punish it by assessing punitive damages. The evidence quite clearly shows that this was just what they did, and we need not look beyond their own admis-

sions for proof. The real estate was valuable and unincumbered. There was personal property worth several thousand dollars. The mere filing of a copy in the town clerk's office would have effected a levy on all the property. The defendants filed no copy, and thus made no effort to secure the real estate. Out of the personal property they seized and removed only the main belt, worth less than \$20. The defendant Sheriff Wilson admitted that ordinarily he would have looked up the title to the real estate and attached that by filing copy, and that in the ordinary course of serving a writ he would not have removed the main belt. The defendant Giddings had a conversation with Wilson, who sued out the attachment, and after that conversation went to the mill with the intention of removing the main belt. Both defendants took legal advice before they seized the belt, but the lawyers they consulted were the counsel of the attaching creditor, who told them to remove the belt. Both knew perfectly well that their seizure of the belt would effectually shut down the mill, and entail a loss far in excess of the \$20 they secured thereby. They admit that ordinarily they do not require a bond of indemnity from the attaching creditor where there is no question as to the ownership of the property they are about to levy on, but that when the circumstances are "rather peculiar—out of the ordinary"—they do require such security. They quite wisely concluded that the circumstances of this case were rather peculiar, and before electing to seize a \$20 leather belt for a \$12,000 claim, instead of filing copy in the clerk's office, Giddings asked Wilson, of Dorset, for a bond of indemnity, which was given; thereupon the latter "told [him] what to do," and he did "just what he told [him]." Comment is superfluous.

Defendants reserved an exception to this excerpt from the charge:

"Freedley had a right to have his property there undisturbed except by due process of law. If this man living there [Wilson, of Dorset], thought he would oppress Freedley a little by attaching in this way, when he might have done it in another way, and not interfere with his business so, you should add whatever you think is about right."

It is contended that this instruction allowed the jury to punish defendants for the attaching creditor's wrong, when they can only be punished for their own acts. But the charge must be considered as a whole, and we are satisfied the jury could not have been misled by this part of it. It was the acts of the defendants—"peculiar and out of the ordinary"—in assisting the attaching creditor to oppress the plaintiffs, when as intelligent men they must have known his object, which were left to the consideration of the jury.

Exception was taken to instructions which allowed the jury to include damages sustained by the loss of the use of the gangs of saws, which of course could not run when the main belt no longer transmitted power to the main shaft from which (or from some subsidiary shaft) they were driven. The gangs were personal property, and could have been removed. If defendants had directed their attention to them, taken down and removed them, there could be no recovery for the loss of their use. But it would be going too far to hold that damages necessarily resulting from an unlawful act are to

be disallowed on the theory that, if defendants had kept within the limits of the law, similar damages would have ensued. They elected to act outside the limits of the law, and for the damages resulting from their unlawful act they must respond.

Exception was reserved to the admission of evidence, and its submission to the jury, showing damage to the foundation of the engine and engine bed from the sudden stopping of the engine, on the ground that such damages were not specially pleaded. The jury was charged to confine the damages to such as directly resulted from the stoppage of the engine, and the damages testified to seem to be the natural and reasonably to be expected result of the trespass complained of.

The judgment is affirmed.

ALASKA COMMERCIAL CO. v. WILLIAMS.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1904.)

No. 963.

1. AMENDMENT OF PLEADINGS—DISCRETION OF COURT—AMENDMENT CHANGING ISSUES.

It was within the discretion of a trial court to refuse to permit the filing of an amended answer which sets up a new defense materially changing the issues, and which was not offered until after plaintiff had rested, and defendant had occupied two days in introducing evidence.

2. TOWAGE—DUTY OF TOWING VESSEL—LIMITATION OF LIABILITY BY CONTRACT.

A towing vessel cannot relieve itself by contract from liability for the failure to exercise reasonable care and skill in the performance of the service and for the safety of the tow.

3. SAME—ABANDONMENT OF TOW.

A steamer contracted to carry men and freight for a mining company from Juneau to Lituya Bay, in Alaska, and also to tow a small schooner belonging to the company and used as a lighter. The entrance to the bay is narrow, and can only be passed safely at slack tide. Arriving off the entrance the master deemed it unsafe to enter at that time, and, the manager of the company on board refusing to consent that the men and stores should be loaded on the schooner and left outside, he proceeded with the tow up the coast. On the way the hawser parted, but the steamer proceeded without stopping, leaving the schooner adrift in the open sea, with five men on board, none of whom were acquainted with the coast. She was never seen afterwards, and all that was ever known of the fate of the men on board was the finding of the body of one on the beach. *Held*, that the obligation of reasonable care on the part of the steamer continued after leaving the bay, and that nothing in the towing contract would relieve her from liability for the abandonment of the tow, there being nothing in the situation which made such abandonment necessary.

4. WRONGFUL DEATH—JURISDICTION—ABANDONMENT OF TOW AT SEA WITHIN THREE-MILE LIMIT.

A steamer abandoned a small schooner which she had in tow on the parting of the tow line off the coast of Alaska at a point where the coast was dangerous, leaving five men on board, who were not competent to handle the vessel, nor having equipment for her navigation. Neither the schooner nor the men on board were seen again, with the exception of one, whose body was found on the beach. In an action against the owners of

¶ 1. See Pleading, vol. 39, Cent. Dig. §§ 601, 773.

the steamer to recover damages for the death of one of the men under the Alaska statute, the jury returned a special finding that when the schooner was last seen from the steamer both vessels were within three miles of land, and they also found, on evidence which justified such finding, that decedent came to his death within such limit, and before the following morning. *Held* that, although the vessels may have been outside the three-mile limit when the line parted, the duty of the steamer to return to the rescue of the schooner, the failure to perform which was the proximate cause of her loss with those on board, continued, and that an instruction that if the jury found such facts, and that the death resulted from the failure of the steamer to perform such duty, the plaintiff was entitled to recover, was correct.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

On April 12, 1900, the Alaska Commercial Company, the plaintiff in error, was the owner of the steamer *Bertha*, a vessel of about 1,000 tons burden, then plying between Seattle, Juneau, Sitka, and other Alaskan ports. The Lituya Bay Gold Mining Company was a corporation engaged in placer mining at or near Lituya Bay, a bay having no port, and rarely visited, situated on the Alaskan coast about 130 miles northwest from Sitka, and 40 miles from Cross Sound. The mining company had its men, freight, and supplies at Juneau, and had there a schooner called the *Dora B.*, of about 15 tons burden. The steamer *Bertha* being then at Juneau, on her regular trip to the westward, Charles Plaut, the manager of the mining company, entered into a contract with Captain Johansen, the master of the *Bertha*, to take his men and freight and to tow his schooner to Lituya Bay. The schooner was equipped with sails and rigging, but the sails were stowed in the hold, and had never been reefed. The schooner was intended to be used for lighterage purposes in Lituya Bay. Five of the men of the mining company were placed on the schooner by the manager. The remainder, together with the freight, were carried on the *Bertha*. The steamer, with the schooner in tow, proceeded from Juneau, on her regular course westward, through the inland waters, towards Sitka. On the evening of April 14th she arrived at Sitka. From Sitka she proceeded on her way to Lituya Bay through the open waters of the Pacific Ocean, in a northwesterly direction, along the coast. She arrived with her tow off the entrance to Lituya Bay at about 6 o'clock on the morning of April 15th. The entrance to the bay lies through a narrow channel, about 300 feet wide, inclosed by rocks on either side. The evidence is that it is a dangerous entrance except at slack tide, as at other times the breakers extend across the entrance, and the tide runs with a strong current. Upon arriving at the entrance to the bay the captain of the *Bertha* made a careful examination thereof, and concluded that it would not be safe at that time to attempt the entrance. He sent for Mr. Plaut, told him of the difficulty, and advised him to have the schooner hauled up alongside the ship, and to have the remaining members of his party and the freight which were on the *Bertha* placed on the schooner, and to sail the schooner into the bay under her own sails. Mr. Plaut was unwilling to do this. There is evidence that the captain then suggested that he might land his men and freight with small boats from a small cove outside the bay, and that this offer was also declined. The *Bertha* remained more than an hour at the entrance of the bay, and at the end of that time her master decided to go on to Yakutat, which is the next harbor up the coast, and about 80 miles distant to the westward. Yakutat was one of the regular ports at which the *Bertha* stopped on her westward and on her return voyage. It was stated by the captain of the *Bertha* and by another witness that Plaut consented to the continuance of the voyage, and stated that as soon as the weather moderated he would sail back to Lituya Bay. The *Bertha*, with the schooner in tow, proceeded on her course nearly directly west and off shore, and about 10 minutes after 12 o'clock, when opposite an indentation called Dry Bay, the towline parted, and left the schooner adrift. There is conflict of the testimony as to the distance from the vessels to the shore at that time. Some of the witnesses estimated the distance to have been as great as 10

miles, others estimated it at less than 3 miles. The steamer made no effort to pick up the tow, but proceeded on her way under full steam, with sails set, and without stopping or slowing down. The men on the schooner ran up a bowsprit or small jib sail. There was a strong wind, blowing from the south-east. The schooner, sailing with her jib sail, followed the steamer, and remained in sight about two hours. The Bertha continued on her way to Yakutat, where she arrived about half past 3 or a little later that afternoon. The schooner was never seen afterwards, except that it was shown that the hull of a wrecked schooner about the size of the Dora B. was seen on the shore of Alaska near Dry Bay, nor was there any evidence of the fate of the men on board, except that the body of one of them was found a week afterwards on the beach between Dry Bay and Yakutat. The defendant in error, who was one of the men of the mining party carried on the Bertha, was by the probate court of Juneau, Alaska, subsequently appointed administrator of the estates of the men who were lost on the schooner. He was appointed administrator of the estate of the decedent W. D. Baldwin upon the request of the decedent's father, who was next of kin. On March 22, 1902, he commenced the present action in the United States District Court, Division No. 1, for the district of Alaska, claiming damages in the sum of \$5,000 for the death of Baldwin, under the provisions of section 353 of the procedure act of Alaska (Act June 6, 1900, c. 786, 31 Stat. 392). The complaint alleged that prior to the departure of the steamer Bertha from Juneau the mining company, for a valuable consideration, entered into a contract and agreement with the plaintiff in error, whereby the latter agreed to transport a considerable amount of freight on board its steamer Bertha, likewise a number of passengers, and to land the same in Lituya Bay, near and in front of the houses and headquarters of the mining company upon said bay, and to deliver said freight and passengers to said company at said point, and further agreed to tow and transport the schooner Dora B. upon the same trip, and bring her into Lituya Bay, and drop her near and in front of the buildings and headquarters of said mining company, and further agreed to transport upon the said schooner the decedent and four other employes of the mining company. The case was tried before a jury, who returned a verdict for the defendant in error for the sum of \$5,000, and thereupon judgment was rendered. To review that judgment this writ of error was sued out.

Chickering & Gregory, A. K. Delaney, A. Heynemann, and Andros & Hengstler, for plaintiff in error.

Lewis P. Shackelford, John R. Winn, Jno. A. Shackelford, and Piles, Donworth & Howe, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended by the plaintiff in error that the court erred in denying its application to so amend its answer as to set forth the terms of the towage contract. The original answer made no affirmative allegation as to the contract, but contained a general denial of all of the facts alleged in the complaint as to the terms of the contract and the breach thereof. The case went to trial more than six months after the issues were made up. On the trial the defendant in error took all of his evidence and rested. The plaintiff in error, after occupying two days in introducing evidence for the defense, submitted to the court the proposed amendment to its answer. The amendment was not verified, nor was it accompanied by an affidavit. It set up as an affirmative defense what the plaintiff in error asserted to be the terms of the towage contract. It stated, in substance, that the owner of the schooner agreed to

properly man and equip her, and to put her in a seaworthy condition, and to ship thereon a crew of seamen, who could handle her in case of emergency, or in case it should be deemed dangerous or impracticable for the said Bertha to tow the schooner into Lituya Bay; that upon arriving at Lituya Bay the condition of the weather and the tide and sea were such as to make it hazardous for the steamer to enter, and that the manager of the mining company then agreed with the captain of the Bertha that he could proceed with the tow to Yakutat; that one of the conditions connected with the towing of the said schooner would be and that it was agreed and understood that in case of any emergency the said schooner should take care of itself by its crew and sailing apparel and tackle as aforesaid. The amendment proceeded to set up the defense of contributory negligence, alleging that the parting of the towline was due to the contributory negligence of the men on board the schooner in not properly parceling the hawser. The court denied the application on the ground that the proposed amendment radically changed the issues as already made, and substantially changed the cause of the defense. The introduction of the defense of contributory negligence, which had not been embraced in the original answer, radically changed the issues as made, and substantially changed the defense. It was in the discretion of the court to allow or deny this amendment, and in denying it we cannot say that there was abuse of its discretion. It is immaterial what reason the court gave for denying the application. There was no offer of an amendment setting forth only the terms of the contract as the plaintiff in error claimed it to be. If such an amendment had been proposed, there would have been no error in its rejection, for it would have been immaterial and unnecessary. The plaintiff in error had the right, under its general denial, to prove that the contract was otherwise than as alleged in the complaint, and in order to do so was free to introduce evidence to show what the contract really was. 1 American & English Encycl. of Pleading & Practice, 818; Marsh v. Dodge, 66 N. Y. 533; Burley v. German-American Bank, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. Ed. 406.

It is contended, however, and this is the subject of one of the assignments of error, that the court in ruling upon the evidence which was offered by the plaintiff in error had excluded its proffered testimony to show that the terms of the contract were other than as alleged in the complaint. This contention is not sustained by the record. Mr. Plaut, the manager of the mining company, had testified that the contract was one by which the plaintiff in error was to tow the Dora B. to Lituya Bay for a stated compensation. The captain of the Bertha, while testifying on behalf of the plaintiff in error as to his action in departing from Lituya Bay without entering it, was asked the question: "What conclusion did you reach under those conditions in regard to going in?" He answered that he had made up his mind that it was not safe to go in, to take the Bertha in, and added: "I didn't wish to endanger my contract with the company, as it was always the understanding—" Here he was interrupted by counsel for defendant in error, who moved to strike out the latter part of the answer as "voluntary and not responsive." The motion was sustained by the court. Subsequently the same witness was asked to state his reasons for not

slacking up and coming back to the schooner after the towline parted. This was objected to as incompetent, irrelevant, and immaterial. The objection was sustained. The witness was then asked the following question: "Q. In your judgment, taking everything into consideration, as matters were at that time, and you speaking now as a seaman, what did you consider best for you to do, both for yourself and the Dora B., after the latter went adrift? A. Well, there was no other way that I could see than to go on the way I did, because, so far as the schooner was concerned, she was perfectly safe, and if I had thought in any way that she wasn't I would have acted different." It is urged that the court in ruling upon the objections to these questions excluded evidence which the witness was about to give of the terms of the contract, and it is said that in the terms of that contract, as he would have stated them, were to be found the reasons why he did not enter Lituya Bay, and why he did not go back or slack up when the towline parted. To this it is sufficient to say that it was not suggested to the trial court that any such evidence was sought to be elicited from the witness, nor was there anything in the questions as they were propounded to advise the court that such was the case. On the contrary, when the witness did, in response to the last question above quoted, state his reasons for his conduct, there was no intimation in his answer that he relied on the terms of the towage contract as excusing him for not returning to pick up the tow. It would seem, moreover, that the "contract with the company" referred to in response to the first question was not the contract he made with Plaut, but the contract that existed between the witness and his employer, the plaintiff in error, which he feared would be endangered by his entering Lituya Bay under the conditions then existing. How was it possible to endanger the alleged contract which was set up in the proposed amendment by taking the schooner into Lituya Bay at the request of her owner?

But we are of the opinion that if the plaintiff in error had proved the contract to be as in the proposed amendment it was alleged to be, it would not have afforded it exemption from liability in the present case. In the *Steamer Syracuse*, 12 Wall. 167, 171, 20 L. Ed. 382, Mr. Justice Davis said:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because if it be true, as the appellant says, that, by special agreement, the steamer is liable, if through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

Of similar import are *In re Moran* (D. C.) 120 Fed. 556; *The Somers N. Smith* (D. C.) 120 Fed. 569; *The M. J. Cummings* (D. C.) 18 Fed. 178; *The Jonty Jenks* (D. C.) 54 Fed. 1021.

The contract as set forth in the proposed amendment to the answer related only to the towage from Juneau to Lituya Bay. If it was made as alleged, it afforded no excuse for the conduct of the master of the *Bertha* in leaving the schooner adrift as he did. His conduct in so doing was not the exercise of reasonable care and maritime skill in conducting the towage service. He admitted that he had no knowl-

edge whether the schooner had on board compass, chart, or other things necessary for navigation. It is not denied that at the time when the towline parted Plaut protested against his leaving the schooner, and told him that the men on board of her were not prepared to navigate her without the aid of any one who knew the coast.

It is contended that the court erred in charging the jury that the contract, which was a contract to tow the schooner Dora B. from Juneau to Lituya Bay, required the steamer to take the tow into the bay, and leave her there, and it is argued that, considering the nature of the bay and the hazardous entrance thereto, such a construction of the contract was erroneous, and that the Bertha had fulfilled her obligation when she reached the mouth of the bay. We think the court properly ruled otherwise, and that the construction placed upon the contract was the construction adopted by the parties thereto. The Bertha had on board nine of the members of the mining company's party and its freight. The captain of the Bertha evidently understood that he was to enter the bay. He testified: "I always made a practice to figure on that tide, because the only way we could enter the bay was slack water, either low or high, and I did so this time." He testified also that it was his custom to arrange the time of his arrival there in order to meet slack water if possible. He testified further: "I had two things, that was either to go in or to go on my course to the westward." It was shown that on the return voyage of the same trip the Bertha entered Lituya Bay, and landed there the mining company's men and freight, and that in June of the same year she again entered it, and that the captain of the Bertha, while in command of another steamer, had entered it in the year 1898 and again in 1899. But whatever may have been the true construction of the contract, the question becomes immaterial in view of the subsequent conduct of the Bertha in departing from the entrance to Lituya Bay with her tow on her way to Yakutat. Her obligation to exercise due care and to take the schooner to her destination remained the same as it was before.

It is earnestly insisted that the court erred in giving to the jury the following instruction:

"The obligation of a towing vessel to a tow is a continuing obligation, and if the jury find from the weight of the evidence that, after said towline parted, the schooner Dora B., with the decedent aboard, even if said towline parted outside of the district of Alaska, or beyond the marine limit of three miles, drifted within said three-mile limit, and that the decedent met the cause of his death within three miles of the shore of the district of Alaska, and that said death could have been avoided by the steamer Bertha and its master, had said master used that degree of skill and caution which prudent navigators usually employ in standing by, aiding, and succoring said schooner and the decedent while within said three-mile limit from shore, and that said decedent met his death by reason of such failure on the part of the master of the steamer Bertha, then you should find for the plaintiff in this case."

It is argued that by this instruction the jury were told that from the time when the towline parted until the death of the decedent there was at each instant of time, and at each point in space, a new wrong committed and a new right created; that is, that the tort was continued, and that the corresponding right continued, and that if the schooner had drifted for instance across the Pacific Ocean, and had subsequently at any time returned within the three-mile limit from the

Alaskan shore, and the decedent had there died, there would have been a cause of action. This argument ignores the salient facts in the case. The jury, in answer to interrogatories propounded by the plaintiff in error, returned several special verdicts, one of which was that the Dora B. was lost on her trip from Lituya Bay to Yakutat, on April 15, 1900. By another special verdict, the jury found that within the two hours during which the schooner was visible from the steamer after the towline had parted both the steamer and the schooner were less than three miles from the land. The evidence was that at the time when the schooner went adrift a strong wind was blowing, and the weather was squally, with mist and snow. There was no evidence that the schooner was equipped with compass or chart, or that more than one of the men on board of her was a sailor, or knew anything about handling a sailing vessel. The schooner had up only her small jib sail, and the evidence was that her other sails were stowed in the hold, and were not rigged for present use. The wind was quartering on her port stern, and the sea was running in obliquely toward the land. The result was a tendency to drift the schooner to the shore. About 3:45 in the afternoon the wind changed to the southwest, so as to send her directly toward the beach. It is the undisputed evidence that between Lituya Bay and Yakutat it is a dangerous sea. Captain Hansen, a witness for the plaintiff in error, testified that he would consider it dangerous to leave any vessel along that coast with a tow, and that good seamanship would require such a vessel in charge of a tow to make the nearest port, which would be Yakutat, with as great haste as possible. The coast survey chart in evidence shows that a continuous range of high mountains, some as high as 16,000 feet, extends along the coast from Lituya Bay to a point back of Yakutat, and it is in evidence that these mountains, covered with snows and glaciers, create uncertain weather and dangerous conditions to navigation along the coast. In view of all these circumstances, it cannot be said that the duty of the steamer in the premises ended with the parting of the towline. Having failed to tow the schooner into the bay, and having started out to take her to Yakutat, it was her duty to complete the voyage to the latter place, unless prevented by circumstances beyond her control. When the towline parted it was her plain duty to return to the rescue of the schooner and take her again in tow. Such undoubtedly continued to be her duty during the two hours in which the schooner was in sight, and while, as the jury found, she was within the three-mile limit from the shore, and such was still her duty thereafter. For how long a time that duty continued it is unnecessary to determine. It certainly existed during that day and so long thereafter as the schooner continued to drift toward the shore, or to proceed on her course toward Yakutat, and so long as the Bertha could have returned and rescued her. Before the morning of the next day she had doubtless been wrecked, and the jury so found. Early on that morning, when the steamer came out from Yakutat Bay and passed Ocean Cape, the point where, according to the testimony of Captain Lennan, pilot of the Bertha, the schooner should have arrived if she had outlived the night, she was nowhere in sight. There was no error, therefore, in the instruction given to the jury, for there was a breach of the steamer's duty com-

mitted within the territory of Alaska. It was not the parting of the towline that caused the decedent's death. It was the continuing failure of the Bertha to come to the relief of the schooner before she was wrecked on the Alaskan shore.

We find no error for which the judgment should be reversed. The judgment is affirmed.

GASTONIA COTTON MFG. CO. v. W. L. WELLS CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 469.

1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—WANT OF LEGAL INCORPORATION OF PLAINTIFF.

An application for a charter for a corporation was made to the Governor of Mississippi in accordance with the laws of the state, and the proposed charter submitted was approved by him. The state statute provides that "the powers therein specified shall by the approval of the charter be vested in such corporation and it shall go into operation at the time and on the terms and conditions specified." The charter in question provided that the corporation should have power to commence business as soon as \$2,000 of its capital stock had been "subscribed and paid for." The three corporators met, and subscribed for that amount of stock, elected themselves directors and officers, and commenced and thereafter carried on business in the corporate name, but neither then nor thereafter was any capital stock paid in, or certificates of stock issued; the business being carried on by the individuals, who drew money out as though it belonged to them individually, without any reference to the corporation, or to the contracts or obligations entered into in its name. *Held*, that the corporation never acquired a legal existence, and could not maintain an action in a federal court against a corporation of another state on the ground that it was a citizen of Mississippi.

2. SAME.

A corporation must have been lawfully created under the laws of a state, to give a federal court jurisdiction of an action brought in its name on the ground of its citizenship in such state; the fact that as to certain persons, and in certain transactions, it may be a corporation de facto, is not sufficient.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

For opinion below, see 118 Fed. 190.

Charles Price and Armistead Burwell, for plaintiff in error.

Murray F. Smith and Charles W. Tillett, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the Circuit Court of the United States for the Western District of North Carolina. The action was brought in the court below in the name of the W. L. Wells Company against the Gastonia Cotton Manu-

¶ 1. Citizenship of corporations for purpose of federal jurisdiction, see notes to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 238.

facturing Company on a money demand for \$35,967.60. The complaint, in its first paragraph, setting out the jurisdiction of the court, alleges that the plaintiff is a corporation created and duly organized under the laws of the state of Mississippi, and is a citizen and resident of the state of Mississippi, and the defendant is a corporation under the laws of North Carolina. The defendant, in the first paragraph of its answer, admits its own corporate character under the laws of North Carolina, but adds:

"It has no knowledge or information sufficient to found a belief as to the truth of the allegation contained in the first section of the complaint, to wit, that the plaintiff is a corporation organized under the laws of the state of Mississippi, and a citizen and resident of that state, and therefore it denies the said allegation."

This is strictly in accordance with code pleading and practice which prevails in North Carolina. Under this system of pleading, there are two modes of defense to a complaint, demurrer, and answer. So this defense set up here, which ordinarily would be made by plea in abatement, is properly made in the answer. Code Proc. N. C. § 240. So, when the case was heard before the jury, the court below, in formulating the issues, put as the first two these: "(1) Is plaintiff a corporation, as alleged in the complaint? (2) Is plaintiff a citizen of the state of Mississippi?" These issues are practically one and the same. Having formulated the issues, the court directed the jury to find them in the affirmative. The issues presented, as will be seen hereafter, were both issues of law. The jury having found for the plaintiff on all the issues under instructions, a writ of error was allowed, and the case is here on assignments of error. The first five go to the instructions of the court on the first and second issues. The burden of proof on these issues being on the plaintiff below, these facts appeared:

W. L. Wells was dealing in cotton in the state of Mississippi, and conducted a large business—among others, with the defendant below. In 1898 a charter was applied for by him, John T. Wells, and George Butterworth for an incorporation under the name of the W. L. Wells Company. Charters in Mississippi are granted under general laws. An application is made to the Governor for a charter. He refers the proposed charter to the Attorney General, and, upon his certificate that it is not violative of the Constitution and laws of Mississippi, the Governor approves it, and causes the great seal to be affixed to it. In the present case the following form of charter was submitted to the Governor of Mississippi, and by him referred to the Attorney General 26th April, 1898:

"Section 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract, and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

"Sec. 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed, and paid for, said corporation shall have power to commence business.

"Sec. 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton fac-

torage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and, generally, may have all powers conferred by Chapter 25 of the Annotated Code of 1892, necessary and requisite to carry out the purpose of said corporation.

"Sec. 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

"The foregoing proposed charter of incorporation is respectfully referred to the Honorable Attorney General for his advice as to the constitutionality and legality of the provisions thereof.

A. J. McLaurin, Governor.

"Jackson, Miss., April 26th, 1898.

"The provisions of the foregoing proposed charter of incorporation are not violative of the Constitution or laws of the state.

Wiley N. Nash,

"Attorney General.

"Jackson, Miss., April —, 1898.

"Executive office [state coat of arms], Jackson, Mississippi.

"The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

"[Great seal of the
state of Missis-
sippi.]

In testimony whereof, I have hereunto set my hand
and caused the Great Seal of the State of Mis-
sissippi to be affixed this 1st day of June, 1898.

"By the Governor: A. J. McLaurin.

"J. L. Power, Secretary of State.

"Office of Secretary of State, Jackson, Mississippi.

"I, J. L. Power, Secretary of State, do certify that the charter hereto attached, incorporating the W. L. Wells Company, was, pursuant to the provisions of chapter 25 of the Annotated Code, 1892, recorded in the book of Incorporations in this office.

"[Great Seal of
the State of
Mississippi.]

Given under my hand the Great Seal of Mississippi
hereunto affixed this 1st day of June, 1898.

"J. L. Power,

"Secretary of State."

The Attorney General gave his certificate in favor of the constitutionality of the proposed charter on the ——— day of April, 1898, and on the 1st day of June, 1898, the Governor caused the great seal of the state to be put to the charter. The act under which the Governor approved this charter declares:

"The powers therein specified shall by the approval of the charter be vested in such corporation and it shall go into operation at the time and on the terms and conditions specified."

It will be noted that the second section of this charter fixed the terms and mode in which it would get life—could act as a corporation:

"The capital stock of said corporation shall be \$50,000, divided into shares of \$500, each, and as soon as \$10,000 of said stock is subscribed and paid for, said corporation shall have power to do business."

The Governor having sealed the charter, the incorporators met on 18th July, 1898, and read over and adopted it. Books of subscription were then opened, and W. L. Wells subscribed for ten shares, John T. Wells for five shares, and George Butterworth for five shares. On the same day and at the same place a stockholders' meeting was held, and W. L. Wells, John T. Wells, and George Butterworth were elected directors. The meeting thereupon adjourned, and the record does not disclose whether they ever met again or not. John T. Wells, who was

secretary and treasurer of the company, says that, when the stock was subscribed for, nothing was paid; that he paid for the stock out of the profits of the first year, so did Butterworth, and so did W. L. Wells. Yet he says that these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder, no stock certificates ever issued. He goes on to say that he never paid any cash into the Wells Company, nor did Butterworth, nor did W. L. Wells, and that there was absolutely no capital to start with; that, notwithstanding, he drew out \$10,217.55, and Butterworth took \$9,022.65—both he and Butterworth being men of small means, having no property liable for their debts. It is very clear from this that, having a charter like this, conditioned upon the payment of \$10,000 in subscriptions, then these men undertook to exercise powers in the charter without fulfilling or attempting to fulfill the conditions precedent in the charter; that, even when they had made money in the business, they ignored the corporation altogether, and drew the money out of the business as if it belonged to them, and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed corporators went on in business, and contracted obligations in the name of the so-called corporation, which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time, two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law, and that the Wells Company had never, and could not have, any legal existence. When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with. In *Beach on Private Corporations*, § 12, p. 18, we find:

"There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made requisite to the assumption of corporate powers. In respect to the former, any material omissions will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question."

The same learned author, at page 27, says:

"It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate."

This seems to be in accordance with the law in Mississippi. In *Perkins v. Sanders*, 56 Miss. 733, the Supreme Court of that state says:

"In charters, which are mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and, of course, no corporate act can be performed, till these conditions have been complied with. In all such cases, when a certain amount is named in the charter as necessary to be subscribed as the capital stock [in the case at bar it must be subscribed and paid in], such subscription [and, of course, such payment] is regarded as a condition precedent to the existence of the corporation, unless otherwise provided in the charter."

Discussing the broad distinction between a charter which creates a corporation, and invests it at once with corporate powers, and that class of corporations created under general laws requiring an application for a charter, the same court says:

"The distinction between the two classes of charters is thus seen to be that in the first class the charter is a mere provision on the part of the Legislature for the formation of a corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter, and as to those acts it would be considered that the corporation had existence before its full investiture with its corporate franchise."

It is contended, however, that the plaintiff, if it be not a corporation de jure, is a corporation de facto, and will be so recognized; that, at least, the defendant, having dealt with it as a corporation, is now estopped from denying its existence as a corporation. It must be borne in mind that the question we are now considering is not the relative rights of the plaintiff in error and of the defendant in error. The former may be estopped by its acts. We are dealing with a question of the jurisdiction of this court—a question which the court must always take up, *suo motu*, if necessary; the question being at the threshold of every case before it. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543. The presumption is always against the jurisdiction of the Circuit Court, unless the contrary affirmatively appears. *Grace v. Am. Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932. Its jurisdiction does not depend upon the consent of parties actually made, or constructively implied by estoppel. The jurisdiction is statutory, and must follow the statute. When a corporation sues in that court, claiming jurisdiction through diversity of citizenship, it can maintain jurisdiction only by showing that it is the creation of the state of which it claims to be a corporation, and that it is really a corporation. Otherwise it is not a legal entity—a person in the eye of the law. "A corporation cannot, for the purpose of jurisdiction in federal courts, be considered a citizen or a resident of a state in which it has not been incorporated." *Southern Pacific Co. v. Denton*, 146 U. S. 203, 13 Sup. Ct. 45, 36 L. Ed. 942. When a complainant comes into the Circuit Court of the United States as a complainant, and seeks to sustain the jurisdiction by virtue of its citizenship, it must establish that right in itself, and show the credentials of its birth and existence. The fact that, as to certain persons, and in certain transactions, it may be a corporation de facto, is not enough.

The defendant in error relies with full confidence upon the case of *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773. That was an action brought in the Circuit Court of the United States for the District of California by plaintiff against the Tulare irrigation district, a public municipal corporation of the state of California. This district had issued coupon bonds for the purposes of their work, had floated them in the market, and plaintiff had become a bona fide purchaser for value. The coupons being matured, payment was refused, and this suit was brought. The defense set up was on certain irregularities in forming the corporation. The act under which the corporation was created required that a petition for the

organization of an irrigation district be presented to the supervisors of the county, signed by the required number of freeholders. Before the petition was presented, the act required that it be published in some newspaper at least two weeks before its presentation, "together with a notice stating the time of the meeting at which the same will be presented." In that case the petition was properly prepared and signed. The petition, with the signatures, was published in the proper newspaper, together with the notice, but the signatures attached to the petition were not reproduced after the notice. All of the public signatures and notice were published in the same column, and as one entire proceeding, separated from the rest of the contents of the newspaper by a black line across the column above, and another across the column below, this publication. This was charged as a fatal defect, and the bonds were claimed to be invalid. The opinion of the Supreme Court strikes the keynote of the decision in the opening sentences:

"It is agreed in the statement of facts of this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and, while acting as a corporation at all times, still sets up that it never was legally organized, and hence had no legal right to issue any bonds."

In the case of *Douglas County Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46, the court said:

"'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by lapse of time, and, we think, applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed."

This idea dominated the decision. It is evident from the opinion that the court thought the defendant a corporation *de jure*. But in the argument, assuming that there were irregularities, the court held that, inasmuch as it attempted to organize under a general law, and it actually used the franchise, and continued to act in every respect as a corporation, it could not deny its corporate existence, so as to defeat its obligations. Indeed, had any other conclusion been reached, a fraud would have been sustained. The distinction between that case and the one at bar is broad and distinct. In the latter case the plaintiff below went into the Circuit Court claiming the jurisdiction because, and only because, it was a corporation resident in a state other than the defendant. It was bound to prove its claim. In doing so, it did not prove a *bona fide* attempt to fulfill the conditions of its incorporation. On the contrary, there is no evidence whatever of its use of the corporate franchise. It had no certificates of stock, no corporate capital, no declaration of dividends, and, as far as the record discloses, no corporate meeting after the first. Nor, as will be seen hereafter, will the ends of justice be defeated if it be not treated as a corporation.

In *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784, the point now under discussion could not arise, as the jurisdiction was not involved. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, simply de-

cides that a state, being creator of a municipal corporation, is the proper party to impeach the validity of its creation, and, if the state acquiesces in the validity of a municipal corporation, the corporate existence thereof cannot be collaterally attacked.

It will be noticed that, in all the cases in which suits by or against de facto corporations were sustained, the ruling is that the corporate existence cannot be collaterally attacked. In the case before us there is no collateral attack. The plaintiff below itself put that question directly in issue.

In our opinion, the plaintiff below (defendant in error here) failed to establish its first allegation, as to its corporate capacity, and the court below erred in instructing the jury to find the issues in this regard in its favor. This conclusion renders unnecessary any discussion of the other assignments of error.

The conclusion reached will not defeat the ends of justice if the claim of the defendant in error be good. It is competent for the persons claiming to be incorporators to carry on the suit in their own names, and, as they have requisite citizenship, the suit can be maintained in the federal court. *Jones v. Aspen Hardware Co.* (Colo. Sup.) 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220.

It is ordered that the judgment of the Circuit Court be reversed; that this cause be remanded to that court, and, if the plaintiffs below (defendants in error here) be so advised as to continue the suit in that court, that they be allowed to amend their complaint by inserting their individual names as plaintiffs, and that thereupon a new trial be granted; if, however, they decline to do this, that the suit be dismissed without prejudice. Reversed.

MOFFITT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1904.)

No. 951.

1. ALIENS—CONSTRUCTION OF IMMIGRATION LAWS—OFFENSES.

The immigration laws of the United States, in so far as relates to punishment for their violation, are highly penal, and are to be strictly construed, and their provisions applied only to cases clearly within their terms and their spirit, construed as a whole.

2. SAME—NEGLECT OF MASTER TO DETAIN ALIEN ON BOARD HIS VESSEL—IMMIGRANTS DEFINED.

Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," clearly relates to immigration, and applies only to the entry into the United States of immigrants who, according to standard definitions of the term, are persons removing into the country for the purpose of permanent residence, and the penalty imposed by section 10 (26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]) on the master of a vessel for neglecting to detain on his vessel any "alien who may unlawfully come to the United States" on such vessel, or to return him to the port from which he came, must be construed in the light of such general purpose, and limited in its application to cases of alien immigrants.

3. SAME—EVIDENCE CONSIDERED.

Defendant was indicted under Act March 3, 1891, c. 551, § 10, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299], for neglecting to detain on the steamship of which he was master an alien not entitled to land in the United States, by reason of which neglect the alien escaped and landed in the United States. On the trial the following facts were shown by an agreed statement: When defendant's ship was anchored off shore at a Mexican port a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore he found that the vessel had started and proceeded some distance. Defendant refused his request that he be taken back and landed, but promised to stop and leave him on the return trip, and thereupon put him at work, but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. *Held*, that such facts were not sufficient to warrant defendant's conviction, the alien not being an immigrant within the meaning and intent of the act, whom defendant was required to put in irons or keep under guard to secure his return on the vessel, and there being no evidence or claim that he did not act in good faith.

In Error to the District Court of the United States for the Northern District of California.

The plaintiff in error, master of the British steamship Tucapel, was indicted in the District Court for the Northern District of California for an alleged violation of the provisions of section 10, c. 551, Act March 3, 1891, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]. The indictment contained three counts. A demurrer was interposed to this indictment upon the ground that it did not in either count set forth sufficient facts to constitute an offense against the United States. A motion was also made to quash the indictment upon the same ground. This motion was denied. The demurrer was sustained as to the second and third counts, and overruled as to the first count. This count charged the plaintiff in error with having unlawfully neglected at San Francisco, Cal., to detain, on board the Tucapel, Rodrego Marquez, an alien not entitled to land, and by reason of such neglect the alien escaped from the vessel and landed in the United States. The defendant entered his plea of not guilty, and the case was tried before the court with a jury, upon the following agreed statement of facts: "(1) Defendant at all the times herein stated was, and now is, master of the British steamship Tucapel, belonging to the Pacific Steam Navigation Company, then plying as a common carrier between San Francisco and Mexican and South and Central American ports, on the Pacific Coast. (2) On the morning of the 25th day of June, 1901, the Tucapel, carrying passengers, a cargo of freight, and the United States mail, destined for San Francisco and elsewhere, arrived off the port of Mazatlan, Mexico, on her way north, and was anchored at a considerable distance there, off shore. She was thereupon surrounded and boarded by native boatmen and peddlers, who coming out to the vessel in small boats or cascoes, according to the practice prevailing at this and other southern ports, came on board the vessel to sell fruits and other wares to passengers and members of the crew. (3) Among these boatmen and peddlers was Rodrego Marquez, a Mexican. (4) After remaining at anchor off Mazatlan for several hours, and completing the transaction of her business there, the vessel proceeded on her journey north, on the afternoon of said day, traveling at her usual rate of speed, of from twelve to fourteen knots an hour. She had proceeded upon her voyage about ten miles, when one of the ship's officers reported to defendant, as master of the said vessel, that Marquez had been by accident overboarded, and was then on board the Tucapel. Defendant thereupon interviewed the Mexican, who begged him to stop the vessel, return to Mazatlan, and land him there, inasmuch as he had not noticed while plying his business on the steamer that she was under way until he had returned to her deck, a short time before

his case had been reported to defendant. Marquez protested that he did not wish to be carried to the United States, but defendant declined to accede to his request, and then return to Mazatlan, especially as it was a matter of common occurrence for a native boatman or peddler to be overcarried from one port or place to another on the South Pacific Coast, but he promised Marquez, however, to bring him back to his native place on the return voyage of the steamer, and, without being placed on the crew list, he was set at work shoveling coal as a work-away on the voyage north. (5) The Tucapel arrived at San Francisco, June 30, 1901, with Rodrigo Marquez on board, who then said he did not want to land, but to be returned to Mazatlan as soon as possible. (6) On her arrival at San Francisco the vessel was boarded by an immigration inspector, who notified defendant not to land Marquez until permission therefor had been obtained from the commissioner of immigration at the port last named, said Marquez having no financial means whatsoever at San Francisco. (7) Marquez was not locked up nor placed in irons on board the steamer, and on the night of the 4th of July, 1901, and just before the steamer left San Francisco on her southern route, he left the vessel without the knowledge or permission of defendant, or of any of his officers, or of the officers of the immigration bureau here. (8) Defendant at no time had any intention or wish to land Rodrigo Marquez at this or any other port or place in the United States, and, as far as defendant could learn, said Marquez had at no time any intention of coming to or landing in the United States. (9) The Pacific Steam Navigation Company has withdrawn its steamers from the San Francisco route, and they, including the steamer Tucapel, are now engaged exclusively in plying between ports and places on the South Pacific Coast, as far north as Panama. The steamer sailed from San Francisco for the last time February 10, 1902. The foregoing statement is subject to any objection thereto or to any part thereof by either plaintiff or defendant on the ground that the same is immaterial or irrelevant."

The defendant moved to strike out certain portions of the agreed statement of facts as immaterial and irrelevant, which motion was denied. After the facts agreed upon had been read to the jury, the defendant moved the court to instruct the jury to bring in a verdict for the defendant upon the following grounds: "(1) That the indictment fails to set out that Marquez was an alien immigrant under the act of 1891, under which the indictment was framed, which relates to foreign immigration, and therefore there can be no conviction unless the indictment has set forth that fact. (2) That the indictment fails further to state a cause of action, in that it does not show in what respect this alien, if an immigrant, was a person not lawfully entitled to enter the United States. It does not show in what respect this alien was included, if at all, in one of the interdicted classes. (3) For the reason that the facts as agreed and shown to the jury do not make a case for the government in that, among other reasons, it is not shown that Marquez was an alien immigrant, and it is not shown that he came to this country with the intention of coming here, but was involuntarily carried here."

This motion was denied. The court also declined to give certain instructions asked for by defendant, and gave other instructions to the jury, to all of which the defendant duly excepted. The jury returned a verdict of guilty, and the defendant was sentenced to pay a fine of \$300. From this judgment the defendant brings a writ of error to this court.

There are 10 assignments of error, covering every ruling of the court below, but, as was said by counsel for the plaintiff in error, these assignments may be grouped into three classes, and pertain "(1) to the insufficiency of the first count of the indictment as a statement of the commission by plaintiff in error of an offense against the laws of the United States; (2) to the proper construction of section 10 of the act of March 3, 1891, under which the indictment was framed, which refers to immigrants and no others; and (3) to the insufficiency of the evidence to sustain the verdict."

Page, McCutchen & Knight, for plaintiff in error.

Marshall B. Woodworth, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). If the alien Marquez was not a person permitted by law to enter or remain in the United States, it is manifest that the plaintiff in error did not exercise reasonable diligence, and was clearly guilty of negligence in failing to detain said alien on the vessel. The good intention, or absence of any wrongful intention, on the part of plaintiff in error, would constitute no excuse whatever for his negligence.

The real question presented for our determination is whether or not the agreed statement of facts is sufficient to show that the alien Marquez belonged to one of the classes of persons whose admission into the United States is excluded by the provisions of the act of March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1299]. It will be observed that this act is "An amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." In some particulars it was amended by "An act to facilitate the enforcement of the immigration and contract labor laws of the United States," approved March 3, 1893 (27 Stat. 569, c. 206 [U. S. Comp. St. 1901, p. 1300]); and again March 3, 1903, by "An act to regulate the immigration of aliens into the United States" (32 Stat. 1213, c. 1012 [U. S. Comp. St. Supp. 1903, p. 170]).

All these acts, as was the act in regard to contract labor (Act Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290]), are highly penal in their character, and should be so construed as to bring within their condemnation only those who are shown, by direct and positive averments and clear proof, to be embraced within the terms of the law. They should be construed as a whole, and not by selecting particular words or sections, and interpreting them according to their strict letter. *United States v. Gay*, 95 Fed. 226, 37 C. C. A. 46. They should not be so construed as to include cases which, although within the letter, are not within the spirit of the law. All laws should receive a sensible construction. General terms contained therein should be so limited in their application as not to lead to injustice, oppression, or absurd consequences. *Tsoi Sim v. United States*, 116 Fed. 920, 926, 54 C. C. A. 154, and authorities there cited.

The act under consideration provides in section 1 that:

"The following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes."

We are of opinion that this act clearly relates to immigration, and is leveled only against immigrants, although neither of these words

is expressly mentioned in section 10 of the act. Section 3 excludes the encouragement of immigration to this country of aliens by promise of employment. Section 4 makes it unlawful for steamships or transportation companies or vessel owners, by writing or otherwise, to solicit or encourage the immigration of aliens into the United States except in certain specified particulars. Section 6 forbids the bringing into the United States of any aliens not lawfully entitled to enter, and punishes the offense. Section 8 provides that upon the arrival by water of alien immigrants at any port it shall be the duty of the master of the vessel bringing them to make report to the proper inspection officers of the name, nationality, and last residence of every such alien before any of them are landed. The inspection officers are thereupon required to inspect all such aliens, either on board the vessel upon which they have arrived or at some other definite place.

This brings us to section 10, under which the plaintiff in error was indicted. It reads as follows:

"That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid."

Was Marquez an alien immigrant, within the true intent and meaning of the act of Congress? The case is *sui generis*. It stands upon a different footing, and is presented by a different state of facts, from any of the previous cases that have found their way into the courts.

In *Warren v. United States*, 58 Fed. 559, 7 C. C. A. 368, which is the principal case here relied upon by the defendant in error, it was there admitted that certain aliens named in the indictment voluntarily embarked for the United States from a foreign port upon the vessel *Kansas*, and did unlawfully come to the United States upon and by means of said vessel. The plaintiff in error there was the agent of the vessel, and his only contention was that there was no negligence or neglect in detaining the said aliens, and that they escaped without any negligence or neglect on his part. No question was there discussed bearing upon the point under consideration. In reviewing the various sections of the act of March 3, 1891, the court very properly said "that the intention of Congress was the absolute exclusion from this country of all immigrants of the classes named in the act." Here the controlling question is whether the alien Marquez is included in the "classes named in the act."

Was he an alien immigrant, within the meaning of those words as used in the act of Congress? In searching for the intent of Congress in the passage of this act, we must first examine the language

that has been used. Lawmakers must be presumed to know the ordinary meaning of the words used by them. The courts are not invested with any function of legislation. They simply seek to ascertain the intent and will of the legislators. They cannot make any "judicial addition" to the language of the statute. *United States v. Goldenberg*, 168 U. S. 95, 103, 18 Sup. Ct. 3, 42 L. Ed. 394.

The standard dictionaries give the meaning of the word "immigrant": "A person that removes into a country for the purpose of permanent residence." "Immigrate": "To remove into a country for the purpose of permanent residence." "Immigration": "The passing or removing into a country for the purpose of permanent residence." See Webster's Dictionary and Century Dictionary. This meaning should be applied to the words as used in the statute in order to discover the intent of Congress. This interpretation has been given by the courts to the language used in the act under consideration.

In *United States v. Sandrey* (C. C.) 48 Fed. 550, the court, after reviewing the several sections of the act, said:

"As clearly appears, the act deals only with the importation of aliens under contract to labor and alien immigration. It is only with regard to alien immigrants that the act imposes duties upon the masters and agents of vessels, or provides penalties for the nonperformance of duties by such masters and agents. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence. Aliens composing the crews of vessels visiting our seaports are in no sense immigrants, and, as the review of the statute as above shows, are in no wise affected by the law in question. With regard to them, the said law imposes no duties or penalties upon the masters and agents of vessels."

In *United States v. Burke* (C. C.) 99 Fed. 895, the court reviewed the different sections of the act, and in the course of the opinion said:

"The legislation contained in the various statutes that have been passed relating to immigration is clearly directed against the immigration into this country of certain classes of persons who come in with the intent to enter into and become a part of the mass of its citizenship or population. Immigration is defined to be the entering into a country with the intention of residing in it. The earlier statutes merely prohibit contract laborers being brought in. The later ones prohibit the bringing in of immigrants—persons who come into this country with the intention of remaining, or fixing a residence here—and who are calculated to become a charge upon the country, or who are unfit, on account of moral character, previous conviction of crime, or disease, to be admitted as citizens."

Where the intent of the statute is plain, nothing is left to construction; but, where the mind of the court must labor to discover the design of the Legislature, it seizes upon everything from which it can be derived. In this search courts should not overlook nor ignore the well-known canon of construction, which often proves to be a safe guide in determining the meaning of statutes. The rule is universal in cases of this character that the evil which Congress intended to remedy must be looked at. All the circumstances, conditions, and contemporaneous events which induced Congress to pass the law must be considered and given due weight. We have already sufficiently stated the objects and purposes of the law in this particular.

One of the best-reasoned cases to be found upon this subject is the *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226 (cited and referred to in *Tsoi Sim v. United States*, supra), where the court was called upon to construe the act of February 26, 1885, "to prohibit the immigration of foreigners or aliens under contract or agreement to perform labor in the United States." See, also, *United States v. Craig* (C. C.) 28 Fed. 795, 798; *United States v. Borneman* (D. C.) 41 Fed. 751; *United States v. Gay*, 95 Fed. 226, 230, 37 C. C. A. 46.

From the agreed statement of facts it does not appear that Marquez was an alien immigrant who left a foreign shore to come to the United States for the purpose of becoming a permanent resident here. When he had completed the business which he went upon the vessel to perform, he started to return on shore, but found that the steamer had left. He demanded to be returned to Mazatlan. He protested against coming to the United States. The plaintiff in error refused his demand, but promised him to take him back to Mazatlan on the return voyage of the steamer. He was not required to pay his passage, but was set to work shoveling coal, without being put upon the crew list. The plaintiff in error owed him no duty other than that he promised to perform. When the vessel arrived at San Francisco on June 30, 1901, Marquez stated that he did not want to leave the vessel, but wished "to be returned to Mazatlan as soon as possible." There is no pretense of any fraud. All the acts and agreements between the plaintiff in error and Marquez affirmatively appear to have been in the utmost good faith, and not for the purpose of evading any law.

Notwithstanding the notification given to the plaintiff in error not to land Marquez until permission was obtained from the commissioner of immigration, Marquez was not an immigrant, within the meaning and intent of the act under consideration, and the plaintiff in error was not required to put him in irons, or keep him under guard, to secure his return upon the steamer. The plaintiff in error was not tried upon an indictment charging him with preventing an immigration officer from performing his duty.

The judgment of the District Court is reversed.

MacDONALD v. TEFFT-WELLER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,325.

1. BANKRUPTCY—MARRIED WOMEN—OBLIGATIONS—"DEBTS."

Since the separate property of a married woman residing in Florida, under the laws of that state, is liable in equity for her business obligations, where she is engaged in business on her own account, though not a free trader, such obligations constitute debts, within Bankr. Law, § 1, Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], defining the term "debt" to include any debt, demand, or claim provable in bankruptcy, and section 63 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]).

declaring that debts of a bankrupt may be proved and allowed against his estate which are founded on an open account, or on a contract, express or implied.

2. SAME.

Bankr. Law, § 4, cl. "a," Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that any person owing debts, except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt, and clause "b," providing that any natural person, except a wage-earner and certain others, owing debts to the amount of a thousand dollars or over, may be adjudged an involuntary bankrupt, authorizes the adjudication of a married woman as an involuntary bankrupt, where she was engaged in business on her own account, and owed business obligations of the amount required by the statute, for which her separate property was liable in equity.

Petition for Revision of Proceedings in the District Court of the United States for the Southern District of Florida, in Bankruptcy.

Involuntary proceedings were commenced in the court below by filing the following petition:

"To the Honorable James W. Locke, Judge of the District Court of the United States for the Southern District of Florida: The petition of the Tefft-Weller Company, a corporation organized and existing under the laws of the state of New York, and Frederick A. Constable, Alfred G. Evans, and the estate of Hicks Arnold, partners doing business as Arnold, Constable & Company, and John T. Sherman and Charles A. Sherman and Aaron L. Reid, partners doing business as Sherman, Reid & Company, all of the city of New York and state of New York, respectively shows that Ruth E. MacDonald is a married woman, who, with her husband, M. G. MacDonald, has for many years resided in the city of Jacksonville, Duval county, Florida, and is a citizen and resident of said city, county, and state; that the said Ruth E. MacDonald for several years preceding the filing of this petition has been engaged in the business of buying, selling, and trading in dry goods, millinery, notions, bric-a-brac, and other goods, wares, and merchandise in the city of Jacksonville, Duval county, Florida, and has conducted said business in her own name, under the style of Mrs. M. G. MacDonald; that the said business, and said goods, wares, and merchandise, store, and office fixtures and furniture and store accounts are her separate personal property, and that the amounts due by said Ruth E. MacDonald in the conduct of said business to petitioners, hereinafter referred to, were incurred by her for the purchase price of the personal property, to wit, stock of goods in the store and business of said Ruth E. MacDonald, and went to the increase of her separate personal property, and that she therefore charged her separate property with the payment of the same; that the said Ruth E. MacDonald has for the greater portion of six months next preceding the date of filing this petition had her principal place of business and resided in the city of Jacksonville, Duval county, Florida, and the district aforesaid, and owes debts to the amount of one thousand dollars; that your petitioners are creditors of said Ruth E. MacDonald, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars; that the nature and amount of your petitioners' claim are as follows: That the claim of the Tefft-Weller Company consists of an open account for the sum of two hundred and thirty-seven and $\frac{21}{100}$ dollars (\$237.21), and is for goods, wares, and merchandise sold and delivered by said the Tefft-Weller Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said the Tefft-Weller Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same; that the claim of Frederick

¶ 2. What persons are subject to bankruptcy laws, see note to *Maltoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.

A. Constable, Alfred G. Evans, and the estate of Hicks Arnold, partners doing business as Arnold, Constable & Company, consists of an open account for the sum of three hundred and thirteen and $\frac{12}{100}$ dollars (\$313.12), and is for goods, wares, and merchandise sold and delivered by said Arnold, Constable & Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said Arnold, Constable & Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same; that the claim of John T. Sherman and Charles A. Sherman and Aaron L. Reid, partners doing business as Sherman, Reid & Company, consists of an open account for the sum of one hundred and eighty one and $\frac{1}{100}$ dollars (\$181.01), and is for goods, wares, and merchandise sold and delivered by said Sherman, Reid & Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said Sherman, Reid & Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same. And your petitioners further represent that the said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald, is insolvent, and that within four months next preceding the date of filing this petition the said Ruth E. MacDonald committed an act of bankruptcy, in that she did heretofore, to wit, of the 26th day of May, 1903, while insolvent, execute and deliver to the Mercantile Exchange Bank, a corporation organized and existing under the laws of the state of Florida, and a creditor of the said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald, a chattel mortgage for forty-four hundred dollars (\$4,400.00), on the lease of Ruth E. MacDonald, in the name of Mrs. M. G. MacDonald, to store number 102 West Forsyth street, in the city of Jacksonville, Duval county, Florida, and all of the personal property of said Ruth E. MacDonald, under the name of Mrs. M. G. MacDonald, therein contained, consisting, among other things, of dry goods, millinery, notions, bric-a-brac, vases, art household furnishings, and other merchandise and stock in trade, kept and exposed for sale in said storeroom, and also all office and store fixtures and furniture, safe, shelves, show cases, and furnishings, and also all such other personal property in said storeroom contained, said property being described in said mortgage as 'being the separate statutory property of the said Ruth E. MacDonald,' and that thereafter, to wit, on the 27th day of May, 1903, the said mortgage was recorded in the public records of Duval county, Florida, in Mortgage Book 11, at page 273; that said mortgage was given for the purpose and with the intent of securing and preferring the said Mercantile Exchange Bank over other creditors of the same class of the said Ruth E. MacDonald; that the effect of the enforcement of such mortgage will be to enable the said Mercantile Exchange Bank, one of the creditors of the said Ruth E. MacDonald, to obtain a greater percentage of its debt than any other of such creditors of the same class. Wherefore," etc.

Mrs. MacDonald appeared by counsel, and filed demurrer to the foregoing petition on the following grounds:

"(1) There are not three or more citizens of the alleged bankrupt petitioners in the above-entitled petition; (2) that there are not three petitioners, creditors of the alleged bankrupt, parties to the above-mentioned petition; (3) that the 'Estate of Hicks Arnold' cannot be a party to this cause in such words; (4) that a partnership consisting partly of the 'Estate of Hicks Arnold' cannot be one of the three petitioners required by law in a petition for an involuntary adjudication in bankruptcy; (5) that a married woman residing in Florida cannot be adjudicated a bankrupt; (6) that there is no personal liability for her obligations resting upon a married woman residing and doing business within the state of Florida, which obligations would be enforceable against her, and that a married woman cannot be adjudicated a bankrupt; (7) that in this court a married woman not a free dealer cannot be adjudicated a bankrupt."

The court below overruled the demurrer, and this court is asked to revise the proceedings on the following grounds:

"That a married woman residing in Florida cannot be adjudicated a bankrupt; that there is no personal liability for her obligations resting upon a married woman residing and doing business within the state of Florida, which obligations would be enforceable against her, and that a married woman cannot be adjudicated a bankrupt; that in this court a married woman not a free dealer cannot be adjudicated a bankrupt."

Francis P. Fleming, Francis P. Fleming, Jr., and Wm. B. Owen, for petitioner.

Charles M. Cooper and John C. Cooper, for respondents.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

PARDEE, Circuit Judge (after stating the facts as above). The question presented is whether, under the facts alleged in the petition in this case, a married woman in the state of Florida, having separate statutory property, and engaging in trade, buying, and selling on her own account, but not a free dealer, can be adjudicated a bankrupt under the bankrupt law of 1898.

Under sections 1505-1509, Rev. St. Fla. 1892, a married woman may have her disabilities removed, and she may have a license as a free dealer authorized to contract, sue, and be sued, and in all respects to bind herself as if she were unmarried. See *Martinez v. Ward*, 19 Fla. 175.

By article 11 of the Constitution of the state of Florida of 1885 it is provided:

"Section 1. All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women.

"Sec. 2. A married woman's separate real or personal property may be charged in equity and sold, or the uses, rents and profits thereof of sequestrated for the purchase money thereof; or for money or thing due upon any agreement made by her in writing for the benefit of her separate property; or for the price of any property purchased by her, or for labor and material used with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon, with her knowledge and consent.

"Sec. 3. The Legislature shall enact such laws as shall be necessary to carry into effect this article."

It does not appear that there has been any legislation under section 3 of said article, but "it is well settled," says the Florida Supreme Court in *First National Bank of Pensacola v. Hirschowitz*, 35 South. 22:

"In an unbroken line of decisions, beginning with *Lewis v. Yale*, 4 Fla. 418, down to the present time, this court has held that 'a feme covert is not competent to enter into contracts so as to give a personal remedy against her.' As was said in *Dollner v. Snow*, 16 Fla. 86: 'At common law the promissory note of a married woman is void. The Constitution and statute of this state make no change in this respect. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her.' Under the rule laid down in these decisions, appellants could not have proceeded at law against the said married woman, Dora Hirschowitz, and hence could not have

reduced their claims to judgment; also see *Crawford v. Feder*, 34 Fla. 397, 16 South. 287."

In the headnotes to this report, which in Florida are prepared by the judges, No. 1 reads as follows:

"At common law the promissory note of a married woman is void. The Constitution and statutes of this state make no change in this respect, unless said married woman shall have been made a free dealer. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her."

The court further says:

"It is also the settled law of this state that 'where a married woman carries on business in her own name, having property employed in such business, and purchases goods upon her sole credit for the purpose of such business, her separate property may be subjected in equity to the payment of claims for money due for such purchases.' *Blumer v. Pollak*, 18 Fla. 707. Also see *Staley v. Hamilton*, 19 Fla. 275; *Garvin v. Watkins*, 29 Fla. 151, 10 South. 818; *Halle v. Einstein*, 34 Fla. 589, 16 South. 554. In *Crawford v. Gamble*, 22 Fla. 487, it was held that 'merchandise purchased by a married woman who is conducting a mercantile business in her own name is her separate statutory property.'"

From these references to the law in Florida it appears that a married woman having separate statutory property, although not a free dealer, can lawfully carry on business, buy and sell upon her sole credit, and thus contract obligations binding upon her property in all respects as if she were a feme sole, except that she cannot be held personally liable at law; the creditors' legal remedy upon her contracts being in equity, under which all her separate property may be taken. That is to say, that such married woman may contract a debt which she morally owes—owes in equity and good conscience, lawfully owes—but which she cannot be personally adjudged to pay.

Is the limited obligation thus resulting a "debt," within the meaning of the word as used in section 4 of the bankrupt law of 1898? Clause "a," § 4, Bankr. Law, July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Clause "b" provides that "any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default, or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act." Blackstone defines a "debt" as follows: "A sum of money due by certain and express agreement, as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it." 3 Bl. Com. 154. Again: "Any contract, in short, whereby a determinate sum of money becomes due to any person and is not paid, but remains in action merely, is a contract of debt." 2 Bl. Com. 464. "The word 'debt' is of large import, including not only debts of record or judgments and debts by specialty, but also

obligations arising under simple contract to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise." *Gray v. Bennett*, 3 Metc. (Mass.) 522, 526; *Shane v. Francis*, 30 Ind. 93. "A 'debt' signifies whatever one owes. There is always some obligation that it shall be paid, but the manner in which, or the condition upon which, it is to be paid, or the means of recovering payment, do not enter into the definition." *Rodman v. Munson*, 13 Barb. 197. "A debt is a sum of money due by contract, express or implied." *Perry v. Washburn*, 20 Cal. 350. Section 1 of the bankrupt law of July 1, 1898, c. 541, which gives the meaning of words and phrases used in the act, provides in paragraph 11 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), "'debt' shall include any debt, demand or claim provable in bankruptcy," and section 63 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), relating to debts which may be proved, provides as follows: "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account or upon a contract express or implied."

These broad definitions of "debt" from the text-books, adjudicated cases, and the bankrupt law all clearly include the obligation lawfully contracted by a married woman, not a free dealer, in the state of Florida, dealing with her separate estate.

We are referred to no adjudicated cases on the question as to whether a married woman can be adjudicated a bankrupt under the present law—all the cases cited are under other and former laws.

The English cases cited, and much relied on by counsel for petitioner (*Ex parte Jones*, *In re Grissel*, 12 Chan. Div. 484, and *In re Gardiner*, *Ex parte Coulson*, 20 Q. B. Div. 249), lose much of their force here, because the married women's property act, 45 & 46 Vict., provides: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." And section 152 of the bankruptcy act provides: "Nothing in this act shall affect the provisions of the married women's property act 1882."

In *In re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7,824, a case decided under the law of 1867, wherein it was held that a married woman residing in Illinois could be adjudicated a bankrupt, seems to have turned upon the laws of Illinois with regard to the rights of married women. In the note by the learned reporter in that case many of the current decisions in this country and in England are reviewed, and the reporter sums up as follows:

"Impossible as it may be to reconcile the decisions on the general question of the rights and liabilities of married women, the duty of the federal courts in administering the bankrupt act would seem to be simply to determine the status of a married woman under the existing laws of the state where the jurisdiction is to be exercised, and administer the act upon the basis of the principles thus discovered. The foundation of bankruptcy proceedings is indebtedness; but the bankrupt act does not make any new standard of liability—it simply operates upon those already existing. The application of the act to married women depends, clearly, not upon their rights, but their liabilities, and those liabilities are determined by the law of the forum where the jurisdiction is invoked."

From what has been said, it follows that we do not agree with the learned counsel, whose able oral argument and exhaustive brief have received our close attention, that the test is whether the contracts of an alleged bankrupt can be enforced by judgment in personam, but rather is whether the said contracts constitute an existing indebtedness.

The object of the bankrupt law is twofold—the benefit of the creditors and the relief of the bankrupt. Mr. Justice Story describes a bankrupt law as “a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts.” 2 Story, Const. § 1113, note 2. Mr. Stephen speaks of it as “a system of law of a peculiar and anomalous character, intended to afford to the creditors of persons engaged in trade a greater security for the collection of their debts than they enjoyed at common law under the ordinary remedy by action.” 2 Steph. Com. 189. It cannot be necessary that both objects shall be attainable in order to warrant proceedings in bankruptcy. In many, perhaps a majority, of cases, the relief to the bankrupt is the only question, for there are no assets to distribute, and in many other cases the benefit and relief of creditors is the only object. A bankrupt may through fraud have lost his right to a discharge. An insolvent corporation whose property, including all franchises, has been distributed to creditors in involuntary proceedings in bankruptcy, takes little, if anything, by a discharge.

But this can be said for the petitioner that, if she is discharged in bankruptcy, and thereafter she is sued at law or in equity, she can plead the discharge in bankruptcy as well as coverture, and with regard to after-acquired separate property she will be relieved from all her present obligations. The legal as well as the general trend of the day is towards emancipating women, married or single, from all legal and other disabilities not bearing on the other sex, and particularly in all directions wherein she is thought to be handicapped in earning a living, taking care of her property, or carrying on business. And if a married woman is encouraged and permitted to carry on business, buy and sell—in short, be a trader, as she is in Florida—why, when she is unfortunate in business and burdened with debts, shall she not, like the married man, be entitled to claim and have her debts wiped from the slate under the more or less wise provisions of the bankrupt law?

On the whole matter, we conclude that neither the terms nor the policy of the bankrupt law of 1898, nor any outside public policy, preclude, because of coverture, a woman owing debts exigible against her property from being adjudicated a bankrupt; and it follows that the question stated at the beginning of this opinion must be answered in the affirmative, and that this petition for revision be denied.

And it is so ordered.

MacMAHON et al. v. UNITED STATES LIFE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1904.)

No. 1,223.

1. LIFE INSURANCE—PAYMENT OF RENEWAL PREMIUM—ACCEPTANCE OF DRAFT AFTERWARD DISHONORED.

Defendant issued life insurance policies, which were delivered on receipt of a year's premiums. They provided that they might be renewed from year to year by the payment of similar premiums within the days of grace allowed after the expiration of each year. After some years the insured wrote from Mexico asking defendant whether it had an agent there to whom a renewal premium could be paid, and, if not, to whom it could be sent, and received an answer that it might be sent to New York "by check, draft, or money order payable to the order of the company." Insured purchased a New York draft from a reputable bank in Mexico, payable to defendant's order, and mailed it to defendant, which received it before the expiration of the year, sent the insured renewal receipts for another year, and deposited the draft for collection. Subsequently, but before the draft was paid, the drawer bank suspended, and it was not paid. Defendant demanded the return of its renewal receipts, and, not receiving them nor further payment, declared the policies canceled, and refused to accept a renewal premium tendered a year later. *Held*, that the draft was not sent in payment of any indebtedness from the insured to defendant, the insured purchasing renewed insurance each year for cash; that having purchased a draft for the amount of a year's renewal premiums, payable to defendant and not indorsed by him, in accordance with defendant's instructions, which it received and accepted in payment for such renewed insurance before the suspension of the bank which issued it, defendant could not charge the loss thereon to the insured, and cancel his policies as for nonpayment of the premium.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Plaintiffs in error, citizens of Texas, sued defendant in error, a New York corporation, in an action at law on three policies of life insurance, aggregating \$10,000, issued by the defendant on the life of Rudolph C. MacMahon, payable on his death to the plaintiff Agnes MacMahon, his wife, who had, before suit, assigned a half interest to her coplaintiff Charles W. Batsell. The defense pleaded was that the policies became void before the death of the insured, on account of nonpayment of premiums. The Circuit Court sustained this defense, and directed a verdict for the defendant. The policies were issued on the 22d of January, 1896, by the defendant in New York, and were thereafter delivered to the insured in Texas. Annual premiums amounting to \$183.90 each year were payable in New York at the company's office, and in case of loss by death of the insured the policies were likewise payable there. Each policy contained the following provision: "This policy shall take effect only upon actual payment of the first premium hereon, and delivery of this policy to the assured (during the life time and sound health of the insured), in exchange for the company's receipt for said payment signed by the president, secretary, assistant secretary, or actuary. Failure to make payment of any subsequent premium, either to the company or to a duly authorized agent, in exchange for receipt signed as above, or non-payment of principal or interest on any note given in connection with this policy, when due, will render this contract null and void. Whenever this policy shall become null and void from any cause, all payments made hereunder shall become forfeited to the company, except that, after being in force three full years an extended insurance shall be allowed, in accordance with the requirements of chapter 690 of the Laws of 1892 of New York." The annual premiums for the first and second years were duly paid, and on the 25th of November, 1897, the insured wrote the defendant from Puebla, Mexico, where he was then sojourning, and, referring to the policies and the premiums

that would be due on the 22d of January, 1898, said: "I beg to come to you for information as to whom amount of premiums should be remitted. Have you an agent in Mexico authorized to receipt for such remittances, and if so, where? If not, shall I remit to New York office and to whom?" In reply, the defendant wrote him on the 3d day of December, 1897, as follows: "In reply to your communication of the 25th ult. would say that we have no agent in Mexico. We would therefore request you to please remit the premiums falling due on your policies 85,650-51-52 direct to this office within the grace allowed. Remittance may be made by check, draft or money order, payable to the order of the company." Thereafter the plaintiff, Agnes MacMahon, purchased from the bank of Leon Raast, of the associated firm of Leon Raast and Raast, Headen & Co., of Puebla, Mexico, a draft or bill of exchange, payable to the defendant's order, drawn on Chas. Einsiedler, Rept. del Credit Lyonnais, New York, for \$183.90 in American gold, for which she paid par, and this draft, without indorsement, was inclosed by the insured in a letter written from the City of Mexico to the defendant on the 10th of January, 1898, reading thus: "Enclosed please find draft for \$183.90, being the amount due on my life policies Nos. 85,650, 85,651 and 85,652, due Jan. 22. Please mail receipts to me at above address, and oblige." The defendant received this letter and the accompanying draft on the 20th of January, 1898, and deposited the draft for collection and credit with the Importers' & Traders' National Bank of New York, that being its usual bank of deposit. Acknowledgment was made to the insured by letter dated the 21st of January, 1898, reading as follows: "Your favor of the 10th is received with remittance of one hundred, eighty-three, 90-100 Dollars, being amount of premiums due Jan. 22, 1898, on policies No. 85,650-1-2. Enclosed please find receipts for same, with postal card, which kindly fill out with your P. O. address in full, date, sign and mail to us, to complete our records, on which your address now is, 'El Paso, Texas.'" Inclosed with this letter were the receipts referred to. One of the receipts read: "\$73.56. Received Seventy-three & 56-100 Dollars, being the annual premium due on the 22nd day of January, 1898, on Policy on the life of Rudolph C. MacMahon, Policy number 85,650, subject to all the provisions, conditions and agreements contained in the above mentioned policy and the application therefor, and those endorsed hereon, all of which are hereby referred to and made a part hereof. This receipt is not binding unless countersigned by the company's cashier or by _____, agent. [Signed] C. P. Farleigh, Secretary." Across the face of this receipt was the following: "Countersigned by Arthur C. Perry, Cashier," the words "Countersigned by" being stamped, and "Arthur C. Perry, Cashier," being signed. There were notices and statements printed on the back, which are not deemed material. The other receipts were exactly like this, except as to amount and the numbers of the policies. On the 21st of January, 1898, the Importers' & Traders' National Bank presented the aforesaid draft to the drawee for payment, and payment was refused for want of funds, but the drawee stated that he supposed funds were on the way, and if the draft should be held it would probably be paid. The draft was then held until the 24th of January, 1898, when it was again presented, and, payment being again refused, was protested. One of the intervening days was Sunday, and another, being Saturday, was half holiday. The bank of Leon Raast suspended payments on the 21st of January, the day after this draft was received in New York. On the 25th of January, 1898, the defendant returned the dishonored draft to the insured, in a letter reading as follows: "We beg leave to advise you that the draft of Leon Raast, of Puebla, Mexico, on Chas. Einsiedler; Rept. del Credit Lyonnais, New York, to our order, for \$183.90, enclosed with your favor of the 10th inst. to pay premiums due the 22nd inst. on policies 85650-51-52 upon your life was not paid upon presentation and has been protested for non-payment. We return said draft (with protest certificate) herewith. Said draft not having been paid, of course the premiums were not paid, and we therefore demand that you return at once the renewal receipts sent you on the 21st inst. As you are aware, the grace allowed for payment of these premiums expires on Feb. 22nd proximo, and unless the remittance for said premiums be paid by you on or before that day, the policies will become forfeited. You will also please send us remittance of \$1.25 for notary's fee on the protested

draft." Neither the receipts nor the draft were ever returned to the defendant, nor did the insured remit, and after some correspondence the defendant, on the 5th of April, 1898, wrote the insured stating that the policies had lapsed owing to nonpayment. On the 12th of December, 1898, the insured notified the defendant by letter that he would probably tender the premiums due in January, 1899, and the defendant replied on the 14th of January, 1899, reasserting that the premiums of 1898 had not been paid, and that the policies had consequently lapsed. Thereafter, on the 17th of February, 1899, the insured, through a representative of Wells, Fargo & Co.'s Express, tendered the defendant in lawful money, at its office in New York, \$183.90 in payment of the premiums due on the 22d of January, 1899. This the defendant refused to accept, on the ground that the policies had become forfeited and void by nonpayment of the premiums due on the 22d of January, 1898. No further payment or tender of premiums was ever made, and on the 30th of January, 1901, the insured died. There was a clause in the policies requiring proofs of death upon the company's blanks, and during the month of February, 1901, the plaintiff Agnes MacMahon applied to the defendant for blank forms to make out and furnish proofs of death, whereupon the defendant declined to furnish such blanks, and denied liability under the policies. Payment was formally demanded and refused, and the present action brought. The trial judge directed a verdict for the defendant. Plaintiff sued out error, and, with appropriate assignments, presents this action of the trial judge as erroneous.

A. L. Beaty, for plaintiffs in error.

Geo. Clark and D. C. Bolinger, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, having stated the case, delivered the opinion of the court.

In our opinion, the Circuit Court erred in directing a verdict for the defendant in this case. The policies were issued on the 22d of January, 1896, by the defendant, in New York, and were thereafter delivered to insured, in Texas. Each of these policies contained the following provision:

"This policy shall take effect only upon actual payment of the first premium thereon, and delivery of this policy to assured during the life-time and sound health of the insured, in exchange for the company's receipt for said payment signed by the president, secretary, assistant secretary or actuary."

It is clear that the dealings of the parties were for cash. No credit was in the contemplation of either, and there was no opportunity for a debt from the insured to the defendant to arise. The carefully guarded provisions with reference to the issuance of the binding receipts show that it was in contemplation of both parties that a receipt was to be delivered only upon payment of the premiums, and that its delivery put the contract evidenced by the policy into effect, to continue for the space of one year, with allowed grace. By the terms of the policies the company offered the insured the privilege of renewing the same in precisely the same manner—that is to say, for cash to be paid during the life of the policy (one year, with allowed grace)—and to obtain therefor a similar receipt, carefully guarded in its terms and execution, which should have the effect to continue the policy for the period of another year, with grace. In the provisions for such renewal—if renewal should be desired by the insured—there was the same absence of any intent on the part of either of the parties

to deal on credit, or to permit the bringing into being of a debt from the insured to the company. When the original dealings took place, the insured and his wife (the assured) were sojourning in Waco, Tex. The premiums then paid, and a like amount subsequently paid, carried the policies in full force up to the 22d of January, 1898. In the fall of 1897 the insured was sojourning in the city of Puebla, Mexico, from which city he wrote the defendant asking information as to whom future premiums should be remitted; whether they had an agent in Mexico authorized to receipt for such remittances, and if so, where? and, if not, whether he should remit to the New York office, and to whom? The defendant replied: "We have no agent in Mexico. You will remit premiums to the New York office within the grace allowed. Remittance may be made by check, draft or money order, payable to the order of the company." In compliance with this advice and directions, the insured procured in the city of Puebla, Mexico, banker's New York exchange, drawn "payable to the order of the company," for \$183.90, American gold, and forwarded the same by mail to the defendant at its New York office, where it was duly received by the defendant on January 20, 1898. At this time the policies were still in force, and the insured was not indebted to the defendant in any amount. On the afternoon of January 20, 1898, this banker's draft, "payable to the order of the company," and not indorsed by the insured, the defendant deposited for collection and credit with the Importers' & Traders' National Bank of New York, that being its usual bank of deposit; and on the same day the defendant issued and mailed to the insured's address premium receipts in the customary and usual form, which, in due course of the mails, came into the possession of the insured. On the most approved judicial authority, it seems clear to us that this transaction, in no one of its particulars, evidences or tends to show the existence of a debt from the insured to the defendant; but, on the contrary, negatives such existence, and permits no inference to be made other than that the dealing was strictly contemporaneous—the offer of a given price for a given kind and quality of insurance, and the acceptance of the offer as tendered. There is nothing in the evidence tending to show that at any time the insured obligated himself to pay the amount of the premiums, or did any act from which such an obligation could have been implied. The mere sending of the draft in compliance with advice and directions, "payable to the order of the company," and not indorsed by him, gave the defendant no right of action against him. It could not sue him on the draft, because he was not a party to it; it could not sue him on any obligation to pay the future premiums, because he had entered into no such obligation. He had parted with his money to the "drawer bank" in the city of Puebla, Mexico, and obtained the drawer bank's draft for the amount in American gold, which was the price of the article he wished to buy, namely, the defendant's receipts, which would put in force for another given period from the 22d of January, 1898, the policies originally obtained from the defendant. If we grant that the defendant need not have accepted this draft, and need not have executed and delivered to the insured, by mailing the same to him, the binding receipts until the draft was paid (as to which we express no opinion),

it did, immediately upon receiving the bill of exchange, execute and forward to the insured the very article which the bill was sent to buy. If the defendant had brought an action at law against MacMahon for the amount of the premiums, counting on the same as a debt, or had brought its action on the draft, the courts would have held that MacMahon was not bound, and that the defendant's recourse was on the "drawer bank." In determining the question before us, we deem it immaterial whether the contracts of insurance are held to be New York contracts or Texas contracts. In our consideration of this case we have not proceeded on any theory that the law of New York has peculiar application to the action on these contracts. The decisions cited have the authority of the high court which rendered them, and of the sound reasoning with which they are supported in the opinions which accompanied their deliverance. *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 620; *Shaw v. Insurance Company*, 69 N. Y. 292; *Gibson v. Tobey*, 46 N. Y. 649, 7 Am. Rep. 335; *Youngs v. Stahelin*, 34 N. Y. 264; *Noel v. Murray*, 13 N. Y. 167; *Whitbeck v. Van Ness*, 11 Johns. 409, 6 Am. Dec. 383.

Of the decisions of the United States Supreme Court, cited by counsel for defendant, we have examined: *Iowa Life Insurance Company v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; *Mutual Life Insurance Company of New York v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181; *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Klein v. Insurance Company*, 104 U. S. 88, 26 L. Ed. 662; and *Thompson v. Insurance Company*, 104 U. S. 252, 26 L. Ed. 765. We have found nothing in either of them which is inconsistent with the views we have expressed. The case of *National Loan & Insurance Company v. Goble*, 51 Neb. 5, 70 N. W. 503, does support the contention of the defendant, but we are satisfied that it is in opposition to the weight of precedent, and we decline to follow it.

There was, in these dealings of the insured with the defendant, not the slightest odor of fraud or trace of unfairness. The exchange on New York was drawn in the city of Puebla, Mexico, by a bank in good standing and credit at the time the bill was purchased, and was sent by mail to the defendant, and was received by it at New York before the "drawer bank" suspended payment. In accordance with the defendant's directions, the draft was made "payable to the order of the company." It was not indorsed by the insured. It cost the insured in actual money the precise amount for which it was drawn. The insured having been induced by the defendant to purchase it, and having parted with his money in perfect good faith, and duly delivered it to the defendant, which thereby became the owner of it, the resulting loss must rest with it, the owner at the time the loss occurred. The transaction, therefore, must be held to constitute payment of the premiums which the insured wished to pay and for which the defendant receipted, giving the policies effect for one year, with grace, from the 22d of January, 1898.

There can hardly be a question that the subsequent actions of the defendant relieved the insured and the assured from the duty of re-mitting premiums to cover the subsequent years up to the death of

the insured. Within the year and allowed grace from the 22d of January, 1898, the insured made actual tender of the amount to meet the premiums required to give the policies effect after the 22d of January, 1899, and the money was refused on the ground that the policies had become void. The strictest law and the most searching equity did not require the repetition of this tender, without notice from the defendant that it would be received. The defendant having received payment of the third premium by the acceptance of the draft and its action thereon, and having refused to accept the tender subsequently made, the policies did not become void, and the assured's rights thereunder were not forfeited. Of course, the unpaid premiums are to be deducted, with interest, from the time at which they would have been received but for the action of the defendant.

It follows that this case must be reversed and remanded to the Circuit Court, with directions to that court to grant the plaintiff a new trial, and thereafter to proceed in the same in conformity with the views expressed in this opinion.

The question we have discussed seems to be the only one that is really controverted between the parties, therefore the other features of the case require no comment from us.

Reversed and remanded.

PARDEE, Circuit Judge, concurs in the result.

On Rehearing.

(April 5, 1904.)

PER CURIAM. The petition for rehearing is denied.

HECKMAN et al. v. SUTTER et al.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1904.)

No. 792.

1. PUBLIC LANDS—ALASKAN TIDE LANDS—RIGHT OF OCCUPANCY.

The provision of section 8, Act May 17, 1884, c. 53, 23 Stat. 24, 26, establishing a civil government for Alaska, and creating a land district therein, that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress," applies to all lands, including tide lands, over which the federal government has exclusive jurisdiction and power of disposal, and protects possessory rights which were then exercised and claimed for fishing or other purposes by occupants of adjoining uplands against others who assert a common right to fish thereon.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

Chickering & Gregory, for appellants.

Piles, Donworth & Howe and Winn & Shackelford, for appellees.

Page, McCutchen & Knight, amici curiæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The case, as well as the acts of Congress bearing upon the question involved, will be found stated in the opinion of this court delivered on the former hearing. 119 Fed. 83, 55 C. C. A. 635. We there said:

"When, in 1884, Congress undertook to provide a civil government for Alaska, it made of the territory a land district; located a United States land office at Sitka; put in full force and effect therein 'the laws of the United States relating to mineral claims and the rights incident thereto,' with certain conditions not necessary to be mentioned, withholding therefrom the application of the general land laws of the United States, and expressly declaring 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.' Section 8, Act May 17, 1884, c. 53, 23 Stat. 24, 26. There has been no 'future legislation by Congress' that applies to the present case, for this case involves no question of purchase or entry, and concerns only the right of occupancy and use of certain of the lands of the United States, including a small strip of tide land, as against a similarly asserted right on the part of third persons, which occupancy and use in no manner interferes with the right of navigation of the public waters. The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high-water mark. Nor is it surprising that Congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands, of whatever character, by means of which they eked out their hard and precarious existence. The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known to the legislative branch of the government, as well as the fact that that business, if conducted on any substantial scale, necessitated the use of parts of the tide flats in the putting out and hauling in of the necessary seines. Congress saw proper to protect by its act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusion by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below securing the complainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants, and for years theretofore had been so held and maintained."

Further consideration has but confirmed us in the correctness of these views. The act of 1884 made no provision for the disposition of the title of any of the public domain except mineral lands; on the contrary, it thereby expressly withheld from Alaska the application of "the general land laws of the United States." Section 8, Act May 17, 1884, c. 53, 23 Stat. 24, 26. Those general land laws are not, therefore, the source from which to derive the meaning of Congress in using the words "any lands" in the proviso of the act of May 17, 1884, "that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." Having extended to Alaska the laws of the United States relating to mineral claims only, if Congress had intended to protect the Indians and other persons in their possession of or claim to such mineral claims only, one would naturally expect the intention to be manifested by the words "such mineral claims," or "such mineral lands," or other equivalent limited expression, and not by the broad and comprehensive words "any lands," used in the act of 1884. Nor is it reasonable to suppose that Congress

intended the broad and comprehensive terms thus used by it to be limited by the interpretation put upon the term "public lands" in the general land laws, which it expressly provided should not be in force in Alaska. In providing for a civil government for that territory, as it did by the act of 1884, Congress was dealing with the then condition of the country; and in providing for such a government it saw proper to protect the existing possession of any and all lands then held by the Indians or other persons in the territory. These, as Congress must have known, were at the time but few in number. It did not provide for the protection of the possession of any lands by any person or persons who might acquire possession or make claim thereto in the future. It is true that it has never been the policy of the United States to dispose of its tide lands, but, on the contrary, that its policy has always been to retain them for the benefit of the future state in which they might lie. But it is thoroughly settled that the United States has all the power of national and municipal government over its territories, and may, if it sees fit to do so, grant rights in or titles to the tide lands of its territories as well as the public lands therein situated above high-water mark. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, and the numerous cases there cited.

Most of our people thought that Mr. Seward was engaged in a sorry business when, in 1867, he bought from Russia for \$7,200,000 what is now the territory of Alaska, from whose ground is now taken by the enterprising miners more than that amount in gold in a single summer. Who knows but that, with its rapid settlement, the building of roads and railroads, telegraph and telephone systems, the development of its vast fisheries and mines and other possible resources, Congress may some day admit it to statehood, with the same right to the tide lands within its borders that passed to California, Oregon, and Washington upon their admission to the Union? In each of these states, in providing for the disposal of such tide lands, the Legislature gave a preferred right of purchase to persons in possession thereof, and who had erected improvements thereon. *St. Cal.* 1867-68, p. 716, c. 543; *Hill's Ann. Laws Or.* 1892, § 3599; *St. Wash.* 1889-90, p. 431. In the state of Washington the statute cited conferred upon the upland proprietor the preferred right of purchasing the tide lands in front of him, and the Supreme Court of that state in the case of *West Coast Improvement Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441, held that no mere trespasser should be allowed to occupy or in any manner interfere with the possession of the upland owner of the tide lands upon his front, until such time as he could exercise his right to purchase the same from the state; saying, among other things:

"If the courts should hold that the upland owner had no right to prevent one having no claim whatever from squatting upon tide lands in his front, we should have such a state of facts existing as would tend greatly to the prejudice of the public interests. The delays of the law are such that it may be years before it will be finally determined as to the right to acquire ownership under the state, and if, during all that time, the possession of such tide lands is to be the subject of an uncontrolled scramble between those claiming no right whatever thereto, a most objectionable state of affairs will be inaugurated. In our opinion, the courts are not obliged to sit idly by and allow the unrestrained

action of the officer in charge in negligently permitting the boat to be overloaded, in consequence of which it was swamped, and a number of the passengers were drowned, such negligence of the officer was with "the privity or knowledge" of the company, which is not entitled to a limitation of its liability for claims arising out of the disaster, under Rev. St. §§ 4283-4285 [U. S. Comp. St. 1901, p. 2944].

Appeal from the District Court of the United States for the Northern District of California.

For opinion below, see 123 Fed. 838.

H. M. Wright, for appellant.

Nathan H. Frank, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. In September, 1900, the steamer Albion, owned by the appellee, Kimball Steamship Company, was anchored in Golovin Bay, Alaska, about a mile and a half from the beach; and, being ready to proceed on a voyage from that place to San Francisco, one of her small boats was sent, in charge of her second officer and two sailors, to the shore, to bring to the steamer such persons as intended to take passage on her. In returning, the boat capsized, and some of the passengers were drowned—among them, Louis G. Weisshaar. Of his estate Ella M. Weisshaar was afterwards appointed administratrix, and as such administratrix she commenced an action at law in the superior court of the city and county of San Francisco, state of California, against the appellee, for the recovery of damages in the sum of \$40,000 for the death of her husband. That action had not been tried, but was at issue, when the appellee filed in the court below its petition, by virtue of sections 4283-4285 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2944], for the purpose of contesting its liability for any damage or injury growing out of the accident, and for the purpose of limiting its liability in the event of being held responsible. In its petition the petitioner alleged that the overturning of the boat—

"Was in no way caused by fault or negligence on the part of the master or the crew of said steamer Albion, or any of them, and that the loss, damage, and injury, if any, thereby done, occasioned, or incurred, were without fault on the part of your petitioner, and without its privity or knowledge, but that the fault of the said swamping and overturning was due entirely to the acts and conduct of the passengers in said boat, in standing upon their seats in said boat and causing her to overturn, combined with inevitable accident occurring by reason of the condition of the wind and wave at the time of said swamping and overturning; that nevertheless certain persons have made claims against petitioner for losses arising out of said swamping and overturning, which said claims are for alleged loss of life of some of such passengers, and alleged loss of baggage so being transported as aforesaid; that among said claims is the claim of Ella M. Weisshaar, as administratrix of the estate of Louis G. Weisshaar, deceased, which said Louis G. Weisshaar is claimed by said claimant to have been one of the passengers so carried on said boat, and so drowned by reason of said swamping and overturning; that other claims have been asserted against your petitioner, and that other claimants have threatened to file libels against said steamer or to bring actions against your petitioner; and that your petitioner apprehends and is in fear that other claims in addition to those set forth will be presented against it, or said steamer Albion, by other

parties who may have sustained loss, damage, or injury by reason of the matters and things hereinbefore set forth."

It is further averred in the petition that there was freight pending by reason of the trip on which the steamer was engaged at the time of the accident, amounting to \$2,265; that the value of the steamer at the close of the voyage did not exceed \$15,000, and that the amount of the claims already presented, and as apprehended and threatened, far exceeds the value of the steamer and the pending freight; that there is no lien on the steamer prior or paramount to any lien that may have attached by reason of the matters alleged.

The value of the steamer and the freight pending were duly appraised, and the administratrix of the estate of the deceased, Weisshaar, answered the petition, putting in issue its material averments, and presenting a claim for damages for the drowning of her husband. In its opinion, the court below said:

"It sufficiently appears from the evidence that Louis D. Weisshaar was one of the persons drowned. It also appears that the boat upon the occasion referred to carried a greater number of persons than allowed by law, and also some baggage. It was down by the head, and so much overloaded that it had but little freeboard, and, in consequence thereof, as soon as the rough water of the bay was encountered, filled with water and capsized. Before it left the beach, the second mate of the Albion, who was in command of the boat, notified those who were in it that it was overcrowded, and asked some of them to get out and wait until the boat should return for them. Some of them did go ashore, but, assured by one of the passengers that there was room in the boat for more, most of them came back again; the officer still protesting that it was overcrowded. Such, in substance, is his testimony, and in this he is, to some extent, corroborated by Carville and De Lay, two witnesses whose depositions were offered in evidence by the claimant. The deceased had not actually engaged passage upon the steamer, but was going aboard for that purpose." 123 Fed. 838.

The court below very properly held that the petitioner, having undertaken to convey the deceased to the steamer for passage thereon, was under the same obligation to use proper care in transporting him as if he had paid for or engaged his passage in advance. The court below, however, further held that the deceased was guilty of contributory negligence in remaining in the boat after he and the other passengers therein were notified by the officer in command; that, "in so remaining, the deceased, as well as the other passengers in the boat, assumed the risk resulting from its overcrowded condition, and voluntarily encountered a danger which a prudent man with notice would have avoided." The court accordingly dismissed the claim of the administratrix of the estate of the deceased, Weisshaar, and entered a decree to the effect that the petitioner is not liable for damages growing out of the overturning of the boat.

The evidence shows that the capacity of the boat was 14 persons, without baggage. At the time of the accident in question it contained 18 persons, a trunk, 2 tool chests, and 3 or 4 sailors' bags. The boat was in charge of the second officer of the ship, who had under him two sailors, and, when ready to receive its passengers was stranded, with its bow well up on the sands of the beach. The evidence shows that the deceased, Weisshaar, was the fifth man to enter the boat, and took his seat about amidship. He had been preceded by a Capt. Tyson, and

by the president of the appellee steamship company, Mr. Marsden. In his direct examination the ship's officer in command of the boat was questioned and answered as follows:

"Q. State what happened at the shore before you left there, with respect to the passengers getting in, and your protesting, and whatever else happened? A. The passengers crowded into the boat, and I told them that 'this boat only holds fourteen passengers.' After some talk, five or six passengers went out of the boat, and went on the beach again. I was just going to leave, when Mr. Tyson sang out: 'There is lots of room. Come on, boys.' He mentioned a few names. Joe Corbell was among them. He says, 'There is lots of room.' Those passengers had left the boat, and I heard them say, 'I don't think we will lose our fresh-meat supper,' and they rushed into the boat the second time. Q. What did you do? A. I told them it was risky. The boat was overloaded, and there were three men left on the beach. I said: 'I have to go back to the beach and make another load. You might as well wait.' They laughed at me and told me I was a coward; that I was scared. I said: 'Well, boys, it is smooth water alongside the beach, but it will not be outside 20 or 30 yards. It will be rough. You had better do as I tell you.' They just laughed at me, and said I was afraid, and pushed the boat out, and out they went."

At the end of his direct examination this witness was asked, "Did you have any means or power to prevent them?" to which question he answered: "I had no power whatever. I was powerless. They took the command away from me, and took control of the boat, and I could not do nothing."

A careful perusal of the entire testimony of this witness, of itself, shows that there was no justification whatever for his statement that the boat was started on its perilous journey against his protest, or that the control of it was taken from him by the passengers. If powerless in the premises, it was only because he did not have the stamina to assert and exercise the authority with which he was clothed, and which the law and good seamanship made it his imperative duty to enforce. The evidence is overwhelming not only that he made no objection to starting the boat with its overload, but that, according to his own testimony, one, at least, of his own sailors took an active part in shoving it off the sand and into a floating condition, which appears without conflict to have been a matter of considerable difficulty; so much so that several of the passengers had to assist the sailors in accomplishing it—some by means of oars, and others, having high boots, by getting into the water and pushing the boat.

Let it be assumed that, when the officer announced that the boat was overloaded and that it was "risky," it became the duty of all the passengers to get out—as well those who had entered when there was ample room as those who had caused the overloading—and that every one who remained thereupon became guilty of contributory negligence; such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip, but, after starting, and while it was yet in smooth water, and after observing that it was down by the head, and with but little freeboard, made no effort whatever to return to the shore to make the boat safe by discharging some of the passengers. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made

nothing more than a milk and water protest against the entry of any one; and even if there had been on the part of the passengers an effort to overpower the officer and force their way into the boat—of which there is not the slightest evidence—it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe. Not the slightest attempt appears to have been made by this officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to shore while he yet had sufficient opportunity, the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Louisville & Nashville Ry. Co. v. East Tennessee, V. & G. Ry. Co.*, 60 Fed. 993, 9 C. C. A. 314; *Harrington v. Los Angeles Ry. Co.* (1903, Cal.) 74 Pac. 15.

This doctrine, which is well established, fits the present case exactly. The case of *Lynn v. Southern Pacific Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710, is, in principle, also precisely in point. In that case the plaintiff passenger was unable to find room inside a car, and therefore stood upon the platform, from which he was thrown and injured; the evidence tending to show that the train was going at excessive speed. In affirming a judgment for the plaintiff, the Supreme Court of California said:

"The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances; but, if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligation to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars."

So, here, as has already been said, if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to. But speculation on that point is no answer to the gross neglect of duty on the part of the officer of the ship.

Moreover, the evidence shows that the negligence of the officer in command of the boat was committed in the personal presence and within the actual knowledge of the president of the appellee corporation, who, so far from seeking to enforce the performance of his duty by that officer, acquiesced in his neglect of duty, as affirmatively appears from the president's own testimony.

The limitation of liability provided for by the statute under which the present proceedings were had is, according to its express terms, to be allowed only when the loss, damage, or injury occurs "without the privity or knowledge" of the owner. In the case of *The Republic*, 61 Fed. 109, 9 C. C. A. 386, the privity or knowledge of the corporation consisted in the negligence of its president, who, by his omission of

proper care in his examination of the vessel, failed to discover her defective condition; and the Circuit Court of Appeals for the Second Circuit there held that the injuries and death occasioned to the excursionist in that case could not be said to have occurred "without the privity or knowledge" of the owner. We think that decision directly in point here. "Privity and knowledge," said Judge Brown in *The Colima* (D. C.) 82 Fed. 665, "are chargeable upon a corporation, when brought home to its principal officers or the superintendent, who is its representative." See, also, *Quinlan v. Pew*, 56 Fed. 111, 5 C. C. A. 438; *Lord v. Goodall, etc., S. S. Co.*, 4 Sawy. 292, Fed. Cas. No. 8,506.

The judgment is reversed and cause remanded, with directions to the court below to dismiss the petition at petitioner's cost, leaving the administratrix of the estate of the deceased, Weisshaar, at liberty to pursue her action for damages in the state court.

THE HELEN G. MOSELEY.

MOSELEY et al. v. ROB. M. SLOMAN & CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1904.)

Nos. 72, 73.

1. COLLISION—STEAMER AND SCHOONER CROSSING—INEFFICIENT LOOKOUT.

A collision occurred at sea in the night between a steamer and a schooner on crossing courses. The night was clear and the wind light, but it was shown that the schooner had steerageway, and that her lights were burning and of more than usual size. While the evidence as to her course was conflicting as between the witnesses from the two vessels, it did not sustain the contention of the steamer that she was on such a course that her lights could not be seen in time to have prevented the collision, although the steamer's lookout and three of her officers testified that they were watching, and did not see the lights until immediately before the collision. *Held* that, under such evidence, the steamer, as the burdened vessel, must be held solely in fault.

2. SAME—INCONSISTENT TESTIMONY OF SAME WITNESSES.

Where the testimony of the crew of a schooner as to her course before and at the time of a collision, and as to the bearing of the light of an approaching steamer with which the collision occurred, cannot be correct in both particulars, or the collision could not have occurred, assuming the witnesses to be honest, the testimony as to the course is entitled to preference, as less liable to error.

Appeals from the District Court of the United States for the Eastern District of New York.

These causes come here upon appeals from decrees of the District Court, Eastern District of New York, holding the steamer *Albano* solely in fault for a collision with the schooner *Helen G. Moseley*, which occurred about 1 a. m. September 10, 1901, off Tucker Beach, N. J.; the steamer being bound from New York to Newport News, and the schooner from Fernandina to New York. The night was dark, but good and clear for seeing lights. The wind was light from about the southwest. The day before, there had been a strong breeze from the N. E., and there was still an easterly sea bearing in. The *Albano* was about 380 feet long, and her bridge was located about amidships. The schooner was three-masted, about 150 feet long, and 566 tons register. The opinion of the District Court is reported in 117 Fed. 760, and may be referred to for facts not hereinafter restated. The testimony of the most important witnesses was taken by deposition.

Harrington Putnam, for appellants.

Edward E. Blodgett, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The claim of the schooner is that she was on a course of N. E. by E. (having changed to that course from a N. E. one about midnight), with the wind directly astern, and sailing with her sails winged out—i. e., head sails trimmed in, foresail hard amidships, mainsail on the port side, and spanker on the starboard side—and going two or three knots. A bright light was first seen by the lookout, and reported to the mate, who was in charge of the navigation, and was at once seen by him. It bore about three points on the port bow, and a little later the green side light of the steamer was seen bearing in about the same direction. It was expected that the steamer would change her course and keep clear, and the schooner held her course. The steamer came on without apparent change, and collided with the schooner, striking her on the port bow at an angle of about four points.

The steamer's story is that she was on a course S. W. by S. when the lookout reported a red light ahead. The second officer, who was in charge of the navigation, and others on the bridge at the same time, saw the loom of sails slightly on the starboard bow, but very close aboard, with a small, dim, red light, apparently heading to the southeastward. The Albano's helm was instantly put hard astarboard, her engines stopped, and put full speed astern; but so close was the schooner that the wheel was barely over, and the Albano had not swung off as much as a point, when her starboard bow was struck a square blow by the schooner's stem.

From the narrative of neither side is there any warrant for holding this to be a case of inevitable accident. There was fault somewhere. The Albano, being a vessel under steam, was bound to keep out of the way of the schooner under sail, and, having failed to do so, can excuse herself only by showing fault on the part of the schooner. Manifestly the proximate cause of the accident was the failure of those on the steamer to discover the red light of the schooner until she was within one length of them. Judging from the event, the navigator of the steamer would have used better judgment, had he at once ported to the schooner's red light, but that bit of navigation came so close to the collision that it need not be considered. The brief moment left in which to navigate was primarily responsible, and its briefness was the result of failure to make out the schooner earlier. The second officer was in charge of the steamer's navigation. The boatswain was on the bridge with him, performing there the duties of a junior officer. The quartermaster had served in the German navy; the lookout, in the German army. All were experienced men, and had undergone special eyesight examination. The captain was also on deck, but he had returned so recently after a momentary absence in the chartroom to work out an observation, taken to ascertain location off shore, that he should not be counted among the watchers for lights. It is difficult to understand how such a body of officers and men, at the beginning of their watch, could have failed

to see the red light earlier, if it had been visible. The circumstance that it was lower than the plane of observation of the lookouts, that there was still an easterly sea, that several other lights had recently been seen and kept under observation, thus tending to distract attention, seem hardly sufficient to account for a temporary aberration, lasting some minutes, on the part of four competent observers simultaneously. Nevertheless individual aberrations of sight and attention do occur, even among the ordinarily careful, and, however enormous the odds may be against such a simultaneous occurrence among four persons, the combination is possible. Therefore, under well-settled principles, unless there can be shown some cause, due to the schooner, why her red light was not shown to the steamer until in the very jaws of the collision, the conclusion must be that the steamer was in fault.

When the libel was filed and the proofs were taken, it was intimated that the red light had not been lit until just before the steamer sighted it; and effort was also made to show that the light was a dim one, of insufficient size. The testimony, however, shows conclusively that the light was a proper one, of more than regulation size; was properly set and properly burning. This testimony need not be discussed, because on this appeal no question is made of the sufficiency of the light. Nor is there any contention in this court that either the head sails or anything else obscured or hid the light. The only proposition now relied on by the steamer is that the schooner was heading S. E., or so far to the south of east that the steamer was in reality approaching her abaft the range of her lights, and that some slant of wind or a freshening land breeze brought the schooner far enough around to the east again just before collision to show her regulation side light—not its full surface flame, but only a glimmer of the edge rays shining backward as the surge of the sea swung the schooner over to port. If this were so, not only was the failure to see her red light not a fault, but the schooner herself would be in fault for not exhibiting a flare-up light or a torch to the vessel approaching abaft her beam.

The only question to be examined, therefore, is, on what course was the schooner sailing? She insists it was N. E. by E. The steamer contends that it was S. E. The District Court reached the conclusion that her heading was "E. by S., or E. S. E., or E. S. E. $\frac{1}{2}$ S." Since neither of these three courses would bring the steamer abaft the range of the schooner's lights, the District Court held her in fault for failure to discover the red light sooner.

There is a wide discrepancy—seven points, nearly a right angle—between the courses contended for by the respective parties. Such a difference of course in a vessel propelled by sails might be expected, under certain conditions of wind, to produce changes in the position of the sails. The first thing to do is to see which of the suggested courses most nearly harmonizes with the testimony in the case. Some facts are here undisputed. The course of the steamer was S. W. by S. The schooner had steerageway and was going about two knots. Her witnesses so testify, and the second officer and the captain of the steamer both admit that she had way enough

for steering. Whatever may have been the condition of the weather earlier in the night, there is no proof to sustain the contention made in argument that just before the collision the schooner was drifting, not sailing. As the vessels approached, the schooner bore on the starboard bow of the steamer. All the witnesses from the schooner say they saw the Albano's green light, and all the witnesses from the Albano saw the schooner's red light on their starboard bow.

A course of S. E. would be an extraordinary one for a sailing vessel with a southwesterly wind, bound from where she was to New York. Her correct course would be, as she claimed, about N. E. by E. There should be a distinct weight of persuasive evidence to warrant the conclusion that she was so far off her course as the steamer contends she was. The District Judge has discussed the evidence, and made careful calculations of the headings of the vessels at different times. It is not necessary to quote. His opinion may be consulted. The calculations are accurate if all the factors which enter into them are correctly found. It was assumed, or, rather, deduced from disputed testimony, that the angle of collision was nearly a right angle—fully seven points—and that the steamer, when sighted by the schooner, bore three points on the latter's port bow.

As to the angle of collision, all the witnesses from the steamer give it as about seven points, or nearly a right angle. It should be noted, however, that none of them saw the schooner until a few seconds before collision; that they then believed she was crossing their own course at about a right angle; that this belief was induced by the loom of her sails as they came into view, apparently on the port side of the schooner. "I was right into them broadside," says the second officer of the Albano. "* * * I was of opinion that she was bound to the southward." It may be assumed that some, at least, of the witnesses from the steamer, deduced their conclusion that the heading of the schooner at collision was such as to make a seven-point angle, from the appearance of her sails spread broadside in front of them. The master of the schooner and one of the watch below, both of whom hurried on deck in response to the warning of an imminent collision, agree with the steamer's witnesses. The view of the schooner's wheelsman was obscured by the sails, and he gives no estimate, while her mate and lookout give the angle at three to four points; and, of the two surveyors who examined the wound, one, called by the steamer, admitted the blow might have been an angling one, and the other, called by the schooner, estimated the angle of collision at two to three points. The testimony from the schooner is uniform that she was winged out during the former watch, which ended at midnight. This is inherently probable, because, with a southwesterly wind, it was proper navigation to make her destination. Moreover, her testimony is to the effect that during that watch her main boom and spanker boom were both fastened out with tackles, so that the booms should not swing back and forth. This also was proper seamanship, and the testimony is inherently probable. Her witnesses also testify that those tackles were not touched after the new watch began, down to the time of collision. Inasmuch as the wind did not shift more than a point during this

period, there is no conceivable reason why the tackles should have been disturbed; and we are fully persuaded that at the time of collision, whatever her heading may have been—whether it was still nearly N. E. by E., or had dropped down more to the southward—her after sails were still winged out. Appellants' counsel has inserted in his brief two lithographs which admirably illustrate the different appearances presented by the sails of a schooner when she looms through the darkness of night, at an angle of about two points, and also at a right angle. The second one represents a vessel on the starboard tack with her sails to port and trimmed in. If the obscurity were a shade greater, and the after sails were winged out, so that the observer saw them end on, the effect would be different; and there is some weight in the argument of the appellees that the observers from the Albano might, in the darkness, have been deceived by the winged-out sails, towards which they seemed to be approaching broadside, into the belief that they were encountering a vessel crossing their course at right angles. The weight of direct evidence is in favor of the conclusion that the collision was at a seven-point angle, but not so strongly as to require the discarding of some other proposition inconsistent with such result, but established by more convincing evidence.

As to the bearing of the steamer: The District Judge says:

"The crew of the schooner state that she was headed N. E. by E.; that the steamer's white light, and later her green light, bore three points on the schooner's port bow; and that the steamer did not change her course. With such heading of the schooner and bearing of the steamer, the accident could not have happened, and the red light not the green light of the steamer should have appeared."

This is correct, and is made very clear by a diagram in appellants' brief. But it is certain that it was the steamer's green light which appeared. Not only do the schooner's witnesses so testify, but all the steamer's witnesses concur in the statement that the schooner appeared off the Albano's starboard bow. It is quite plain that the statements of the schooner as to both course and bearing cannot stand. Which one is to be rejected? Apparently the one which is most liable to error, and whose elimination will make the harmonizing of the remaining testimony most easy. As to the course of N. E. by E., the lookout, Ommundsen, who came on watch at 12 o'clock, merely says the schooner was going before the wind. Normand, who had steered in the prior watch N. E. by E., turned the wheel over at 12 o'clock to Hornsley, and gave him that course. Hornsley, the wheelsman, said he was given this course of N. E. by E., and that he steered it. Keiley, the mate, says that when he came on deck, at 12 o'clock, he "altered the course to N. E. by E.," and that such course was held.

As to the bearing of the steamer's light: Ommundsen, lookout, says "it was pretty near ahead; about three points on the port bow." Hornsley says it was "about two or three points on the port bow." Keiley says "about three points on the port bow." Now, in the testimony as to course, assuming the witnesses to be honest, there is one source of error, viz., defective memory. The witnesses testify

to facts, not to opinions. The man who gave an order, the man who heard it, the man who watched the compass card, all testify to their recollection of absolute facts. On the other hand, the testimony as to bearings is exposed not only to error resulting from imperfect memory, but also to error from careless or unskillful estimates. The witnesses testify to their recollection of an opinion formed by them, which opinion may not originally have been an accurate one. Upon the whole, it might well be supposed that the schooner's testimony as to her course should prevail over her testimony as to the varying estimates of her watch as to bearings. And this is confirmed by a bit of testimony given by the mate. It was brought out on cross-examination that, when he first made the steamer's light, he took its compass bearing, and found it "just about N. E." That would be one point off the port bow, and with that bearing the collision might have happened as the schooner's witnesses describe it, except that the angle of collision would be much acuter than seven points.

On the whole, we find great force in the argument that the angle was not more than three points, and that the schooner's course was as she claims. Such findings would reconcile the other testimony in the case. But we need not go so far. We are entirely satisfied that the evidence fails to show that the schooner was heading so much to the south of her course as to obscure the steamer's view of her red light. That is the conclusion reached by the District Judge.

The decrees are affirmed, with a single bill of costs and interest on the decree against the Albano.

MEXICAN NAT. R. CO. v. PALMER.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,287.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—ISSUES—BURDEN OF PROOF—REQUESTED INSTRUCTIONS.

Where, in an action for injuries to a Pullman porter in a railroad wreck, whether he was injured at all in the wreck was in issue, and the evidence thereon was strongly conflicting, defendant was entitled to a charge that the burden was on plaintiff to establish by a preponderance of the evidence, to the jury's satisfaction, the derailment of the train on which plaintiff was serving as a porter, and that he was injured in the manner alleged in his petition, and that if he had failed to so establish either of such propositions as alleged he could not recover.

2. SAME—INSTRUCTIONS GIVEN.

Such instruction was not covered by a charge that the accident was alleged to have happened at a particular point on defendant's road; that plaintiff in his petition claimed that the derailment of the coach in which he was riding was caused by defendant's negligence in running the train at an excessive and dangerous rate of speed, and by the defective condition of defendant's track at the point where the accident occurred; that if plaintiff's injuries resulted from either of these causes, or both combined, defendant would be liable; and that the burden was on plaintiff to prove his case as alleged; together with a subsequent charge that in civil cases, like the present, the jury were entitled to predicate their finding on a preponderance of the evidence.

In Error to the Circuit Court of the United States for the Southern District of Texas.

Thos. W. Dodd, for plaintiff in error.

E. A. Atlee and Chas. H. Bertrand, for defendant in error.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

NEWMAN, District Judge. This case is here on writ of error from the Circuit Court for the Southern District of Texas. The case in the court below was a suit by Frank Palmer against the Mexican National Railroad Company for damages for injuries which he alleges he received by the derailment of a train on the Mexican National Railroad in the Republic of Mexico, and near the station of Maravatia, on said road. On the trial of the case the plaintiff obtained a verdict, and judgment was entered thereon.

Frank Palmer, the plaintiff, was a porter on a Pullman car called "La Gitana." The train consisted of the engine and tender, baggage car, three Pullman cars, and two ordinary coaches, second and third class. The "Matamoras" was the front sleeper next to the baggage car, "La Paloma" was next, and "La Gitana," on which the plaintiff was porter, and on which he was riding, was third. The two ordinary coaches were in the rear. The cause of the accident, it appears, was a broken rail, although it is not material to the issue here what caused it. It seems that the engine and baggage car passed over the broken rail, but the "Matamoras" and "La Paloma," the two front sleepers, were derailed. "La Gitana," in which the plaintiff was riding, was not derailed, although its platform was broken in the accident. The plaintiff says that "the trucks that the front part of his car mounted had left the rail, and that is what stopped the car."

The plaintiff, according to his testimony, at the time the accident occurred, was sitting on a stool in the aisle at the front end of the sleeper. He was near a window, and near a swinging door between the main portion of the car and the ladies' toilet room. In his direct testimony plaintiff says that "it gave a quick jolt, and threw me off my seat, and threw this leg through the window (indicating his right leg)." On cross-examination he said: "The sudden stopping of the train threw my leg through the glass that is in the inner door that one goes through to go to the ladies' toilet room. The glass must be two and a half feet from the floor in the door. The door is on automatic hinges, that it opens either way, backward or forwards." The plaintiff offered evidence of two physicians to show that he had a badly ulcerated leg. Neither of the physicians stated the cause of the condition of plaintiff's leg, but substantially stated that it could be the result of an injury such as plaintiff claimed to have received. One of the physicians first examined plaintiff in June, 1901, and the other first examined him in July, 1902.

While the plaintiff's petition alleges that the accident occurred on February 4, 1901, it seems really to have occurred on January 4, 1901. Plaintiff's suit was commenced on the 25th of February, 1902.

The defendant offered evidence tending to show that plaintiff made

no complaint of any injury on the night of the accident, or the next morning, and gave no evidence of injury.

Part of the testimony of the conductor of the Pullman cars was as follows:

"My duty was to see what damage was done, and make a report of it. I examined the car carefully, and there was no damage to the car except the front platform. I made a damage report of that train, and turned it in. I examined the door that swings on automatic hinges, and the glass in that door, and the whole body of the car, and there was no broken glass in that door or in the car at all."

It will be seen from the foregoing that a clear issue was made in the case as to whether the plaintiff was injured as claimed.

Defendant's counsel requested the court in writing to charge the jury as follows:

"The jury are instructed that the burden of proof is upon the plaintiff to establish, by a preponderance of the testimony, to your satisfaction, (1) the derailment of defendant's train, upon which the plaintiff was serving as a Pullman porter; (2) that he was injured in the manner alleged in his petition; (3) if the plaintiff has failed to establish the derailment, and his injuries as alleged, or either the derailment or his injuries, by a preponderance of the evidence, you will return a verdict in favor of the defendant company."

This written request to charge the court refused.

The part of the charge of the court as given, so far as it relates to the burden of proof being on the plaintiff, is as follows:

"The accident out of which the suit arose is alleged to have happened at a point on the road of defendant within a few miles of the station of Maravitia, in the Republic of Mexico. In his petition plaintiff claims that the derailment of the coach in which he was riding was caused by the negligence of defendant's employees in running the train at an excessive and dangerous rate of speed, and by the defective condition of defendant's track at said point, and the burden is upon him (the plaintiff) to prove his case as alleged."

In concluding his charge, the court in addition said this:

"In civil cases, such as the present one, you may predicate your finding upon a preponderance of the evidence."

The learned judge in the court below probably refused the request of defendant's counsel to charge as indicated above, for the reason that it was believed to have been covered by the general charge as quoted. We do not think so. The charge as given, so far as it puts the burden on the plaintiff, clearly did so with reference to the cause of the accident. The language used confines it to this. We think, fairly interpreted, that this instruction refers only to the plaintiff's claim that the train was running "at an excessive and dangerous rate of speed," and that the track was in a "defective condition," and then puts the burden upon the plaintiff to prove those causes of derailment as alleged.

The conclusion that the court did not intend to apply this part of the charge to the matter of injury is strengthened by the fact that in the next paragraph of the charge it seems to be assumed that the plaintiff was injured as alleged. The opening sentence of the paragraph is: "If the injuries of plaintiff resulted from either one of these causes, or both combined, the defendant would be liable, and your verdict should be against it."

The last paragraph of the court's charge, to the effect that "in civil cases, such as the present one, you may predicate your finding upon a preponderance of the evidence," cannot be claimed in any sense to cover the defendant's request.

A distinct issue was made on the trial of this case as to whether the plaintiff was injured as claimed, and in the manner claimed, by this accident. Consequently the defendant was entitled to have the court instruct the jury specifically, as requested, that the burden was on the plaintiff to show that he was injured in the manner alleged. We are not unmindful of the well-recognized rule that when a specific request has been really and substantially covered by the general charge there is no duty on the court to give such request; this being especially true when the request would tend to emphasize unduly a particular feature of the case. In this instance, however, we think the rule inapplicable, for the reasons which have been stated. In view of the direction given to this case, we refrain from any further comment on the evidence. Such mention of it as has been made was only for the purpose of showing the existence of an issue rendering pertinent the instruction requested for the defendant.

An exception having been saved by the defendant to the refusal of the court to charge as requested, we are constrained to hold that the same was well taken.

The judgment of the court below is reversed, and the case remanded, with directions to grant a new trial.

MUNICH ASSUR. CO., Limited, et al., v. DODWELL & CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1904.)

No. 975.

1. MARINE INSURANCE—INSURABLE INTEREST OF CHARTERER IN CARGO.

The charterer of a steamship has an insurable interest in goods in his possession as carrier to the full extent of their value against a loss for which it is possible that he may become responsible, and the question whether he has a right to recover on the policy is not to be determined after the loss by inquiring whether he is in fact then liable to the owners on account of such loss.

2. SAME—GENERAL AVERAGE LOSSES ON CARGO—CONSTRUCTION OF POLICY.

A marine policy issued to the charterer of a steamship insuring the cargo against general average charges, "as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all," is to be construed as covering the entire cargo in the vessel, whether owned by the charterer or by others, and the charterer is entitled to recover thereon the full amount of general average charges apportioned against the cargo.

Appeal from the District Court of the United States for the Northern District of California.

For opinion below, see 123 Fed. 841.

¶ 2. Marine insurance, general average, see note to *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 O. C. A. 357.

Andros & Hengstler, for appellants.
Page, McCutchen & Knight, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. Dodwell & Co., Limited, a corporation, the appellee, was the charterer of the steamship Tacoma, and as such charterer it received on board a cargo of merchandise for transportation from Seattle to Nome, Alaska. Part of the cargo belonged to the appellee, but the greater portion thereof belonged to various shippers, to whom as a carrier it issued bills of lading. The appellee thereupon obtained from the Munich Assurance Company, Limited, the appellant herein, insurance on cargo valued at \$100,000 in the steamship Tacoma, at and from Seattle to Nome, "against general average and salvage only." The policy insured "Dodwell & Co. as well in his or their own name as tor and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." It was not shown that the other owners of the goods authorized the insurance or ratified the same. On the voyage, owing to the stranding of the vessel in Behring Sea, a jettison of a part of the cargo became necessary. The loss of the owners of the jettisoned cargo became chargeable to the ship, freight, and cargo in general average. The appellee paid to the owners of such cargo the general average share, due from the goods which it owned, and paid them also the contributions due from cargo belonging to other owners. To recover the amount thus paid to the owners of the jettisoned cargo the appellee brought the present suit upon the policy of insurance. From a decree of the District Court adjudging it entitled to the full amount thus paid, the present appeal is taken.

The appellant admits that the policy covers the amount of the general average contribution paid by the appellee on its own goods on board the steamship, but contends that it is not liable under the policy for the amount of the contributions chargeable to the goods of which the appellee was not the owner, for the reason that the latter had no insurable interest therein. It is argued that as a common carrier or bailee the appellee could insure goods in its possession only against a risk which would expose it to loss or liability. There are some expressions found in the text-books which lend color to this view. Thus, in Gowan on Marine Insurance, 311, it is said: "The liability for general average on the policy of insurance cannot be greater than that of the assured on the contract of affreightment." And in Wood on Fire Insurance, § 294, concerning the insurable interest of a common carrier, it is said: "But his right to recover beyond the extent of his own interest must depend on the circumstance whether he is liable to the owner for the loss." To sustain that doctrine the author last mentioned cites *Seagrave v. Union M. Ins. Co.*, L. R. 1 C. P. 305, and *London, etc., Ry. Co. v. Glyn*, 1 El. & El. 652. But if by the language of the text-book so quoted it is meant that the right of a carrier to recover beyond the extent of his own interest must depend on the question whether he is actually liable to the owner for the loss after it has occurred, it announces a doctrine not supported by the decisions referred

to or by other authority. The case first cited goes no further than to hold that the insured had no insurable interest for the reason that the insurance was obtained by a nominal shipper and consignee of the goods, who was a mere agent having no lien upon the goods for advances, commissions, or otherwise, nor the possession or custody of them as carrier, factor, warehouseman, or other bailee, nor any liability to account for their loss by the perils insured against. In the second case the insurance was obtained by carriers upon "goods their own and in trust as carriers." The court sustained the insurance contract, and the learned judges who composed the bench each expressed the view that the fact that the insured were not liable to the owners "does not at all affect the case." After a careful investigation of English and American decisions, we think the true doctrine is that a carrier has an insurable interest in goods in his possession as such, to the full extent of their value, against a loss for which it is possible that he may become responsible, and that the question whether he has the right to recover under the policy is not to be determined after the loss by inquiring whether in fact he is then liable to the owners of the property for the value thereof or for damage thereto. In the present case the appellee insured against general average. It is undoubtedly true that it might have become liable to the owners of the goods for loss on general average resulting from its own negligence in navigating the steamer. It may have been so liable in this case, for aught that the record discloses to the contrary. It had the right to insure against its own negligence as well as against the necessity of being required to enter into the inquiry whether its own negligence caused or contributed to the stranding of the vessel, the jettison, and the resulting general average charges.

In *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 323, 6 Sup. Ct. 755, 29 L. Ed. 873, the court said:

"Any one who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to obtain insurance upon them. * * * So a common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not state the nature of his interest."

The opinion cites with approval *Crowley v. Cohen*, 3 B. & Ad. 478; *London & Northwestern Ry. Co. v. Glyn*, 1 El. & El. 652; *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; and other cases. In *Crowley v. Cohen* the insurance was obtained by carriers upon goods, and upon tackle, etc., on 30 canal boats. The question was raised whether the interest of the insured was sufficiently described. The court was of the unanimous opinion that it was. *Littledale, J.*, said:

"Goods in the custody of carriers are constantly described as their goods in indictments and declarations in trespass. The plaintiffs here were liable in particular cases for the loss of the goods they carried, and had a special property in them on that account. The goods were for the present purpose their goods."

In *London, etc., Ry. Co. v. Glyn* the insurance was upon "goods their own and in trust as carriers." The purport of the decision in that case has already been referred to. *Savage v. The Corn Exchange Co.* was

a case in which the carrier insured against any loss or damage he might sustain "on cargoes on account of himself or others." The court said:

"The plaintiff was a common carrier, and received the goods for transportation. As such he was bound to make safe delivery at the place of destination, unless excused by the act of God or the public enemy. His obligation to the owner of the cargo, as well as his interest therein for advances and freight, vested in him an insurable interest to the extent of the fair value of the property covered by the contract of indemnity."

Other decisions are of similar import. In *Waters v. Monarch Assurance Co.*, 5 El. & Bl. 870, it was held that a warehouseman, whose responsibility for goods intrusted to his charge is of a lower degree than that of a carrier, had an insurable interest in goods in his possession, "although he is liable only for his own negligence to the owner." In *Baxter v. Hartford Fire Ins. Co.* (C. C.) 12 Fed. 481, Judge Gresham held that a commission merchant operating a grain elevator had such an interest in the grain deposited with him by others as to authorize him to insure it for its full value against loss by fire, notwithstanding that the contract between him and the depositors of the grain stipulated that fire was at the owner's risk. In *Waring v. The Indemnity Fire Ins. Co.*, 45 N. Y. 606, 611, 6 Am. Rep. 146, the court said:

"Agents, commission merchants, or others having the custody of, and being responsible for, property, may insure in their own names; and they may, in their own names, recover of the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. * * * The right is put upon the fact that, having the possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect it from loss, so that it or its value may be rendered to the owner when he calls for his own."

In *Eastern Railroad Co. v. Relief Fire Ins. Co.*, 98 Mass. 420, 423, the court said:

"A common carrier has an insurable interest in the goods carried by him, which he may insure to their full value without regard to his liability to the owner of the goods."

In *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72, a policy of fire insurance was issued to a common carrier upon "any property upon which they may be liable in freight building or yards." It was held that the policy covered merchandise belonging to other parties for which the carrier was liable as a common carrier, although other common carriers were by contract bound to indemnify it for all loss thereon. So, in *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 543, 23 L. Ed. 868, it was held that warehousemen having goods in their possession "may insure them in their own names, and in case of loss may recover the full amount of insurance for the satisfaction of their own claim first, and hold the residue for the owners." In *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 409, 10 Sup. Ct. 365, 33 L. Ed. 730, the court announced the same doctrine. The underlying principle of all of these cases is that a possible liability of the carrier may result from the risk insured against, and that this creates an insurable interest.

It is contended, further, that the policy by its terms covers only the interest of the appellee in the cargo, and that there is nothing therein to show that the insurance was to cover other goods. It must be assumed that the insurer was aware that the charterer was a common carrier. By its policy it undertook to insure cargo valued at \$100,000 in the steamer Tacoma. It did not undertake to insure the appellee in its own right only. It expressly stated in the policy that it insured the appellee as well in its own name "as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." These are comprehensive words, and clearly import that the insurance was to cover the whole cargo in the steamer, whether belonging to the appellee or to others. The appellant contends, however, that this language of the policy is no more than the equivalent of the phrase, frequently used, "on account of whom it may concern," and that it has the effect to limit the insurance to the insured and to those to whom he may transfer the property or an interest therein, and it directs our attention to the construction placed upon those words in *Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229, where the court held that they were sufficient to show the intention to protect the interest of the insured or that of any person to whom he might transfer the insured property. In so holding we think the Supreme Court gave a wider meaning to the words than we have given to the language of the policy in the present case. Here the policy contemplated insurance, not only of the interest of the insured, but that of any person to whom the subject-matter of the policy at that time appertained. In *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90, where the policy insured the plaintiffs, naming them, and added the words, "to whom it may concern," it was held that the insurance covered the interest of an undisclosed owner of the goods at that time. We find no error in the decree of the District Court.

The decree will be affirmed.

UNITED STATES v. HEATON et al.

(Circuit Court of Appeals, Third Circuit. February 17, 1904.)

No. 39.

1. UNITED STATES—ACTION ON BOND OF CONTRACTOR—RIGHT OF PRIORITY IN FUND PAID IN BY SURETY.

Rev. St. §§ 3466-3468 [U. S. Comp. St. 1901, p. 2314], which provides that debts due the United States shall have priority in the administration of the estates of insolvents, and that a surety who pays the debt shall be subrogated to such right of priority, do not give the United States such right of priority in a fund paid into court by the surety on the bond of a contractor for government work in discharge of the obligation of the bond, which under the statute and its terms secures the claims of other creditors of the insolvent contractor as well as that of the United States, and in the absence of statutory provision such right of priority does not exist.

2. SAME—DISTRIBUTION OF FUND.

The fact that the United States first commenced an action on the bond does not give it a right to priority, and, the fund having been paid into

court, the right of the United States therein under the statute may properly be determined by the court as against other creditors brought in without objection, although the action is one at law.

3. SURETY—RIGHT TO ALLOWANCE OF COUNSEL FEES—PAYMENT OF MONEY INTO COURT.

The surety on the bond of a contractor, who when sued thereon pays into court the amount of the penal obligation of the bond, and is thereupon discharged from further liability, is not entitled to the allowance of counsel fees from the fund, which is insufficient to pay the claims of creditors of the principal against it.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 124 Fed. 699.

James B. Holland and J. Whitaker Thompson, for plaintiff in error.
Samuel Galt Birnie and F. B. Bracken, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. An action was brought by the United States against Edward Heaton and the American Bonding & Trust Company of Baltimore City, upon a bond of the defendants in the penal sum of \$8,000, conditioned for the performance by Heaton of a contract to install a system of electric light wiring in the post office building in the city of Philadelphia, and also for the prompt payment by him of all persons supplying him labor or materials in the prosecution of the work provided for in the contract. Heaton did not complete the work, and the United States in consequence paid the sum of \$4,537 in excess of the contract price to have it completed. The bonding and trust company accepted service of process and appeared by counsel. As to Heaton, the summons was returned "Not found." He is insolvent. The statement of plaintiff's claim, from which it appears that the suit was brought to recover the sum of \$4,537 above mentioned, with interest, was filed upon June 12, 1902; and thereafter, before plea pleaded, the bonding and trust company filed a petition setting forth, *inter alia*, that several persons and firms named in the petition had made demand upon the petitioner for payment by it of their respective claims for materials furnished to the said Edward Heaton in the prosecution of the said work of installing a system of electric light wiring; that these demands were made upon it as surety in this bond, by virtue of its provision for the payment of all persons supplying labor or materials as aforesaid; that these claimants threatened suit against the petitioner; and that it could not make payment to them and to the United States to the extent of their several demands without paying a sum largely in excess of its liability. It offered to pay the penal sum of the bond into court, and thereupon prayed the court to cause distribution of said sum of \$8,000 to be made among the plaintiff and all other rightful claimants thereto, etc. Upon consideration of this petition, the Circuit Court "ordered that the petitioner be permitted to pay into this court the sum of eight thousand dollars, pursuant to the prayer of said petitioner, and that Albert B. Weimer, Esq., be, and is hereby, appointed auditor to hear proof, upon due and proper notice, of all claims

as against said fund which may be presented herein by the said persons named in the foregoing petition as claimants under the bond in suit, and to make report to this court of his findings as to the respective amounts of said claims, and as to the proportion of said sum of \$8,000 which should be paid to each of said claimants, including the plaintiff herein; and the said auditor is hereby directed to notify each of the said claimants named in the said petition of this proceeding, and of the time and place when he will hear proof of their claims; and it is further ordered that upon the payment of said sum of \$8,000 into court the said petitioner shall be forever thereby released from any further liability as surety on the said bond."

No objection was made nor exception taken by the plaintiff in error, or by any other party in interest, to this order. In pursuance of it the \$8,000 was paid into court, and the proceedings contemplated by it ensued. The several claimants, including the United States, presented their claims before the auditor, who, after hearing and consideration, reported the allowance out of the fund of the expenses and costs and a counsel fee to the bonding and trust company of \$200, and the balance he distributed to the United States and to the several other claimants pro rata. To this report the plaintiff in error excepted; but the court below overruled its exceptions, and decreed distribution of the fund in accordance with the schedule submitted by the auditor. To that decree this writ of error is directed.

As stated in their brief, the contentions of counsel on behalf of the United States are:

"First, that the United States is entitled to priority and payment in full of its claim, with interest, by reason of its having first brought suit against the defendant on the bond given by the defendant company as surety for Edward Heaton; second, that the United States is entitled to priority and payment in full of its claim, with interest, under sections 3466, 3467, and 3468 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2314]; third, that the United States is not liable for counsel fees and costs in this proceeding, and that the award to the United States should not be diminished by such payment."

The right of priority affirmed by the first and second of these propositions is to priority of payment from a fund paid into court by the surety in a bond executed under and in conformity with an act of Congress requiring certain contractors with the United States to execute the usual penal bond, with sureties, "with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; * * * upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense." Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]. That this additional obligation was prescribed for the benefit of the persons supplying labor and materials appears from the title of the act, and also from its provision authorizing them to sue for

their own use, and it contains nothing to suggest that it was intended that their claims under such bonds were to be secondary or subordinate to those of the government. But it is argued that the right of priority asserted in this case was vested in the United States by the much earlier enactments, which are embodied in sections 3466, 3467, and 3468 of the Revised Statutes, as follows:

"Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

"Sec. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

"Sec. 3468. Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

Undoubtedly, the first of these sections does establish priority in the United States whenever the person indebted is insolvent; but the debtor with whom this controversy is concerned is not the insolvent Heaton, but is the bonding and trust company, and, as that company is admittedly solvent, section 3466 has no application. It is argued, however, that it appears, upon "reading the three sections together, that the intention of Congress was that the United States should be entitled to the same priority against the surety as against the principal." The sufficient answer to this argument is that no such intention was expressed. As was said by the learned judge of the Circuit Court:

"The United States has no priority against a surety, for the reason that no statute has given it such a privileged position, while it has priority against an insolvent principal for the analogous reason that Congress has seen fit so to enact. The right of a surety, after he has paid the money due upon his bond to the United States, to be preferred in the distribution of his insolvent principal's estate, does not depend at all upon the answer to the question whether the United States has previously had priority against the surety, but rests solely upon the language of section 3468, which expresses the legislative will upon the subject. It is this section that is the source of the surety's right, and I think its true construction gives priority for so much, and no more, of the government's claim as the surety may have been obliged to pay by legal proceedings, or may have paid voluntarily, in discharge of his obligation upon the bond."

The cases of suits upon official bonds, which have been cited in support of the proposition that the United States is entitled to priority by reason of its having first brought suit, are not pertinent. The bond sued on in this case is not an official bond. *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 96 Fed. 25. Nor is there any force in the suggestion that the court below, though sitting as a court of law, determined the rights of these parties upon equitable principles. The question was as to the legality of the claim of one of them to preferential payment out of a fund paid into court by the surety in a bond, and the validity of that claim did not depend upon the right application of any principle of equity, but upon the correct construction of the statute under which the bond was given, and of the other statutory provisions to which reference has been made. Therefore the issue was one which a strictly common-law court was competent to try, and the mode of trial which was adopted is not open to question, for all parties voluntarily submitted to it.

We think the allowance of a counsel fee to the bonding and trust company was erroneous. That company was not a mere stakeholder. It was a party, and it was for that reason that it required counsel. It is plain that his services up to the time the money was paid into court were rendered exclusively for its benefit, and with the subsequent proceedings it was not concerned. The resulting indebtedness, therefore, was absolutely its own, and should not have been charged against the fund. This ruling, however, can avail none of the claimants other than the United States, for no other of them is before this court as a plaintiff in error.

The cause will be remanded to the Circuit Court, with direction to disallow, as against the United States, the claim of the American Bonding & Trust Company of Baltimore City for a counsel fee, and the decree of that court, when amended in conformity with this direction, will stand affirmed.

DU BOIS v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. January 27, 1904.)

1. APPEAL—MATTERS REVIEWABLE—DISCRETIONARY ORDERS.

An order of a Circuit Court overruling exceptions to the report of a master for the reason that the record was not printed as required by the rules was within its discretion, and is not reviewable on appeal.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On motion to dismiss appeal or affirm order of the Circuit Court entered November 24, 1902.

William L. Pierce, for appellant.

Frederick Seymour, for appellee.

Before TOWNSEND and COXE, Circuit Judges.

PER CURIAM. We have examined the papers with care, and are satisfied that no question presented upon the hearing before the

master is reviewable in this court, for the reason that no exceptions to the master's report are before us, and the action of the Circuit Court in overruling the exceptions filed below, for the reason that the record was not printed as required by the rules, was entirely within the discretion of that court, and is not reviewable.

The only question which can be presented for review in this court is the question whether or not the Circuit Court erred in making the order of reference to the master to fix the awards. That action was unquestionably correct, unless the contention can be maintained that the various attorneys and counsel to whom awards were made by the master were precluded from receiving compensation for their services upon a quantum meruit, for the reason that they had originally been employed by the complainant, or his agent, to prosecute the action upon a contingent fee limited to a certain percentage of the recovery. Whether the complainant, after receiving the services of his lawyers for a long period of time, could discharge them and demand the papers back, without paying a reasonable sum for their services, may be a debatable question, which the appellant has a right to present to this court upon a review of the order appealed from. The papers now before us appear to contain all the facts necessary for a full discussion and determination of this question, which, it would seem, is one of law arising upon undisputed facts. If the appellant desires to present this question, he may print the record and bring on the appeal in the usual manner. Upon proof that the papers now before us have been printed and filed with the clerk, a motion will be entertained to place the cause on the calendar. If this record be not printed and filed on or before February 23, 1904, the appeal will be dismissed without further order.

The foregoing views dispose of the motion to compel the filing of the exhibits with the clerk of this court. Ordinarily, such a motion should be addressed to the Circuit Court, the record being there made up and transmitted to this court in completed form, but if upon the argument of the appeal it should appear that any of these exhibits will throw light upon the question involved, we will request the counsel in whose possession it may be to produce the original.

SNOWDEN et al. v. LOREE.

(Circuit Court of Appeals, Third Circuit. February 24, 1904.)

No. 5.

1. APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The admission of a deposition in evidence for all purposes, if error, was harmless where it ought not to have changed the result.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 122 Fed. 493.

L. C. Barton and O. F. McKenna, for plaintiffs in error.

Johns McCleave, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This was an action of ejectment to recover a piece of land situate in the county of Allegheny, state of Pennsylvania. It was tried by the court without a jury. The learned judge correctly held that the right of the plaintiffs to recover was dependent upon the strength of their own title, irrespective of that of the defendant. The plaintiffs based their claim of title, first, upon a patent of the state of Pennsylvania to Luke Loomis, dated August 15, 1837; and, second, upon the allegation "that plaintiffs' grantors entered into constructive possession of the land in dispute the 9th day of July, A. D. 1822, or thereabouts, and into actual possession about the 15th day of August, A. D. 1837, and that plaintiffs and their grantors held continuous, uninterrupted, hostile, and notorious possession of the same from said times up to year 1881, when they were ousted by defendant's grantor." The Circuit Court fully considered both of these matters, and reached the conclusions that the patent to Luke Loomis was void, and that the plaintiffs had failed to establish title by adverse possession. Upon attentively examining the record, we are fully satisfied that these conclusions were right, and we think that the opinion of the learned judge of the court below amply vindicates them. Notwithstanding the able argument submitted for the plaintiffs in error, we concur in that opinion, and adopt it as that of this court. *Snowden v. Loree* (C. C.) 122 Fed. 493.

The first specification avers that the court below erred in ruling during the trial that the affidavit of R. Hilands, attached to the application of Luke Loomis, wherein it was deposed that the land described in said application "was first improved in the month of June, 1829, and not before, by Luke Loomis," was admissible "for the purpose of showing the steps leading up to the granting of the patent, but not for the purpose of proving the facts therein stated." Whether the Pennsylvania rule that the recitals of title in a patent are prima facie evidence has any application in this case is at least doubtful (*Green v. Brennessoltz*, 73 Pa. 425); but that question need not be discussed, for we are clearly of opinion that this Hilands affidavit, if it had been admitted for all purposes, ought not to have changed the result. Therefore the ruling of the court in respect to it in no degree prejudiced the plaintiffs' case, and consequently that ruling, even if erroneous, would not be ground for reversal. *Hornbuckle v. Stafford*, 111 U. S. 393, 4 Sup. Ct. 515, 28 L. Ed. 468.

The judgment is affirmed.

HERMAN & GUINZBURG v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 23, 1904.)

No. 2,991.

1. CUSTOMS DUTIES—CLASSIFICATION—ORNAMENTAL GRAINS—GRASS PIQUETS.

Grass piquets, used for millinery purposes, consisting of stalks of oats and wheat, cut in the milk, and grasses, some of which are mixed with palm leaf and artificial leaves, bound together in bunches about 15 inches long, and all dyed to imitate the natural color of the plants, are dutiable

under the provision in paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], for "artificial or ornamental * * * fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed," and not under paragraph 449 of said act, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], as manufactures of grass.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 121 Fed. 201.

This is an appeal by Herman & Guinzburg, importers, from a decision of the Circuit Court (121 Fed. 201), which affirmed the decision of the Board of General Appraisers which sustained the assessment of duty by the Collector of Customs at the port of New York. The decision of the board reads as follows (In re Simon, G. A. 4511):

Wilkinson, General Appraiser. The goods are known in trade as grass piquets. They were assessed for duty at 50 per cent. ad valorem, under paragraph 425, Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], and are claimed to be dutiable at 10 per cent., or at 20 per cent. under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], or at 30 per cent. under the provision of paragraph 449, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678] for manufactures of grass. Counsel for the appellants stated that the only claim relied on was that under paragraph 449. Each piquet is a bunch about 15 inches long, bound with wire at the end of the stems. Exhibit 1 (35,424f) consists of stalks of oats cut in the milk. Exhibit 1 (37,036f) is composed of wheat of the same character, mixed with pieces of palm leaf. Exhibit 1 (37,039f) consists of two kinds of grasses, with some artificial leaves of cotton cloth, and the other piquets are similar to the foregoing. All have been dyed to imitate the natural color of the plants, and all are used for millinery purposes. The pertinent of paragraph 425 is: "And also dressed and finished birds suitable for millinery ornaments, and artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum ad valorem." The piquets in question include the stems and the leaves of the plants. The fact that the grasses are almost altogether natural does not, in the opinion of the board, exclude them from classification under the paragraph. Dyed feathers and dressed birds are no more artificial than these grasses are. We find that the goods are ornamental stems and leaves. The decisions of the collector are affirmed accordingly.

Stephen G. Clarke, for appellants.

Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The finding of the Board of General Appraisers accurately describes the importations, and we think they are more specifically enumerated by paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], than by paragraph 449, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678].

Decision affirmed.

UTARD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 3,144.

1. CUSTOMS DUTIES—GROUND GLASS—BOTTLES WITH CUT-GLASS STOPPERS.

Held, that certain bottles made of molded or pressed glass, with stoppers that have been cut or ground more than is necessary for fitting, are dutiable under paragraph 100, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], relating to "glass bottles * * * cut, * * * ground (except such grinding as is necessary for fitting stoppers)," and not as "molded or pressed * * * glass bottles," under paragraph 99 of said act (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]).

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal by Emil Utard, an importer, from an affirmance by the Circuit Court of a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs on merchandise imported at the port of New York. For decisions below, see 124 Fed. 997, and *In re Utard*, G. A. 4,769, T. D. 22,503.

The importer was dissatisfied with the conclusions of the board only as to the merchandise included in the board's third finding. The opinion of the board, so far as it refers to such merchandise, is as follows:

FISCHER, General Appraiser. The protestant imported numerous perfumery bottles of various designs and patterns, which for convenience may be divided into three classes, namely: * * * (3) Such as have ground or cut glass stoppers; this class comprising all of the goods under protest, with the exception of Nos. 2,478 and 2,724. The articles were assessed for duty at 60 per cent. ad valorem under the provisions of paragraph 100 of the act of July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], as cut-glass bottles, or as decorated glass bottles, and are claimed to be dutiable under the provisions of paragraph 99 of said act (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]). Counsel for the Importers relies chiefly upon the ruling laid down in the case of *Koscherak v. United States*, 39 C. C. A. 166, 98 Fed. 596, to sustain his claim. That case arose under Act Aug. 27, 1894, c. 349, § 1, Schedule B, par. 90, 28 Stat. 513, and the paragraph construed by the court was as follows: "All glass bottles, decanters, or other vessels or articles of glass, when cut, engraved, painted, colored, printed, stained, etched, or otherwise ornamented or decorated, except such as have ground necks and stoppers only, not specially provided for in this act. * * *" The court held that etched bottles were dutiable under that provision only when such etching amounted to ornamentation or decoration, and said: "The use in the new section of the phrase, 'not otherwise ornamented or decorated,' after an enumeration of several processes by which an article may be ornamented or decorated, not only implies, but indicates, an understanding that this result of the enumerated processes is to be an ornament or decoration, in order to bring the article within the terms of the paragraph." The corresponding paragraph of the present act is, however, in somewhat different form, and is as follows: "100. Glass bottles, decanters, or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner, or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers). * * *" If we apply the principle of the *Koscherak* Case to this paragraph, it would seem that while under the act of 1894 the "result of the enumerated processes is to be an ornament or decoration," in the present paragraph, if the result is either an ornamentation or a decoration or a grinding, the article will be included within the terms of paragraph 100. * * *

As to the balance of the goods before us, constituting the third class above referred to, it appears that, while most of them are ground and cut, some of them are cut simply; yet, as cutting is a process of grinding, we are of the opinion that the articles so treated are included within the terms "ornamented, decorated, or ground," of paragraph 100, and are dutiable under said paragraph if the grinding is more than is necessary for fitting the stoppers. From the testimony in the case and the samples before us, we find that such grinding * * * is in fact more than is necessary for fitting stoppers, and that it considerably improves the appearance of the bottles, giving the stoppers the appearance of cut glass, and relieving them of the common and cheap appearance they had when taken from the pressing mold, and we hold that these bottles are therefore dutiable under paragraph 100, as assessed. * * *

The point is made by the importers that the cost of cutting the stoppers of the bottles is so small that the classification of the articles should not be changed on that account, and the maxim, "*De minimis non curat lex*," is invoked. From the importer's own brief it appears, however, that the cost of the labor thus expended constitutes on an average over 12 per cent. of the cost of the bottles; for while the price paid, as appears by the affidavit in evidence, is only 4 centimes for each, the brief of counsel for the importers states that the average cost of the bottles is 3.78 francs per dozen, or 31.5 centimes each. But, even were the cost of the labor considerably less, it could not be disregarded, in view of the decisions of the courts. In the case of *Saltonstall v. Wiebusch*, 156 U. S. 601, 604, 15 Sup. Ct. 476, 477, 39 L. Ed. 549, the Supreme Court said: "The fact that the further process which the articles underwent represented but three or four per cent. of the total labor expended upon them is by no means decisive when it is a question of classification, since the very object of Congress may be to protect the additional labor. The lines between different articles enumerated in the tariff law are sometimes very nicely drawn, and a trifling amount of labor is often sufficient to change the nature of the article and determine its classification." And in the case of *United States v. Hinsberger Cut-Glass Company* (C. C.) 94 Fed. 645, the court, discussing the word "ground" as used in the very paragraph here under discussion, said: "Counsel for the importers contends that Congress could not have meant to provide for such an infinitesimal amount of cutting, and must have intended to cover, by the provision for articles of ground glass, only those where the grinding was done for a permanent purpose. But the court would not be authorized in thus contradicting the express provision of the statute. It is clear that this grinding is intentional and for some purpose, and as the language of the statute includes all grinding except for stoppers for bottles, and inasmuch as the bowl is an 'article of glass,' I think it is dutiable, under the provisions of paragraph 100, at 60 per cent. *ad valorem*." Furthermore, while the act of 1894 excepted from the operation of paragraph 90 such bottles as had "ground necks or stoppers only," the exception in the corresponding paragraph of the present act is only as to such "grinding as is necessary for fitting stoppers," making it clear that Congress intended to include in the present paragraph bottles where the grinding, although confined to the stoppers only, was more than necessary to fit the stoppers.

We accordingly * * * overrule the protests.

Frederick W. Brooks, for importer.

D. Frank Lloyd, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The findings of the Board of General Appraisers adequately state the facts, and the decision is affirmed.

SANDERS v. HANCOCK.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1904.)

No. 1,238.

1. PATENTS—INVENTION AND INFRINGEMENT—DISC PLOWS.

The Hardy patent, No. 556,972, for improvements in rotary disc plows, claim 2, as to its principal feature, which consists in setting the cutting disc not only at an angle with the line of draft, but also at an inclination backward from the vertical, was anticipated by prior patents for disc harrows; but the combination of the claim as a whole, including as elements the disc and staggered furrow and caster wheels, so placed and adjusted as to hold the disc in position horizontally and to resist the landward pressure, and which, while old, singly, by their co-operative action produce a new and improved result, is novel, and shows patentable invention. Such claim also *held* infringed.

2. SAME—INVENTION—COMBINATION.

It is not necessary to a valid combination that all the parts should co-operate all the time, but it is enough that in the normal and progressive use of the machine they do so some of the time.

3. SAME—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.

An element of a combination, although not definitely described in the claims, except by reference to the specification by the words "substantially as described" at the end of each claim, may be read into the claims, where it is fully described in the specification, and is essential to the operation of the machine.

4. SAME—INFRINGEMENT—DISC PLOWS.

The Hancock patent, No. 692,655, for means for converting a single disc plow into a plurality disc plow, and the converse, and incidentally of means for interadjustment of the disc-carrying beams and other appurtenances, construed, and *held* not anticipated, valid, and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This appellee, Hancock, brought this suit in equity, complaining of the infringement by the appellant, Sanders, of three several patents, one of them being patent No. 556,972, dated March 24, 1896, issued to Keating as assignee of Hardy, and subsequently assigned by Keating to the complainant; another being patent No. 643,499, dated February 13, 1900, issued to the complainant; and the third, being patent No. 692,655, dated February 4, 1902, also issued to the complainant; and praying for an injunction and for profits and damages resulting from the alleged infringement. All of the patents above mentioned were for inventions of "improvements in rotary disc plows." The defendant answered the bill, denying that the several persons who were alleged to have invented the improvements for which the respective patents were granted were in fact the original inventors thereof, and he also denied infringement of any of said patents. The judge of the Circuit Court awarded a preliminary injunction *pendente lite*. The complainant filed a replication. Proofs were taken, and, the cause having been brought on for hearing, the court dismissed the bill as to patent No. 643,499, but decreed for the complainant in respect to the second claim of patent No. 556,972, and all of the claims, of which there were seven, of patent No. 692,655, awarding a perpetual injunction, and the recovery of profits and damages, for the ascertainment of which a reference to the master was ordered. Thereupon the defendant appealed.

The following opinions were filed in the Circuit Court by CLARK, District Judge, the first on motion for preliminary injunction, May 2, 1902:

"In disposing of the question now before the court it is not permissible or desirable that any extended discussion of the issues presented should be en-

¶ 2. See Patents, vol. 38, Cent. Dig. § 29.

tered upon. On the contrary, it has often been ruled that the court, from the very nature of the proceedings, should examine the case only far enough to ascertain whether the plaintiff has an apparent title to protection, and the court is not expected to enter into inquiry concerning difficult questions of law, or the weight and value of conflicting evidence. 3 Robinson on Patents, §§ 1173-1210; *Wise v. Grand Avenue Ry. Co.* (C. C.) 33 Fed. 277, and cases there cited.

"It may be useful to restate here certain general principles which apply on the hearing for a preliminary injunction, and some of which apply as well on final adjudication. It is well settled that a mere conception or idea of a desirable function or result, resting in the mind, which might be obtained by a machine or device, is not invention, either for the purpose of obtaining a monopoly, or for the purpose of making the defense of prior invention. Invention, in the legal sense, must involve a practical, successful, operative device. *Rubber Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410; 1 Robinson on Patents, § 335; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; 2 Greenleaf on Evidence [16th Ed.] § 495, and cases cited. It must be a perfected invention, and either put to practical use, or be clearly capable of such use, and the novelty of an invention is not negatived by a prior useless process or thing. Walker on Patents [3d Ed.] § 65. Nor is anticipation made out by a device which might, by slight modification, be made to perform the same function, if the prior invention were not designed by its maker nor adapted to actual use for the performance of such function. *Topliff v. Topliff et al.*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Krementz v. The S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134. And of course the prior invention, when relied upon as anticipating, must be a complete, operative instrument, and the burden to show this is on defendant. 2 Greenleaf on Evidence [16th Ed.] §§ 501-503, and notes. Another well-settled proposition is that even in a combination patent infringement is well established whenever the alleged infringing device accomplishes the same result, and substantially in the same way. *Cantrell et al. v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Rowell et al. v. Lindsay et al.*, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; *Machine Company v. Murphy*, 97 U. S. 120, 24 L. Ed. 935. And mere colorable and immaterial difference in the mechanical arrangement and adjustment, or difference in the form of parts of the structure, or methods of fastening or bolting such forms together, does not avoid infringement, as omitting an element, so long as the same result is obtained, and substantially in the same way. *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339; *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Walker on Patents, §§ 350-353, 363-368, and illustrative cases. Nor for similar reasons will an immaterial addition avoid infringement. Walker on Patents, § 347. And no rearrangement or transposition of the parts or substitution of one thing for another avoid infringement, so long as the fact remains that the same result is worked out in practically the same way. Walker on Patents, §§ 348, 350.

"Attention may, I think, be called to the now well-established doctrine of the recent cases in regard to combination patents, which put those inventions on a different footing from what the tendency of the reasoning of the older cases put them. The older cases are well calculated to create the impression that a combination patent must in all cases receive a narrow construction, and that such an invention is hardly entitled to the benefit of the doctrine of equivalents. It has been demonstrated, and particularly in recent years, that patents which satisfy in the highest degree the requirements of the public, and a growing and complex business establishment such as ours, are not limited to the class called the primary or pioneer patents, but include combination patents. Indeed, the practical utility, and the change from failure to success, is shown in the highest degree in combination patents, and in view of this a more liberal attitude is now shown towards such patents. In the case of *Brammer v. Schroeder*, 106 Fed. 918, 920-921, 46 C. C. A. 41, the result of the more modern cases is restated by Judge Sanborn in the following language: 'One who invents and secures a patent for a machine or combination which first performs a useful function is thereby protected against all ma-

chines and combinations which perform the same function by equivalent mechanical devices. * * * In other words, the term mechanical equivalent, when applied to the interpretation of a pioneer patent, has a broad and generous signification. This general rule of law, like every other principle of jurisprudence, applies equally to all patents, whether for combinations, machines, or combinations of matter. If, however, one invents and secures a patent for a new combination of old mechanical elements, which first performs a useful function, he is protected against all machines and combinations which perform the same function by equivalent mechanical devices, to the same extent and in the same way as one who invents and patents a machine or composition of matter of like primary character. The doctrine of mechanical equivalents is governed by the same rules, and has the same application, when the infringement of a patent for a combination is in question as when the issue is over the infringement of a patent for any other invention. *Imhaeuser v. Buerk*, 101 U. S. 647, 653, 25 L. Ed. 945; *Griswold v. Harker*, 62 Fed. 389, 391, 10 C. C. A. 435, 437, 27 U. S. App. 122, 150; *Thomson v. Bank*, 53 Fed. 250, 253, 3 C. C. A. 518, 521, 10 U. S. App. 500, 509; *Seymour v. Osborne*, 11 Wall. 516, 542, 548, 20 L. Ed. 33; *Rees v. Gould*, 15 Wall. 187, 189, 21 L. Ed. 89; *Fay v. Cordesman*, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979; *Watermeter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024; *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 373, 3 C. C. A. 559, 565, 3 U. S. App. 340, 357; *Belding Mfg. Co. v. Challenge Corn Planter Co.*, 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370.

"And in the case of *Keystone Manufacturing Company v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, Mr. Justice Shiras, speaking for the court, said: 'Where the patented invention consists of an improvement of machines previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one. But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the courts should not be ready to adopt a narrow or astute construction fatal to the grant.' And so in the case of *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, Mr. Justice Brown, speaking for the court, said: 'The fact that this invention was first in the line of those which resulted in placing it within the power of an engineer, running a long train, to stop in about half the time and half the distance within which any similar train had stopped, is certainly deserving of recognition, and entitles the patent to a liberality of construction which would not be accorded to an ordinary improvement upon prior devices.' And in another of these Westinghouse cases, namely, *Westinghouse Air-Brake Co. v. New York Air-Brake Co.*, 63 Fed. 962, 11 C. C. A. 528, Judge Shipman, giving the opinion of the Circuit Court of Appeals for the Second Circuit, said: 'It is not important now to determine the grade of its pioneership, and whether it may be classed in the list of those inventions which are of the highest rank; but it was an invention created to achieve great necessities and overcome great hindrances, and was one of wide breadth. A court would not be justified in adopting a "narrow or astute construction" which would minimize the character of the invention, leave its real scope open to trespassers, and thus be "fatal to the grant."'

"I have set out the foregoing as a brief statement of the legal view under which the case is to be considered. It is well understood by the eminent counsel who are giving the case attention on both sides that I am not expected, on this hearing, to consider the case with a view of disposing finally of any serious issue of law or fact. It is manifest that I should not do so, as the affidavits of witnesses, as now presented, constitute an ex parte statement of the witnesses only, without the advantage of cross-examination, and certainly without the advantage of fullness in any respect.

"Now, in regard to the various patents relied on by the defendant as anticipating those of the plaintiff, it would become necessary for the defendant to show that these were practical, successful inventions, as a mere patent on

paper, accompanied with drawings or models, never reduced to practice, does not constitute anticipation. The patent must have been put into practical use, or must clearly have been such a patent as that it could have been put into practical use, and nothing short of this constitutes anticipation. And in order that the defendant might make good, if he can, the defense of prior invention, it would be necessary, in almost any case, to go fully into the evidence on that subject, which has not been done, and could not be done on this hearing.

"It is quite obvious, without stating more, that the court can act only on *prima facie* impressions of the case on this hearing, although in the main those impressions should be clear and satisfactory, in view of the fact that the case is necessarily imperfectly developed at this time. And because the court does not and cannot decide any of these issues finally, it would not be well for the court to discuss the facts found in this record, as these facts appear on an *ex parte* or *prima facie* showing, and I thereby purposely avoid doing so.

"It is sufficient now to say that I think this case has been brought fully within the doctrine of the case of *Blount v. Société Anonyme Du Filtre Chamberland & Système Pasteur et al.*, 53 Fed. 98, 8 C. C. A. 455, and this case has been often cited, approved, and followed by the Circuit Court of Appeals for this circuit in subsequent decisions, and must be regarded as controlling authority for this court.

"After a study of the affidavits of the expert, and after making a comparison of the two models by inspection, I conclude, on the record as it now is, that, with the exception of the seventh claim in the first of the Hancock patents, the claims actually in question, and about which serious issue was made on the hearing, are valid, and that they are infringed by the machine made and sold by the defendant.

"It strikes me that such changes as appear to exist between the defendant's machine and that of the plaintiff are immaterial, changes simply in form and in the method of adjusting the parts, and still more by the simple rearrangement and transposition of some of the structural parts of the machine, and the substitution in one or two instances of parts which are exactly the functional equivalent of the parts for which they are substituted.

"The circumstances which appear in the record, as it is now made up, that the plaintiff has devoted years of earnest study, and has expended large sums of money, in efforts to design and complete his invention, while the defendant has devoted no such time, and incurred no such expense, is a circumstance which is significant in the examination of these questions. It is established, as the record now is, and not controverted, that such study as the defendant has given has been with a view to so modify the plaintiff's machine as to avoid infringing it, and he does not, as the case now is, appear at any time to have entered upon any original inquiry, with a view to the exercise of his inventive genius, if he possesses any such genius. This is clearly proven by the expert mechanic of the Chattanooga Plow Works, and is not controverted by the defendant.

"And I will make but one more reference to the facts, and that is that the expert mechanics of some of the very largest manufacturing establishments in the country prove that they have carefully studied the plaintiff's invention, with a view to the very question of infringement, and that after such study it was concluded that the patent was valid, and accordingly contracts were made with the plaintiff, by which a license was obtained to make the machine in accordance with his patents and claims. This is public acquiescence in the very highest and best sense of the term, as used in the adjudged cases. Indeed, in this feature it cannot be controverted that the case is unusually strong.

"I have now said all that I feel should be said on this *prima facie* showing, and until the case shall have been seriously entered upon, and the issues made determined by careful examination of the prior state of the art, with the aid furnished by experts, subjected to the valuable test of cross-examination. It is settled beyond question that in determining whether a preliminary injunction shall issue I consider merely whether there is a strongly probable *prima facie* case made, and then I compare the inconvenience and injury which may result to one side by granting the injunction with such inconvenience and injury as may result to the plaintiff in a denial of such injunction. The court

is always, on an issue like this, discharging a delicate duty, and it is unpleasant in any case to award an injunction which does or may seriously interfere with any person's business, and it is quite unpleasant to feel the necessity of doing so in this case; but my views on this showing are such that I am left no choice but to allow the injunction, except as to the seventh claim.

"This injunction will become effective and operative from and after May 5, 1902, at which time it is conceded the present season of demand for these plows will be over. From the order allowing this injunction an appeal lies at once to the Circuit Court of Appeals, without waiting for further hearing, and the case in that court is given precedence over other cases, and it is easy to have the case reviewed and the questions adjudged by the Circuit Court of Appeals before the date when another season of demand for these plows opens, and this appeal does not interfere with the speedy preparation of the case for final hearing on its merits. The plaintiff is expected at once to enter, with all reasonable speed, upon the preparation of the case, and if the plaintiff shall fail to do this it is open to the defendant to make application to the court for such order as will be sufficient to meet any apparent disposition to delay, which is, of course, not to be expected.

"The plaintiff will execute before the clerk of this court, with satisfactory surety, bond in the sum of \$10,000, conditioned to indemnify and save the defendant against any damage which may result from the issuance of this injunction, in the event the plaintiff fails in the law suit. If a bond in this sum is not adequate, or if in consequence of future events it would become inadequate to fully protect the defendant, application can then be made to the court for a further order to increase the bond.

"The defendant is allowed to proceed under the conditions heretofore prescribed in the restraining order until May 5, 1902, at which date the injunction now granted will become effective, and restrain the defendant from further making or selling the machine complained of as an infringement in the bill. On May 5, 1902, the injunction will become fully effective."

Supplemental Opinion.

(May 4, 1902.)

"A memorandum opinion indicating my views in this case, very shortly stated, was forwarded to the clerk yesterday. To-day I am furnished, through courtesy, with the advance sheet opinion of the Circuit Court of Appeals for this circuit in the cases of the Dowagiac Manufacturing Co. v. The Superior Drill Co. and P. P. Mast & Co. v. The Superior Drill Co. (which were submitted on February 11, 1902, and decided April 8, 1902) 115 Fed. 886, 53 C. C. A. 38.

"In view of the fact that the opinions of the Circuit Court of Appeals are controlling and absolute authority for this court, and also because the case is an exceedingly well-considered one, and a most instructive one, I deem it proper that I should call attention of counsel on both sides to this opinion as a most important citation to make, in addition to those already made. In the memorandum opinion already filed I quoted liberally from the opinion of Judge Sanborn in the case of National Hollow Brake Beam Co. et al. v. Interchangeable Brake Beam Co., 106 Fed. 693, 45 C. C. A. 544, to show that in a combination patent the doctrine of mechanical equivalents is governed by the same rule as when the infringement complained of is in relation to a patent for any other invention within certain limits, indicated in the opinion of Judge Sanborn, and now again in the opinion just cited. It will be seen that the Circuit Court of Appeals expressly approves the opinion of Judge Sanborn in the case just cited. It will also be noticed, of course, that the patent involved in the opinion of Judge Severens related to that class of drain drills known as 'disc drills,' and the case in all its bearings is a close analogy, I think, to the one at bar."

Opinion on Final Hearing.

(April 11, 1903.)

"This case is now before the court on final hearing, having also been before the court on two former occasions, when the same questions were elaborately discussed by eminent counsel, and given such study by the court as the importance of the issues demanded. In view of this situation, and of the fact that a written opinion was filed when the case was up for consideration on the

application for preliminary injunction, it is not necessary now that the same ground should be gone over again in this opinion, and it seems quite sufficient to state, in the briefest form possible, the result arrived at on a final study of the case, and counsel will understand the bearing of such brief observations as are necessary quite as well as from an elaborate opinion.

"Giving, then, the result, in condensed form, it seems sufficient to say that I conclude that claim 2 of the Hardy patent, No. 558,972, is valid, and the defendant does not controvert that the plow made by him is an infringement, if this claim 2 of the Hardy patent is to be regarded as valid. The only issue made on the claim of that patent is one of validity, and not of infringement. It is conceded that claim 4 of the Hancock patent of 1900 is not infringed, and this renders any ruling on the question of its validity immaterial, and, in view of the fact that the defendant changed his plow construction so as to avoid any objections under claims 5 and 6, I do not regard those claims as now in issue or calling for judgment. In reference to claim 7, I have been unable to change my opinion as formed when the case was under consideration on the application for injunction. There is much force, indeed, in the contention that as this claim covers a particular construction, being a specifically manufactured model, that it is patentable. Viewed in this light, the question must be regarded as close; but I conclude again, upon this final study of the case, that claim 7 is not valid. I also reach the conclusion, as on the former hearing, that the claims of the Hancock patent of 1902, No. 692,655, are valid, and that they are infringed by the defendant's construction. As before stated, I do not deem it necessary to go over the ground again in relation to this particular patent. It results from these views, upon the whole case, that the injunction is allowed as to claim 2 of the Hardy patent, and denied as to all the claims in issue in relation to the Hancock patent of 1900. An injunction is also allowed on the claims of the Hancock patent of 1902. Of course, if it is desired, the usual account for profits and damages will be allowed, and the costs will, agreeably to the general rule, be taxed against the defendant."

Robert Pritchard and J. B. Sizer, for appellant.

Brown & Spurlock and Williams & Lancaster, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, delivered the opinion of the court.

The principal controversy between the parties in this case relates to the validity of the two patents which were sustained by the Circuit Court. The defendant in that court contended there, as he does here, in respect to these patents, that at the time of the alleged inventions the progress of the art of manufacturing rotary disc plows had advanced so far in the direction of said inventions that no more than the skill of those conversant with the business was required to devise the alleged improvements.

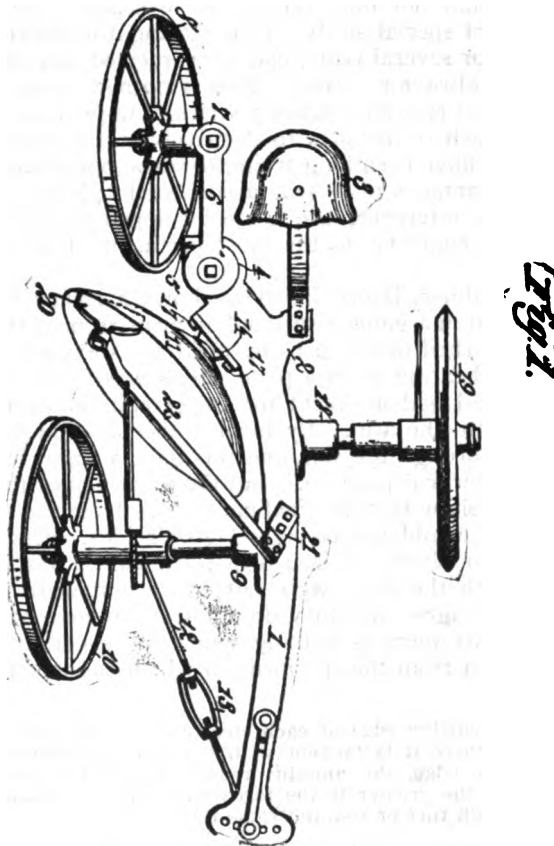
Rotary disc plows, although they have been the subject of invention for 25 years or longer, have only quite recently come into extensive use. They have come in the wake of disc harrows as cultivators of the soil. A number of patents showing different forms of construction had been taken out prior to the date of the inventions of complainant's patents, and it will be convenient to state in a comprehensive way the condition of the art at that time. These plows, as they had been usually constructed, consisted of a frame, generally carried on wheels, in which was located a large concave disc, one or more, of iron or steel, having an edge on its periphery, and revolving on an axle at its center. The vertical plane of the edge of the disc was, in the usual form, perpendicular to the frame and to the soil, but the horizontal plane was turned at an angle to the line of draft, so that when the disc was let down and the machine was moved forward the disc would

enter the soil at the same angle to the line of movement, and, revolving, would turn out on its concave side a furrow of the earth scraped out by the edge of the disc, the area of earth moved corresponding with the angle at which the disc was set and the depth to which it entered the soil. Provision was made for raising and lowering the disc in the frame or with the frame, and for counteracting the sidewise pressure produced by the movement of the earth on the concave side of the disc, as by the use of sharp-edged wheels entering the soil and running parallel to the line of draft, or by staggered wheels inclining inwardly at the bottom. When more than one of such discs were used they were sometimes set one a little forward of another, and on parallel lines, so as to operate on strips of the soil after the fashion of what are known as gang plows.

It is contended for the complainant, and we think it is a just conclusion from the evidence, that certain objections had been found in such former constructions of these plows which tended to defeat their usefulness and prevented their coming into general use, notably these two: The disc, running in the ground with a perpendicular plane, simply scraped out the soil instead of plowing it, and left the soil in the bottom of the furrow compacted by the scraping; and, secondly, that in order to compel the disc to properly enter the soil it was necessary to carry a considerable weight upon it, which was dead weight, and much increased the motive power required to operate the machine. Some of the most recent patents showed columns of extra weights located above the discs to effect the purpose. The principal object of Hardy's invention, which is the subject of patent No. 556,972, is found in his conception of means for overcoming the defects above stated, though he also stated a purpose "to so arrange the landside wheel relatively to the plowing disc that it shall form a pivoted support by which the plow may be turned easily at the corner or end of the furrow."

His main purpose he accomplished by removing the dead weight hitherto found necessary to drive the disc into the ground, and turning the upper edge of the disc to a backward inclination, so that in operation it would stand not only at a horizontal angle to the line of draft, but also at an angle to the perpendicular plane of its former position. The results of this change were important. The cutting edge of the disc in its lower forward section would enter the ground at an angle more acute, the tendency of which would be to give the disc a dip or "lead" under the soil instead of rolling over it. This dispensed with the weight theretofore put into or upon the machine to impel the disc into the soil. The soil when cut up from below would slide upward and off the concave of the disc in much the same manner as it slides on the moldboard of the common plow, instead of being scraped and crowded off. Both of these features—the lightening of the load and the relief of the obstruction to the movement of the earth in front of the disc—would, of course, diminish the motive power required for the operation. Moreover, the compaction of the bottom of the furrow would be avoided, for the new angle of inclination which Hardy's invention contemplates could be so adjusted that the disc would not be riding upon the bottom of the furrow and dragging over it, but would be lifting off its furrow from the moment it is severed

by its cutting edge. It appears from the record that after the introduction of this improvement the use of these plows rapidly increased, and they were accorded public favor. This may to some extent have been due to other causes than the merit of the plows. Nevertheless we cannot but believe that the improvement we have mentioned was the principal reason, for it seems to us a probable result. Fig. 1 of the drawings of the Hardy patent shows the construction he describes, and with the description we have given of his invention, and the statement of claim 2, next following, sufficiently illustrates his improvement. It consists essentially in the location, or more particularly the position, of the disc which is turned to the left of the line of draft and backward at the top. The landside wheel is shown at 19. The caster-wheel, 8, the arm, 6, turning on the pivot, 4, and the stop, 5, about which more will be said hereafter, are also shown.



The second claim of the patent, which is the only one here involved, reads as follows:

"(2) In a rotary plow, the combination with a plow-beam, of a box-bearing arranged on the plow-beam, an axle rotatable in the box-bearing, a plowing-disc secured to the said axle, rotated solely by the natural draft thereof and the friction of the soil, set diagonally to the line of draft and inclined out

of a vertical plane for cutting the furrow, and turning the soil therefrom, a furrow-wheel mounted on an axle at the same side of the plow-beam as the plowing-disc and arranged in advance thereof, an arm pivoted to the rear portion of the plow-beam and provided with a caster-wheel arranged in rear of the plowing-disc, and a stop device for limiting the swinging motion in one direction of the arm carrying the caster-wheel, said furrow-wheel and caster-wheel being inclined for resisting the side pressure of the plowing-disc, substantially as described."

In its physical aspects the change made in the position of the disc by Hardy does not seem large, but we are satisfied that it was an important one, and contributed much to the final success of these plows.

It is contended, however, that, considered in the light of previous inventions, it is not so new or recondite but that the insight of workmen skilled in this art should have perceived the advantages which would ensue from the change of construction, and would have made it. It is shown, however, that not only the skilled workmen, but those who were giving this art special study and exploring for improvements in rotary disc plows for several years, had not perceived this one, although the need of it was always pressing. This is no new suggestion, but it seems to have special relevancy when a series of improvements has culminated in one which contributes so decisively to the utility of a machine which others have been long trying to make operative. We have said that these advantages of this improvement in plows had not been perceived. Certain references are made by appellant which are supposed to show the contrary, to the most pertinent of which we shall next give attention.

A patent to Gardiner, issued in 1883, shows a rotary plow having these discs arranged in a gang suspended on arms secured to the frame. The discs were attached to the arms by rigid axles extending from the disc into a box or bearing upon a plate which was pivoted at the bottom to the arm, and had a slot at the upper end through which ran a bolt extending into the arm. By turning the plate on the pivot the upper bolt moved through the slot, and this gave a slight inclination to the disc out of its vertical position. But the drawings of the plate and of the slot seem to show that this inclination was from the top forward only, and, if so, it would not embody Hardy's idea. Another patent referred to is one to Cleveland, issued in 1891, which was for a rotary gang plow in which the discs were not entire, but were dish-shaped rings, with cutting edges; but they do not seem to have had a vertical inclination. At least there is nothing which more certainly indicates it than the quotation from the specification which counsel makes in his brief, as follows:

"Moreover, as the cutting edge of each steel annulus (or disc) is but little lower at the point where it is tangent with the soil than the corresponding point upon the inner edge, the annulus readily enters the earth. * * * The deeper it enters the greater is the force with which it rotates, enabling the edge to cut through turf or sod and raise the soil."

But this would seem to follow from the shape of the cutting rings, which are very concave. It must be admitted, however, that both these patents came near to the development of Hardy's improvement.

But a more serious trouble for the leading purpose of Hardy's invention is found in one or more previous patents for disc harrows. A patent to Niles, issued in 1882, for "improvements in revolving plows"

(so called, but, in fact, revolving harrows), shows the discs set not only at an angle to the line of draft, but also at an inclination backward from the vertical. He describes as his preferred form a disc having a flat working face. But he says, "if it is desired, the discs may be made somewhat dishing, in which case a better moldboard effect will be produced" than with ordinary discs. And he further says:

"Now, when the machine adjusted in this way is drawn forward, this double inclination of the discs will cause them not only to cut into the ground, as shown, but also to turn it over, instead of crowding or scraping it outward from the working face of the disc in the ordinary way—that is, the portion of the disc back of the point or cut will have a moldboard action on account of the inclination downward of its axis of rotation. This moldboard action, whereby the soil is turned in furrows, is obtained to a greater or less degree by changing the angle of inclination of the shaft to the line of progression, * * * as the shafts are inclined backward more and more, the discs cut deeper, and turn the soil over more completely."

It is difficult to distinguish this from Hardy's conception. It is true it is found in a slightly different kind of machine. But they belong to the same family—a very kindred art. We think, therefore, there was no patentable novelty in Hardy's principal idea, that of the peculiar position of his disc. If it had been new, there could be no doubt it would have made his combinations new and patentable.

We have no doubt that Hardy had no knowledge of any of these former patents, for they had not been much extended in use or public notice; but the consequence of their existence no less affects his claim of novelty than if he had known all about them, notwithstanding their obscurity. *Evans v. Eaton*, 3 Wheat. 454, 514, 4 L. Ed. 433; *Frederick R. Stearns v. Russell*, 85 Fed. 218, 29 C. C. A. 121; *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Crompton v. Knowles* (C. C.) 7 Fed. 199.

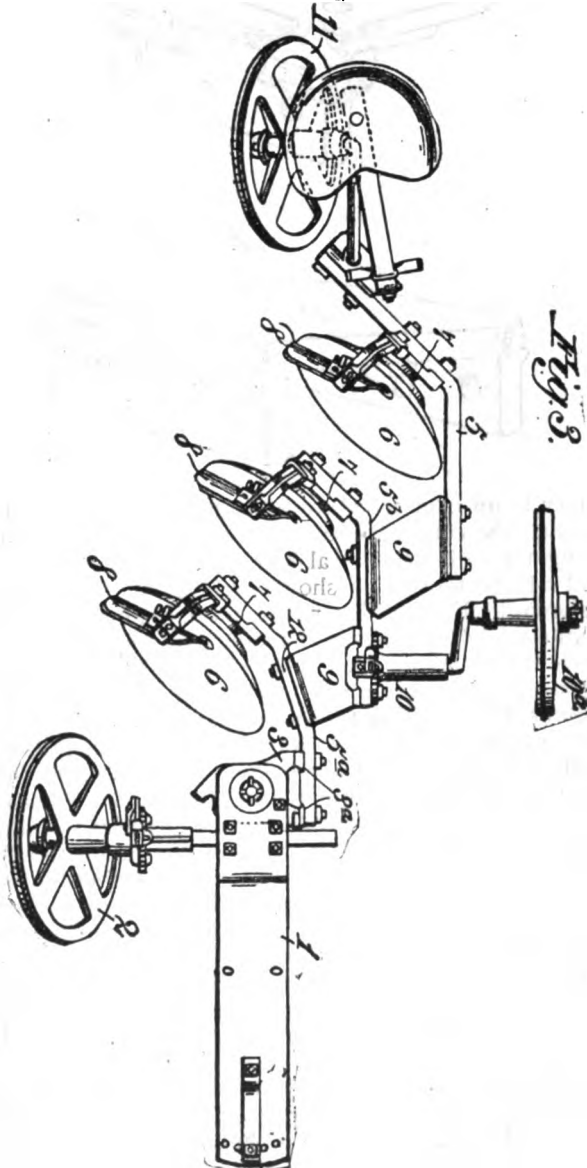
This conclusion is in accord with the ruling of the Patent Office, where the claim for the disc, separately, was rejected. But the claim for the combination which included it was held valid and allowed. We think that this conclusion also was correct. We recognize the familiar doctrine that the mere bringing together of old elements found in older machines of the same or a kindred art to perform the same functions and effect the same mechanical result does not amount to patentable invention. But we do not think the conditions of the present case justify the application of that rule. That all the elements of this combination may be found in some form and in some relations in existing machinery must be admitted, and in a restricted sense they severally perform similar functions. But they also co-operate with each other in effecting the whole result, and do not each, unaided by the others, accomplish a step in the operation. Thus the disc performs its function as it did in the earlier machines, but it does not do so unaided. Its operation is affected by the staggered wheels, which not only contribute to carry it on an even, horizontal plane, holding it to its proper depth in the soil, but resist its pressure toward the unplowed land. And the staggered wheels, as between themselves, have a co-operative effect. The furrow wheel, without the aid of the caster wheel, would draw the forward end of the plow away from the land, and throw the rear in an opposite direction. The caster wheel,

without the aid of the furrow wheel, would turn the plow off to land, and by the proper location of each with reference to the disc a uniform direction of the plow is secured. The stop preventing the swinging arm of the caster wheel holds it in line in the forward movement of the plow, leaving the wheel free to swing in the opposite direction in turning the plow around. Like observations apply to other parts of the combination. It is not necessary to a valid combination that all the parts should co-operate all the time. It is enough that, in the normal and progressive use of the machine, they do so some of the time. Again, the patent describes that the staggered furrow wheel shall be located about the middle of the length of the frame, but in advance of the disc. This relative location of the wheel and disc near each other also facilitates their continued uniform co-operation when plowing around corners or when plowing crooked furrows.

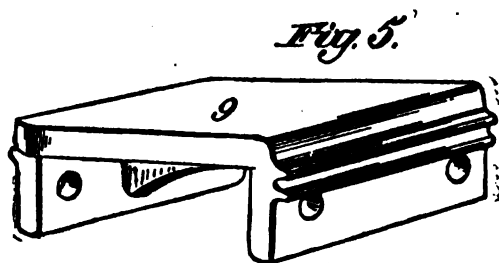
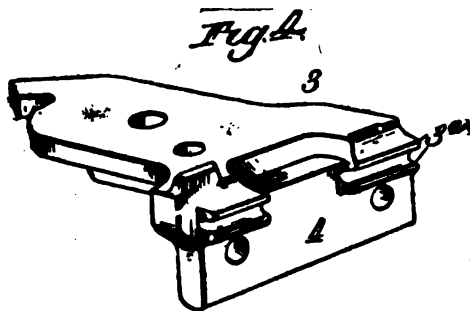
We have in several instances held valid combinations of old elements when from their different location in the new organization a different mechanical result was effected and a beneficial use subserved. Thus, in *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 49 C. C. A. 409, the new location given to the brush which takes off the current from a trolley wheel on street railway cars, which effected a more advantageous transmission of the current and afforded better protection to the brush, was patentable. In *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 53 C. C. A. 36, the changing of the location of a shield running by the side of a disc in a seed drill, which although it performed a similar service effected a different result in its combination with other parts, which was beneficial, entitled the author to a patent. And in *Stilwell, Bierce & Smith Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 54 C. C. A. 584, we held the location of a conveyor of oil meal in a new and different place in the machinery which effected a better result than had been previously obtained gave valid claim to a patent. We are not referred to any prior rotary disc plow or other machine which embodied the same elements or similar elements organized in a similar manner to that of the Hardy plow. And, having regard to the presumption of validity arising from the grant, the success which it has attained, the nonexistence of any anticipation, and the adoption of it by the defendant in his business, with express notice of the patent, and with a view to profit by it, we think we should hold the combination of claim 2 to be valid. *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.*, 120 Fed. 267, 272, 56 C. C. A. 547; *Lehnbeuter v. Holthaus*, 105 U. S. 94, 96, 26 L. Ed. 939; *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Streator Cathedral Glass Co. v. Wire Glass Co.*, 97 Fed. 950, 38 C. C. A. 573. Infringement thereof if the claim is held valid is not seriously disputed, nor could it be successfully, for it is free from doubt. The defendant's plow is a copy of the complainant's in all essential particulars.

The invention covered by the Hancock patent, No. 692,655, had for its object the provision of means for converting a single disc plow into a plurality disc plow, or the converse, and, incidentally, of means for interadjustment of the disc-carrying beams and their appurtenances. Aside from the manner of arrangement, the novel things supplied were principally a "coupling element" designed to connect the primary beam

of the plow, and, through it, the whole organization of the working parts of the plow, to the tongue, and a "spacing number" or plate, with flanges at the side to insert between the several beams when more than one disc is used, which serves the purpose of holding the beams in relation to each other at the proper distance apart. Fig. 3 of the drawings shows the general organization of the plurality disc plow, 3 being the coupling element, and 9 a spacing plate.



Figures 4 and 5 show the coupling element, 3, and the spacing member, 9, more clearly.



The primary beam is attached to the coupling element on the flange, 4, of Fig. 4, and the coupling element is connected with the tongue by a bolt running through the central hole on the horizontal part, 3, and the rear end of the tongue as shown in Fig. 3. The disc carrying beams are shown in Fig. 3. There are seven claims, all of which are for combinations in disc plows embodying one or both of the special features above mentioned. The "spacing members" are not described in the claims except by reference to the specifications by the words "substantially as described" at the end of each claim. But as we have held (*Soehner v. Favorite Stove & Range Co.*, 84 Fed. 182, 28 C. C. A. 317; *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 54 C. C. A. 584; *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* [C. C. A.] 120 Fed. 267; *Canda v. Michigan Malleable Iron Co.* [C. C. A.] 124 Fed. 486), this carries into the claims the description of the specification. The defendant denies that there was any invention disclosed by this patent, because, he says, of earlier patents, which he alleges fully anticipated it. We think it sufficiently appears from the references made that "spacing members," of a kind so closely resembling those of *Hancock* as to deprive his form of construction of the merit of invention, had been disclosed in former patents or in prior public use. But in respect to the "coupling element," which he makes an element in all his claims, there is more doubt; and it is necessary to know more definitely what his coupling element is or may be, within the scope of his claims, and they, as we said of his "spacing members," must be construed, when they lack definiteness, by reference to his

specification. It must be admitted, we think that by his coupling element must be understood a distinct member, and not all kinds of means for effecting a connection between the primary beam and the tongue. So restricted, we do not find anything in the prior art which anticipates his device. But it is contended that, assuming this to be so, the defendant does not infringe, because, as is said, Hancock's coupler is one having a pivotal or hinged connection with the tongue, and this Sanders does not use, but bolts his coupler rigidly upon the tongue. But is Hancock restricted to a coupler having a pivotal connection with the tongue? In his drawings he shows Fig. 4 above, two bolt holes in plate 3. Only the one at the left hand will be used when he employs a pivotal connection, which he says he prefers. The other bolt hole nearer the edge of the plate finds correspondence in the head or burr of a bolt shown in Fig. 3 forward, and a little to the left of the central bolt on the rear of the tongue. When both bolts are used the connection is rigid, and there is no pivot. Then he says in his specification:

"The numeral 8 indicates the preferred form of coupling element or bracket employed, and to which the rear end of the tongue is pivotally connected, so that the tongue and the staggered furrow-wheel carried thereby may swing in the proper direction to facilitate the turning of the plow."

The reason for his preference is easy to see. If the turning pivot is located at that point, the turn would be made without swinging the discs; whereas, if the turn is made on the caster wheel behind the body of the plow, all the discs must swing in turning. This language of the patentee just quoted plainly imports that he does not limit himself to a coupler having a pivotal connection with the tongue. He gives, as he is required to do by the statute, "the best mode of applying the principle" of his invention. If there were nothing more, this statement, coupled with the drawings, fairly indicates that he did not limit himself to a bracket having a pivotal connection with the tongue, and he indicates in a way which any mechanic would understand another form of bracket, which would have a rigid connection, and the claims are broad enough to include this form. This is the form and character of the bracket employed by the defendant. We find no sufficient reason for denying validity to the Hancock patent, and, no other material distinction between the defendant's organization and that of the Hancock patent than that we have already discussed being pointed out, we think the charge of infringement is sustained.

As these conclusions are in accord with those of the Circuit Court, its decree will be affirmed.

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 77.

1. PATENTS — VALIDITY AND INFRINGEMENT — VALVE MECHANISM FOR AIR-BRAKES.

The Boyden patent, No. 481,134, for a valve mechanism for automatic air-brakes, which admits both train-pipe air and auxiliary-reservoir air to the brake-cylinder in applying for emergency stops, and which is provided with means for restricting the flow of auxiliary-reservoir air, as

compared with the flow of train-pipe air, thereto, was not anticipated, and shows patentable invention; but, in view of the prior art, it must be restricted in construction to the combination of mechanical elements described and shown, or their equivalents, and, as so limited, claim 2 can be given no broader construction than to cover the mechanism described in claim 11. Claims 4 and 11 *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 123 Fed. 306. See 113 Fed. 594.

Wm. A. Jenner, for appellant.

J. Snowden Bell and F. H. Betts, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. In disposing of this appeal, it would subserve no useful purpose to rehearse the history of the railway brake litigation during the past 15 years, or to discuss the mechanical construction of the devices under consideration. To those who are familiar with the progress of the art, the issues herein are simple and easily understood. This defendant was originally sued by this complainant for infringement of its Westinghouse patent, No. 360,070. The defendant there contended, and the court sustained its contention, that its device (the one which is here alleged to infringe) resembled that of certain Boyden patents, one of which is the patent here in suit, and a motion for a preliminary injunction was denied on that ground. Thereafter complainant, having become the owner of said Boyden patents, brought this suit on one of them, alleging infringement thereof. The court below originally granted a preliminary injunction, and afterwards, upon final hearing, an injunction and accounting, from which this appeal is taken.

The devices here in question belong to the class known as "quick action triple valves," such as are used in connection with the ordinary automatic brake systems on railways. Their special and peculiar utility consists in their adaptation for use in effecting the application of the brakes for making emergency stops. In the specification of the patent in suit, Boyden, the inventor, states that in all prior constructions a supplemental passage was required, in connection with the triple valve proper, in order to combine with the preservation of its ordinary functions the additional function of introducing train-pipe air into the brake-cylinder for emergency stops. An example of a prior construction referred to in said specification is Westinghouse patent, No. 360,070. There, upon an extreme reduction of pressure for an emergency stop, the piston of the triple valve uncovered a separate emergency port, through which train-pipe pressure passed from the train pipe into the brake-cylinder. An improvement upon this construction, covered by Westinghouse patent No. 376,837, consisted in the use of a separate supplemental piston and valve. Boyden states that he has "provided a new principle of construction and a new mode of operation, by use of which the desired result aforesaid may be produced without the aid of the auxiliary valve heretofore required for the purpose." He then explains that this new invention embodies only a triple valve, per se, without auxiliary device; explains that its greater efficiency depends upon his in-

vention of means for restricting the flow of auxiliary-reservoir air to the brake-cylinder, as compared with the more open delivery of train-pipe air, and that, as a result of thus graduating the flow of air at different pressures, he secured the desired result by the use solely of the main valve, which "is here made to perform the office of opening communication to the brake-cylinder from both the train-pipe and the auxiliary reservoir in the quick application of the brakes for emergency stops."

The defendant alleges noninfringement, anticipation, and invalidity of the claims in suit. The admissions of defendant's experts and the opinion of the Supreme Court of the United States as to the Boyden patents simplify and narrow the scope of the issues presented, and dispense us from the necessity to discuss at length some of the defenses argued.

Messrs. Quimby and Christensen, in their affidavits in the original suit on patent No. 360,070, in differentiating defendant's device from that of No. 360,070, specifically pointed out the details in which defendant's device corresponded in construction and operation with the Boyden device. And defendant's expert, Livermore, having clearly and exhaustively discussed the whole railway brake art, is forced to admit that, with a single immaterial qualification, he finds in defendant's device all the elements of the three claims in suit. A comparison of the two structures establishes infringement of claims 4 and 11.

The court below, in its opinion, has, by its citations from the specifications of the patent and in its discussion of the evidence, accurately defined the construction of the patented valve and its operation in the emergency applications. Upon sudden reduction of train-pipe pressure a single triple valve piston moves to the extreme limit of its traverse, and opens a single emergency valve, which establishes communication through a single passage between both the train-pipe and auxiliary-reservoir passages and the brake-cylinder. The passage from the auxiliary reservoir is restricted at a given point. This is the means specified in the patent to comparatively restrict the flow of the two airs to the brake-cylinder. Such comparative restriction in emergency applications is necessary because the pressure of the train-pipe air is much lower than that of auxiliary-reservoir air, and it has been found to be of practical importance that the train-pipe air should be more freely vented into the brake-cylinder until the two pressures are equalized, or so that, in a certain sense, it may be said that the reservoir air follows the train-pipe air into the brake-cylinder. In defendant's valve, upon reduction of train-pipe pressure, a piston like that of complainant also moves to the extreme limit of its traverse, and opens a single emergency valve, which establishes communication through a single passage between both air passages and the brake-cylinder; the passage from the auxiliary reservoir being restricted as in complainant's device.

The Supreme Court of the United States (170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136), in discussing the Boyden patents, including the one here in suit, in connection with the Westinghouse patents, held as follows:

"Mr. Boyden has certainly exhibited great ingenuity in the discovery of a new and more perfect method of performing such [Westinghouse's] function.

If his patent be compared with the later Westinghouse patent, No. 376,837, * * * the difference between the two, both in form and principle, becomes still more apparent, and the greater simplicity of the Boyden patent certainly entitles it to a favorable consideration. * * * Under such circumstances, the law entitles him [Boyden] to the rights of an independent inventor."

In view of this statement, it is unnecessary to consider the evidence, which conclusively shows that this device involved invention.

The objections urged in the court below, and chiefly relied on here, attack the status of the patent in suit, and are to the effect that the patent, in view of the prior art, is not entitled to a broad construction, and that the claims in suit, especially claim 2, are void for various reasons, or, if not void, must be so limited as to relieve defendant from the charge of infringement. And counsel for appellant strenuously contends that the court below has misconceived the opinion of the Supreme Court as to the character of this patent, and has mistakenly held that it covered a primary invention.

The claims in suit are as follows:

"(2) In valve mechanism for automatic air-brakes, the combination of a communication with the brake-cylinder from both the auxiliary-reservoir and train-pipe, a single valve controlling said communication, and means to retard or restrict the flow thereto of the auxiliary-reservoir air when applying the brakes in comparison with the flow of train-pipe air, whereby train-pipe air at lower pressure than said auxiliary-reservoir air will pass said valve when making an emergency application of the brakes."

"(4) In a valve for automatic air-brakes, the combination of a communication with the brake-cylinder, a suitable valve controlling said communication, two air-passages coacting with said valve and relatively proportioned as to their capacity to allow the flow of both train-pipe air and auxiliary-reservoir air each at a different pressure to pass said valve when open, and a check-valve to prevent the return of air to the train-pipe."

"(11) In valve mechanism for automatic air-brakes, the combination of a main port communicating with a brake-cylinder from both the train-pipe and the auxiliary-reservoir, a suitable valve controlling said main port, a graduating-valve which admits air-pressure in small volume to the brake-cylinder, and air-passages coacting with said main port and relatively proportioned as to their capacity to allow both train-pipe air and auxiliary-reservoir air, each at a different pressure, to pass to said main port when the latter is open."

In view of the admission of defendant's expert that only two patents (Boyden 1883 patent, No. 280,285, and Holleman patent, No. 405,705) anticipate or impose limitations upon the claims in suit, we shall not discuss the numerous other patents cited.

The device of the Boyden 1883 patent admits both train-pipe air and auxiliary-reservoir air to the brake-cylinder through the same valve, for the purpose of recharging the auxiliary reservoir when the pressure is reduced by leakage, without releasing the brake. The valve of this patent differs so materially in construction and operation from the automatic quick action valves here under consideration that its triple valve could not be used in connection with these later valves. The valve is provided with train-pipe, auxiliary-reservoir, and brake-cylinder connections, controlled by two pistons so connected together as to form a double-ended piston, balanced by equal pressure of auxiliary-reservoir air on the inner faces of both pistons. For reasons hereafter to be stated, it is unnecessary to further explain its construction. Upon a sudden release of a considerable quantity of train-pipe pressure, the piston descends in such a way

as to cause auxiliary-reservoir pressure to flow into the brake cylinder, and thereby, in combination with other parts of the apparatus, to permit train-pipe air also to pass into the brake-cylinder. It will be observed that this operation partakes of the characteristics of quick action operation. But it is admitted that this valve never went into practical use; that its operation would require great care and attention; that, while pressure may be increased as above, it cannot be diminished, except by releasing the brakes; and "that the passages are not properly proportioned to produce highly effective quick serial action." The patentee, in his specification, failed to refer to any capacity for quick action, and admitted, contrary to his own interest, in the Westinghouse-Boyden suit, considered by the Supreme Court, that it "was not a quick action valve, or intended as such." The statements of the objects of the invention in the specifications of the patent confirm the opinion of the court below that its scope is limited to an invention "whose object was to provide for replenishing, 'while the brake is on,' the air reservoir or brake-cylinder, when the pressure is reduced by leakage," etc. From the whole evidence, it is clear that this device does not provide any means for comparatively restricting the flow of the two airs to the brake-cylinder, and that such material alterations as would make it an operative quick action valve would destroy it for the performance of the functions for which it was designed.

Holleman patent, No. 405,705, of 1889, was not pleaded in the answer, nor greatly pressed upon the argument except as to the single point which will be considered hereafter. It describes and shows a triple valve, which, as stated in the specification, is capable, upon sudden great reduction of train pressure, of admitting air to the brake-cylinder from train-pipe and auxiliary-reservoir through a single passage. The drawings show a construction apparently capable of such operation. There is a conflict of testimony as to whether such construction would be practicable. This device appears to be an improvement upon an earlier Perkins patent, No. 163,242, of May 11, 1875. One serious objection to its limiting effect upon the patent in suit is that, while the two airs eventually flow through the same passage to the brake-cylinder, the passages from the train-pipe and auxiliary-reservoir, respectively, are controlled by separate, although rigidly connected, valves covering different and distinct ports, and which depend upon different air pressures to hold the valves upon their seats. It does not appear that any device has been made under the Holleman patent. It fails to show any proportioning of the auxiliary-reservoir and train-pipe airs, and the patent is entirely silent on this point.

But the relevancy of these two patents and of Westinghouse patent, No. 360,070, to the issues herein, appears from the contention by defendant that, in view of Boyden's single controlling valve for both airs, and Holleman's construction, and the restricted port of No. 360,070, no broad claim for a single valve controlling both airs could be sustained, and that it would not involve invention to proportion the flow of air in the reservoir and train-pipe passages so as to accomplish the result of the patent in suit. This contention brings us to a consideration of the forcible argument of counsel for

defendant that the claims in suit, and especially claim 2, are absolutely void.

Claim 2, for "communication with the brake-cylinder from both the auxiliary-reservoir and the train-pipe," and "a single valve controlling said communication," and means to retard "or restrict the flow thereto of the auxiliary-reservoir air when applying the brakes in comparison with the flow of train-pipe air, whereby," etc., comprises the single valve controlling both airs and the narrow opening in the auxiliary-reservoir air passage. This claim is broad enough in terms to include any single controlling valve, and any means to restrict comparatively reservoir air. It is admitted that "the essential feature of novelty and utility" is the single valve, controlling both train-pipe and reservoir air. But, as already shown, Boyden, in his 1883 patent, showed a device wherein, upon an extreme traverse of a piston, a single valve controlled the passage of train-pipe and auxiliary-reservoir air to the brake-cylinder. And in Holleman, as we have seen, the extreme traverse of a single piston controlling a valve, structurally single, but functionally double, causes said valve to admit train-pipe and auxiliary-reservoir air to the brake-cylinder, and thus accelerates the emergency action. Its two air passages seem to be adapted to the comparatively restricted construction covered by the patent in suit, as already shown. It may be assumed that Boyden of 1883 and Holleman were mere paper patents, not capable of successful practical operation. But this does not defeat their relevancy as limitations upon the scope of the patent in suit, provided they sufficiently embody the elements and disclose the principle of operation of said patent. *Pickering v. Lomax*, 104 U. S. 310, 319, 36 L. Ed. 716; *Packard v. Lacing-Stud Co.*, 70 Fed. 66, 16 C. C. A. 639; *Dashiell v. Grosvenor*, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025. Their effect and that of Westinghouse patent, No. 360,070, in showing the prior use of a single controlling valve, and of restricted openings where more than one valve is used, is to establish that what the patentee did was to develop and combine along practical lines the ideas and instrumentalities of others, and those described in his own prior patent.

Defendant's expert, Livermore, has accurately defined the status of this patent in suit by his testimony, as follows:

"The Boyden patent in suit, however, is, so far as I know, the first one that shows a single valve which admits air both from the train-pipe and from the auxiliary-reservoir into the brake-cylinder, and in which the passage which supplies the air from the auxiliary-reservoir is of smaller size or sectional area than the passage which supplies the air from the train-pipe. * * * I have treated the invention forming the subject of the patent as including broadly the combination of elements by which the valves of the Boyden patent in suit accomplish the result aimed at with a mode of operation that differs substantially from that involved in all of the other quick action triple valves known to me, or considered by me in this case."

The patentee says in his specification, after describing his embodiment of his invention, as follows:

"My invention therefore includes any form of structure of valve wherein a single valve admits both train-pipe air and auxiliary-reservoir air to the brake-cylinder in applying for emergency stops, and which structure is provided with

means for restricting or retarding the flow of auxiliary-reservoir air to the brake-cylinder, as compared with the flow of the train-pipe air thereto."

But this does not necessarily follow from the statement of his invention, because the utmost that can be claimed for it is that it broadly covers his elements so combined as to accomplish an old result by a substantially new mode of operation.

Claim 2 should not be construed to cover every single controlling valve, and every means whereby to restrict the flow of reservoir air thereto, because each of these means was old. It is possible that a valve device might be constructed, embracing a single controlling valve and restricting means, and yet involve independent invention, or make use only of a combination of the elements found in the prior art. A construction of claim 2 to cover "every form of structure," etc., as is contended for by complainant, would not only unlawfully restrict other independent inventors who wished to avail themselves of the Boyden 1883 and Holleman valves in new and independent relations, but would, in effect, sustain said claim for a function, for the doing of a thing, the accomplishment of a result, in every possible way, irrespective of the means employed therefor. We conclude that the second claim, thus broadly construed, cannot be sustained.

If claim 2 be given such a limited construction as to cover only the combination of elements described and shown by the patentee and the equivalents thereof, then it is identical with claim 11.

The fourth claim covers specifically a "valve controlling two air passages coacting with said valve, and relatively proportioned as to their capacity to allow the flow" of the two airs, each at different pressures, to pass said valve, and "a check valve." The additional element is the check valve, which is found also in defendant's device. This claim is quite as broad as the scope of the invention admits. But here the specific means—the "air passages * * * relatively proportioned," and their operative relation "coacting with said valve"—are definitely set forth. We conclude that this claim is valid.

Claim 11 is a clear, precise, definite statement of the elements of complainant's invention, combined and limited in conformity with the statement of the invention in the specification. That these two claims are infringed is sufficiently shown by the comparison of the two devices and the admissions of defendant's experts, already discussed, and by the instructions given in defendant's "Christensen Instruction Book" for using its apparatus, as pointed out in the opinion of the court below.

Various other questions were raised in the briefs and on the arguments, such as the alleged impracticability of complainant's device, the fact that certain elements in defendant's infringing device perform a variety of functions not performed by those of complainant, etc. These contentions have not been discussed, but have been duly considered in determining the validity and scope of the claims in suit.

The decree of the Circuit Court is reversed as to claim 2, and is affirmed as to claims 4 and 11, without costs of this court, and cause remanded to the court below, with instructions to enter a decree in conformity with this opinion, and with two-thirds costs to complainant.

PRESSED STEEL CAR CO. v. HANSEN.

(Circuit Court, W. D. Pennsylvania. February 29, 1904.)

No. 13.

1. MASTER AND SERVANT—INVENTIONS BY EMPLOYÉ—RIGHT OF EMPLOYER TO PATENTS.

An obligation on the part of an employé to assign to his employer patents obtained for inventions made in the course of his employment does not arise from the relation of employer and employé, but can only be created by an express contract.

2. PATENTS—PAROL CONTRACT TO ASSIGN—VALIDITY AND ENFORCEMENT.

A parol agreement to assign the right to obtain a patent for an invention is valid, and, when established by sufficient proof, may be specifically enforced in equity.

3. SPECIFIC PERFORMANCE—PAROL CONTRACT—SUFFICIENCY OF PROOF.

To authorize a court of equity to decree the specific performance of a parol contract, not only the contract itself, but its terms, must be clearly proven.

4. PATENTS—AGREEMENT TO ASSIGN TO EMPLOYER—EVIDENCE TO ESTABLISH.

The fact that an employé assigned to his employer the right to patents applied for by him for inventions made in the course of his employment does not alone warrant an inference that he was bound by a contract to assign all such inventions, especially where his action is reasonably explained on other grounds.

5. SAME.

Evidence considered, and *held* insufficient to establish a contract by an employé to assign to his employer the patent rights in inventions made by him in the course of his employment, either express or implied.

In Equity.

Bakewell & Byrnes, Knox & Reed, John R. Bennett, and W. C. Strawbridge, for complainant.

Kay & Totten, Geo. H. Christy, D. T. Watson, and Geo. B. Gordon, for respondent.

BUFFINGTON, District Judge. This is a bill in equity, brought by the Pressed Steel Car Company against John M. Hansen to compel him to transfer to it six applications, or the patents issued thereon. The complainant is engaged in the manufacture of steel cars. The respondent was its chief engineer when the inventions in question were made. The allegations upon which the complainant bases its right to the relief sought are, in substance, set forth in its bill as follows: That Hansen was for several years previous to the complainant's incorporation employed by the Schoen Manufacturing Company, its successor, the Schoen Pressed Steel Company, and finally became chief engineer of the last-named company; that complainant succeeded to the business and good will of the Schoen Pressed Steel Company, whereupon Hansen "entered your orator's employ as its chief engineer, under an agreement and understanding to devote his entire time, ability, and skill to your orator's business and its advancement, and that all inventions and improvements that

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 71; Patents, vol. 38, Cent. Dig. § 125.

he might make during the period of his employment, and all letters patent that might be obtained therefor, should be the sole property of your orator"; that "it was a condition of his employment as chief engineer, and in part consideration of the salary paid him as such, and his employment as such implied, and was upon the express understanding and agreement by him, that all designs, inventions, and improvements that he might make or develop while in your orator's employ, and all letters patent that might be obtained therefor, should become and be the sole and exclusive property of your orator, and that for all such designs, inventions, and improvements, if found or regarded as patentable, he would, from time to time, as he made or developed such designs, inventions, or improvements, disclose the same to your orator's solicitor, and, through him, and at your orator's expense, make all necessary and proper applications for letters patent, and execute all necessary and proper papers to that end, and that he would, from time to time, as such applications were executed and filed, likewise execute and deliver to your orator, with such applications, properly executed assignments of all such applications, inventions therein specified, and letters patent that might be granted thereon and therefor, with directions to the Commissioner of Patents to issue all such letters patent to himself as assignor to your orator of all his right, title, and interest in and to all such letters patent, which should be the entire right, title, and interest therein; that, such being the terms and conditions of the respondent's employment by your orator, and in full appreciation and consideration therefor, and of the inventions and improvements that he might make and letters patent that he might obtain therefor, he was paid by your orator a salary at the rate of \$4,000 per year to January 1, 1900, at the rate of \$5,000 per year to September 1, 1900, at the rate of \$6,000 per year to October 1, 1901, and at the rate of \$10,000 per year down to January 1, 1902, when he left your orator's employ"; that thereafter, and while performing his duty as chief engineer, he made the inventions in question, and made application for patenting the same; that he subsequently left the employment of complainant, and refused to assign the same. On the part of the respondent it is explicitly denied there was any contract, express or implied, to assign these patents.

The law applicable to this case falls within a narrow compass. The obligation of an employé to assign to an employer an invention made in the course of his employment does not arise from the existence of the relation of employé and employer alone, but there must be in addition a contract to assign. Thus, in *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 320, 13 Sup. Ct. 888, 37 L. Ed. 749, it is said:

"A manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of an express agreement to that effect. *Hapgood v. Hewitt*, 119 U. S. 228 [7 Sup. Ct. 193, 30 L. Ed. 389]."

It will thus be seen that the agreement by the employé inventor to convey is the obligation which compels him to convey.

In view of this fundamental requirement it becomes our duty to inquire whether such contract is established by the proofs in this case. That a contract to assign may be by parol, and, if established, will be enforced, is settled. As said in *Dalzell v. Dueber*, supra,

"An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within section 4898 of the Revised Statutes [U. S. Comp. St. 1901, p. 3387], requiring assignments of patents to be in writing; and may be specifically enforced in equity upon sufficient proofs thereof. *Somerby v. Buntin*, 118 Mass. 279 [19 Am. Rep. 459]; *Gould v. Banks*, 8 Wend. 562 [24 Am. Dec. 90]; *Burr v. De la Vergne*, 102 N. Y. 415 [7 N. E. 366]; *Blakeney v. Goode*, 30 Ohio St. 350."

It will be noted, however, that, this being a bill for specific performance, the terms of the contract to be enforced should be clearly proven. Thus, in *Colson v. Thompson*, 2 Wheat. 336, 4 L. Ed. 253, cited approvingly in the *Dalzell v. Dueber* Case, it was said:

"The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

Where it is doubtful whether an agreement has been concluded, and unless the proof is clear and satisfactory both as to the existence of a contract and as to its terms, specific performance will not be enforced. *Carr v. Duval*, 14 Pet. 79, 10 L. Ed. 361; *Nickerson v. Nickerson*, 127 U. S. 668, 8 Sup. Ct. 1355, 32 L. Ed. 314; *Hennessey v. Woolworth*, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500. Turning, then, to the proof, we inquire whether the complainant has met this standard. The answer traverses the allegation of a contract, and the burden is therefore upon the complainant to overcome such denial, and prove the contract by a preponderance of proof. 1 *Daniell's Chancery Pr. and Pl.* 850. It will be observed that the bill avers the contract sought to be enforced was made when Hansen entered the employ of the Pressed Steel Car Company. The testimony of Mr. Hoffstot, the principal witness for complainant, is explicit that he has no personal knowledge that such a contract was then made. "I did not employ Mr. Hansen, when he first came to the Pressed Steel Car Company, as chief engineer, and I was not a director of the Pressed Steel Car Company at the time he first entered its employ." In view of this statement, the denials of Hansen:

"Q. I believe, Mr. Hansen, that while you were in the employ of the Pressed Steel Car Company you had something to do with certain inventions which were or might possibly be useful in that company's business? A. I did. Q. I wish you would state whether or not there was any agreement or understanding or arrangement of any sort, either verbal or written, between yourself and that company, as to the ownership of any inventions which you might make or did make while in its employ? A. I have no knowledge of any."

And of Mr. T. C. Schoen:

"Q. At the time that the Pressed Steel Car Company was organized, who employed Mr. Hansen as chief engineer, and by whom was it determined to so employ him? A. I was at the head of the Schoen Pressed Steel Company at the time of the formation of the Pressed Steel Car Company, and the whole organization of the new company was substantially taking over the old or-

ganization, so that I do not recall that there was any specific appointment made. There was no formality observed about making any specific appointments. I probably consulted with the manager and vice president, and we decided that Mr. Hansen should be the chief engineer. Q. At whose request was Mr. Hansen appointed assistant to the president, and what were the reasons that led to this appointment? A. He was of great assistance to the president in the negotiation of contracts. I don't think it was at anybody's request. I appointed him. I don't recall that anybody requested me to do it. Q. Was there any agreement made between Mr. Hansen and any of these three companies as to the ownership of inventions relating to cars, or parts thereof, that should be made by him during the time he was in the employ of any one of the companies? A. There was not."

—It is clearly shown that no contract was made by Hansen with the complainant company. Although not so alleged in the bill, it is now, however, contended that such a contract is established by the fact that Hansen had been under a contract with the Schoen Pressed Steel Company providing for assignment of patents, and that he assumed the same duties and incident contract obligations when he became chief engineer in the complainant company. Thus Mr. Hoffstot was asked:

"You have stated that you have no personal knowledge of the terms and conditions on which Mr. Hansen was first employed as chief engineer of the Pressed Steel Car Company. Do you know how he came to be employed by the Pressed Steel Car Company as its chief engineer, and what knowledge have you of the terms and conditions under which Mr. Hansen passed over from the Schoen Pressed Steel Company as its chief engineer to the Pressed Steel Car Company as its chief engineer?"

To which he replied:

"The only knowledge I have is that he (Mr. Hansen) has told me and what the Schoens told me at the time, namely, that all their employees of the Schoen Pressed Steel Company were on the same basis that they had been employed with the old concern, as the Schoen Pressed Steel Company's shareholders were largely in the ascendancy in the holdings of the stock of the Pressed Steel Car Company."

He was asked also:

"To make this clear, you were not personally present when Mr. Hansen was employed as chief engineer of the Pressed Steel Car Company, were you?"

To which he answered:

"No. As I have stated before, Mr. Hansen's employment as chief engineer of the Pressed Steel Car Company was simply a holdover, as were the others above referred to. * * * I have stated that I was not personally present, but I have been told by both Mr. Hansen and Mr. Schoen, as well as Mr. Finckel, and a great number of others passed over, and to the best of my knowledge and belief there was no formal time when Mr. Hansen and any one of the people left the Schoen Pressed Steel Company and were formally engaged with the Pressed Steel Car Company."

Mr. C. T. Schoen's and Mr. Hansen's testimony in that regard are quoted above. Assuming, for present purposes, that Hansen's employment by the complainant impliedly imposed on him all contract obligations he was under to the Schoen Pressed Steel Company, we next inquire whether Hansen had contracted to assign patents to that company. No witness was called who was present at the making of such a contract, or had personal knowledge of it or its terms. Mr. Hoffstot says explicitly, "I was not present when Mr.

Hansen was engaged as chief engineer of the Schoen Pressed Steel Company." He bases his belief that there was a contract upon what Mr. C. T. Schoen and Mr. Hansen told him in that regard. Clearly, what Schoen said in Hansen's absence is not competent to establish a contract on Hansen's part. But not only is Hoffstot's proof in regard to such declarations denied by both Hansen and Schoen, but, in addition to this, we think the statements of Mr. Schoen, even if competent, do not necessarily show the existence of a contract by Hansen to assign patents. In other words, Schoen's statements are reconcilable with the fact that Hansen was not under contractual obligations to assign. First taking up the question of the existence of a contract, we have, as we have seen, the testimony of C. T. Schoen, the president of the Schoen Pressed Steel Company, that there was no contract with Hansen; that of Hansen to the same effect; of Fraser, the assistant treasurer of the Schoen Company, and subsequently auditor of the complainant, who testified that as auditor of the complainant he had charge of all the company's contracts, and had never heard of any contract with Hansen; of W. H. Schoen, the secretary or treasurer of the Schoen Pressed Steel Company during its whole existence, that he was consulted in connection with Hansen's appointments and promotions, and that he knew of no "agreement, verbal or otherwise, with Mr. Hansen, requiring him to assign to any one of these three companies any inventions or improvements he might make in steel cars or parts thereof." Another witness, E. A. Schoen, was connected with all three companies, having been superintendent and general manager of the Schoen Manufacturing Company, later of the Schoen Pressed Steel Company, and general manager and a vice president of the complainant up to January, 1901. Referring to Hansen, and in answer to the question, "When he was advanced from one position to another in these different companies, had you anything to do with his promotion?" he says, "All of his promotions all the way through were decided upon by Mr. C. T. Schoen and Mr. W. H. Schoen and myself." He further testified:

"Q. Was there any agreement made between Mr. Hansen and any of these three companies as to the ownership of inventions made by him relating to the car or parts of cars during the time that he was in the employ of any one of the companies, to your knowledge? A. There never was any such agreement. Q. During the time you were connected with the company, or any of these companies, was it understood that part of the consideration of the salary paid to Mr. Hansen was based upon an agreement that Mr. Hansen should assign any invention made by him to the company? A. There never was, as far as I know. Q. At the time of the formation of the Pressed Steel Car Company, when Mr. Hansen was appointed chief engineer of that company, which ones of the officers of that company consulted together and determined upon Mr. Hansen's appointment as chief engineer? A. Mr. Charles T. Schoen, Mr. W. H. Schoen, and myself. Q. Was Mr. F. N. Hoffstot connected with the company at that time, and was he consulted in any way as to the appointment of Mr. Hansen as chief engineer? A. Mr. Hoffstot at that time was merely a stockholder, and consulted in no way about any appointment made by the company."

In addition to the above, Mr. De Armond, who was secretary of the Schoen Pressed Steel Company from July, 1896, to January,

1899, and of the complainant until August, 1901, and whose official position and duties required him to know of such contracts, testified that he never heard of such a contract by Mr. Hansen. After a careful study of the testimony, we are justified in finding, and do find, that by the clear weight of the evidence no express contract by Hansen with the Schoen Manufacturing Company or the Schoen Pressed Steel Company to transfer patents existed.

It is, however, contended that the existence of such a contract is shown by what is termed the "King incident." It seems that Messrs. King, Allman, and Hansen, while employed by the Schoen Pressed Steel Company, devised an improvement for car doors, and applied for a patent. An office search showed the device was anticipated, and the application was abandoned. Prior to this abandonment Mr. Charles T. Schoen was informed by the three of the improvement, and of the intention to charge his company royalty for its use. The incident and its alleged bearing will appear from the following testimony of Mr. Hoffstot:

"Q. What knowledge have you as to the subject of the assignment of said inventions and said applications for letters patent therefor, during the period of employment of Mr. Hansen by the Pressed Steel Car Company, and from what source or sources did you derive that knowledge? A. I knew that the patents were being taken out by him, and assigned by him to the company, and the knowledge was received from the records of the company, as well as his statements from time to time. Q. From what person or persons other than Mr. Hansen, if any, did you derive said knowledge? A. As to the patents which he took out from the Pressed Steel Car Company, as I said before, from the records of the company, and as to what is known as the 'King incident,' from Mr. Charles T. Schoen. Q. Please explain what you mean by the King incident? A. To Mr. George I. King and Mr. Hansen and another man, whom I can't think of for the moment, having attempted to take out a patent on their own account, and then claim a royalty from the Schoen Pressed Steel Company. Q. Did this King matter occur during the existence of the Schoen Pressed Steel Company, or after the formation of the Pressed Steel Car Company? A. Before the formation of the Pressed Steel Car Company. Q. When did this conversation occur with Mr. Schoen—before or after the formation of the Pressed Steel Car Company? A. Mr. Schoen first told me about this incident about the time it happened, and referred to it at different times since then, and the first occurrence was prior to the formation of the Pressed Steel Car Company. Q. In referring to this King incident, what did Mr. Schoen say to you? A. He stated that these three young men had attempted to do some patenting on their own account, and that he told them very plainly, but firmly, that he would not have any one working for the Schoen Pressed Steel Company that was getting out patents who did not assign them to the company in exactly the same manner as he did, and expressed himself at considerable length on the justness of this demand, and stated that one of the young men had left on that account, but that John M. Hansen was smart enough to realize that he (Schoen) was right, and remained. He also referred to this incident many times after in speaking of Mr. Hansen."

Clearly, these declarations of Schoen, made in the absence of Hansen, are not evidence to affect the latter, and must be disregarded. Assuming their competence for present purposes, let us examine the testimony of the participants. Mr. King, a witness for complainant, gives this version of what followed the meeting:

"Q. When did you have the next conversation with Mr. Hansen about this matter, and what did he tell you? A. To the best of my recollection, the next conversation with Mr. Hansen on this subject was had on the day following

our interview with Mr. Schoen above referred to. The substance of Mr. Hansen's conversation with myself was to the effect that Mr. Schoen had called him into his office that afternoon, and told him that he would have to do one of two things—either assign the application for a patent on this door mechanism to the Schoen Pressed Steel Company, or get out; and do one or the other damned quick, as I recollect it. Mr. Hansen and I then discussed the situation, and I told him that personally it was a case of leaving at once, whereupon I arranged to do that, and gave him my verbal resignation on the spot. Q. Did Mr. Hansen, in this conversation, the day following the conversation with Mr. Schoen, state what grounds Mr. Schoen had taken for the position that the invention should be handed over to the company or you should get out? A. My recollection on this point is that Mr. Hansen reported to me that Mr. Schoen did not propose to have any inventions of that sort taken out by employees of the company, and that they would have to be assigned to the company in any similar case."

On the other hand, Schoen's account is.

"Q. Please state how this matter was brought to your attention, and what took place in connection with it. A. As I recollect it now, Mr. King and Mr. Hansen called on me at the hotel in Pittsburg where I was stopping, to talk about this device. I invited them to dinner, and Mr. King did the principal part of the talking about it. I gathered the impression from his talk that his motive was to get some money out of the company. I said very little, if anything, regarding the subject. Later I had a talk with Mr. Hansen, and advised him it was not wise for him to be mixed up in that matter. I advised him that he had a bright prospect in the future with our company, and it would be wise on his part to not get mixed up with other men who were not in the same relationship as he with the management of the company; that I considered him one of the young men I had picked out to be of some account, and that he had better not have anything to do with it. These two men left of their own accord shortly afterward. Q. Did you state to Mr. Hansen that you would not have any one working for the Schoen Pressed Steel Company that was getting out patents who did not assign them to the company? A. I did not, nor did I talk with him on that line at all. I talked to him in the most friendly spirit. Q. Did you ever state to Mr. Hoffstot that you had told Hansen very plainly, but firmly, that you would not have any one working for the Schoen Pressed Steel Company that was getting out patents who did not assign them to the company in exactly the same manner as you did? A. I have no recollection of making any such statement to him. There never was an occasion, to the best of my knowledge, for me to speak in that tone to Mr. Hansen in all my connection with him."

Hansen's account is:

"Q. Well, now, I wish you would state what the conversation was that you had with Mr. Schoen. A. Well, Mr. Schoen told me that he was not going to pay us any royalty on any patents we took out; that if Mr. King or I decided that this company should pay royalty, why he wouldn't stand for it; and he told me, as far as I was concerned, he thought it was a matter I ought to drop anyhow. He made no demands for me to do so; he simply left it to my own judgment. Q. Did he say to you that you would have to assign the patent to the company? A. No, sir; he did not. Q. Did he say anything to you about having to quit the company unless you did? A. No, sir. Q. When you met King, what did you tell him? A. I told him that I had seen Mr. Schoen, and he wasn't going to stand for any royalties. He said, well, he wouldn't let him use it without any royalty, under any consideration. He would rather quit, and stick to what he considered his rights in the patent; and, as he stated in this testimony, he quit within thirty minutes."

Assuming, however, that Mr. King's statement is correct, and that Mr. Schoen's statement, as made to Mr. Hoffstot, is competent and established, they do not necessarily show the existence of any contract by Hansen to assign. Indeed, if anything, they show the con-

trary, for Schoen did not insist on an assignment by virtue of a contract to assign, but on prompt assignment as a condition of continued employment. Indeed, King recognized this, and resigned. If the patent had been granted, it would not be contended King was under any obligation to assign it, and no more was Hansen. As to the latter, no inference can be drawn from his continuance with the company. He never did assign his interest in the patent, and with the abandonment of the application the matter ended. At most, we think this incident only showed that Schoen demanded, if improvements were made by an employé, he would not continue to employ the inventor unless he assigned such patent to the company; but it by no means follows that his employé had not the option to decline to assign, terminate his employment, and hold his patent.

It is also contended the conduct of Hansen in assigning or joining with C. T. Schoen in assigning patents to the company recognized the existence of a contractual obligation on his part to do so; in other words, that his acts are inexplicable unless based on a contract. The contention is thus stated in complainant's brief:

"This evidence of appreciation is something extraordinary, and does not appeal to the sober, sound sense of intelligent business men. If this respondent received a salary which was only commensurate with the duties performed by him as an ordinary employé, and was not expected to transfer or assign the results of his inventive genius, it is unreasonable to suppose that he would, out of the goodness of his heart, or as the result of a generous impulse, have transferred numerous valuable patented inventions to his employer, the Pressed Steel Car Company."

Assuming, for present purposes, such a course of conduct may avail to establish the existence of a contract, we are of opinion that, in view of the facts shown in this case, it does not necessarily imply one. Hansen gives this explanation of his assignments:

"In order to make the matter clear, I wish to say that, as already stated, my business career practically dated from my connection with the Schoen Manufacturing Company. I was always very closely associated with Mr. C. T. Schoen, and I looked upon the Schoen Manufacturing Company and the Schoen Pressed Steel Company as being Mr. Schoen's property. I always felt that all the advancement I received in the way of position and salary was through him, and my future I felt was practically in his hands as long as I was connected with him, and my intentions always were to stay with his interests. I knew very little about the habits and customs on the question of assignments at the start, but as I was being pushed along I later on felt what I was getting was very largely through Mr. Schoen, and, as already stated, I intended to follow the business right along. The question never occurred to me as to whether or not I should assign the patents. I simply did it as a matter of routine, and I felt it was one way of showing appreciation. * * * During my employment with the above companies [all three] I really gave the matter no thought; that is, gave the matter no thought to figure out what my rights were. * * * The first application was a joint application—Mr. C. T. Schoen and myself—and when the papers were prepared and forwarded to Mr. Schoen he executed them, and they were then turned over to me, and I noticed that the papers were to be signed by me, and I did so. In that way this practice was established and became sort of a routine matter, and one that I gave no thought."

His other acts are in keeping with motives to which he attributes his acts in assigning patents to these companies. He assigned numerous foreign patents taken out on his inventions to the Trans-

portation Development Company, a corporation handling the pressed steel car business abroad. Admittedly, he was under no contract so to do, and no reason or interest is suggested for his doing so, except that such company was composed of Mr. C. T. Schoen and other persons largely interested in the complainant company. It is shown that every increase in salary and promotion came to him unsought. Moreover, his conduct evinces commendable, if not, indeed, unusual, loyalty to the company. When his services were sought by railroad interests, and a salary of \$3,000 in excess of what the complainant was paying him was offered, he announced his purpose was to stay with the complainant company, and did not make the railroad offer a basis for exacting increased compensation. His testimony in that regard—and it is not denied by Mr. Friend—shows such loyalty:

"A. That letter was a letter written by Mr. Underwood [the representative of the Erie Railroad] to Mr. Friend, advising him that he was going to make me an offer, and that he was writing Mr. Friend in the interest of fair play; that he did not want to rob him of any of his employes without giving him due notice. Q. What took place then, after he had given you the letter? A. As already stated, I told Mr. Friend that I knew he had received the letter, or rather that Mr. Underwood had spoken to me, and he remarked: 'Now, Frank [meaning Mr. Hoffstot] hasn't seen that yet, and I haven't said a word to him about it. Now, what do you think about it? What are your ideas?' Well, I said that would be an entirely new field for me, and I never had any particular desire to get into the railroad business. I was always pretty well satisfied with the manufacturing end, and I had about made up my mind that, after consultation with them, I would not accept it. We talked along that line. Mr. Friend evidently forgot himself, and remarked, when I told him I had decided not to accept it, that is just exactly what he and Frank thought about the matter when they talked it over this morning' (meaning the morning of that day. Then Mr. Friend remarked: 'Now, John, we understand that you are going to stay with us.' I said, 'Yes, as far as I know, I will not accept that position.' Q. Was anything said about salary at that time? A. We were about, as I thought, to leave that subject, when Mr. Friend got up, and tapped me on the shoulder, and said, 'John, you are a funny fellow; now is your chance to ask for more money.' And I said, 'I don't care to do that.' It was up to my employer to decide whether I was worth more money or not. I never had asked for more money, and I didn't propose to do so with them, and he said: 'Well, now, I tell you, you have got most of the business right in your vest pocket, and if anything should happen to you where would we be? I will make you a proposition: If you will arrange to get a good assistant, a bona fide assistant, as soon as you do that I will raise your salary from six to eight thousand a year.' I also told him that I had been trying to get a man to assist me for some time. I didn't want to feel that the increase in salary was any particular incentive to me to get an assistant, because I had been trying to do that."

Considering that the respondent in this case, from a draftsman at \$6 a week has been rapidly promoted, and his salary increased from time to time, without his request, we think he had good grounds for feeling grateful towards those who had advanced him. Thus feeling, regarding his own future as linked to the man who had befriended him, and knowing the latter was a large stockholder in the company, we think his conduct in assigning these patents may be attributed to other motives than a contractual obligation. And, even if such motives were not shown to exist, the failure of the assignor to stand on his rights as to the assignment of other patents should not be

ground to infer a contract to transfer a later one which he refuses to assign. What was said in *Fuller & Johnson Manufacturing Company v. Bartlett*, 68 Wis. 73, 31 N. W. 747, 60 Am. Rep. 838, is here pertinent:

"Stress is laid upon the fact that the defendant assigned to Fuller & Johnson an earlier patent. It may be that he did so without knowing his legal rights. It may be that he did not comprehend his legal right to the invention in question until about the time of his quitting the plaintiff's employment. Still the question presented is whether the facts disclosed raise an implied agreement to assign the patent to the plaintiff absolutely. This is not to be inferred from the mere passivity of the defendant."

After careful consideration of the proofs, we have reached the conclusions: First, that no express contract by Hansen to transfer patents is proved to have been made; second, that the facts proven are not such as to warrant the presumption that a contract existed; and, third, that no implied contract to transfer arises from the relation between the parties.

A decree will be drawn dismissing the bill.

DAVIS-COLBY ORE ROASTER CO. V. LACKAWANNA IRON & STEEL CO.

(Circuit Court, M. D. Pennsylvania. February 15, 1904.)

No. 2.

1. PATENTS—INFRINGEMENT—ORE ROASTING FURNACE.

The Greer patents, Nos. 495,883 and 508,542, for an ore roasting furnace, made up of three vertical chambers, each coextensive with the other two, the center one being a roasting chamber to hold the ore, and having openings at several points into each of the others, a combustion chamber on one side, fed from below by fuel gas intermixed with air, and a stack chamber on the other side, the draft created by which draws the flames from the combustion through the roasting chamber, were not anticipated, and are valid. Claims 3 and 8 of patent No. 508,542, covering the combination of the three chambers, and claims 8 and 4 of No. 495,883, and 4 and 5 of No. 508,542, covering a gas chamber in the base of the combustion chamber, having in its top exit openings for gas, and also air ports adjacent, construed, and *held* infringed.

2. SAME.

The Davis patent, No. 520,481, for buttressing walls extending through the combustion chamber of an ore roasting furnace, to strengthen the wall between that and the roasting chamber, *held* not infringed if valid, which doubted.

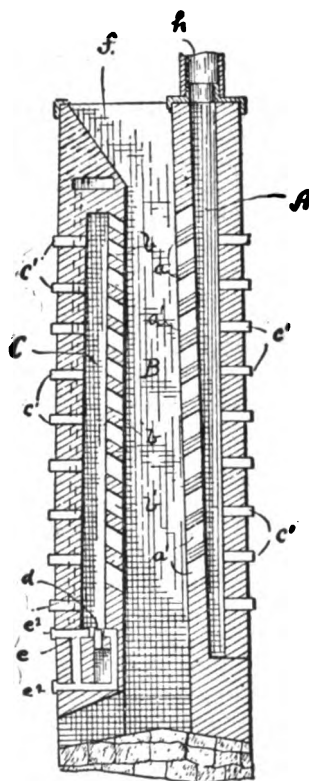
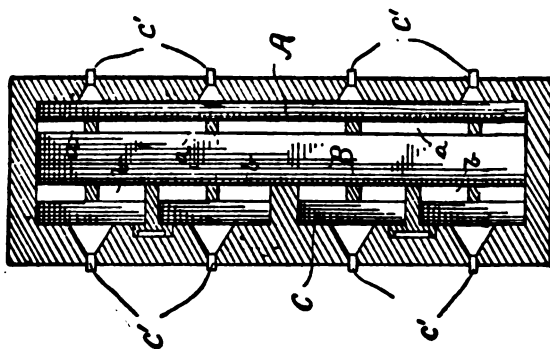
In Equity. Suit for infringement of letters patent Nos. 495,883 and 508,542, for ore roasting furnaces, granted in April and November, 1893, respectively, to R. C. Greer, and No. 520,481, for an improvement in such furnaces granted to O. W. Davis, Jr., May 29, 1894. On final hearing.

Joseph C. Fraley and Henry N. Paul, Jr., for plaintiffs.
Percy B. Hills, for defendants.

ARCHBALD, District Judge. The structure which is the subject of this litigation is what is known as an "ore roaster," designed for expelling the sulphur from iron ore preliminary to smelting. Some

ores have no sulphur, but others are seriously impregnated with it; and this is particularly true of that obtained from the famous Corn-wall banks, near Lebanon, Pa., from which it has been the problem of a hundred years to successfully eliminate it. The complainants are the owners of three patents which are concerned with this subject—two issued to R. C. Greer in April and November, 1893, and one to O. W. Davis, Jr., in May, 1894. Under these patents they undertook to erect at Lebanon in 1895, for the defendant company, who were operating the Colebrook furnaces there, an ore roaster with a capacity of 100 tons daily, guarantied to roast down the sulphur to six-tenths of 1 per cent. This roaster did not work successfully at first, but was made to do so in the end, although there is some question whether this was not the result of favoring it with large-sized ore. In order to overcome, however, existing difficulties, permission was obtained to rebuild certain parts of it, and plans for this purpose were submitted; and whatever lack of success there was, or whatever was the cause of it, the defendant company appear to have been sufficiently satisfied to ask for a proposition looking to the erection of a plant of five roasters at Scranton, Pa., where their principal works then were, in response to which the complainants made suggestions as to further changes which seemed to be desirable. But when it was found that a royalty of \$1,200 for each roaster would be required, Mr. Wehrum, the general manager of the defendants, refused to pay it, and broke off the negotiations; declaring he had never seen a patent which he could not get around. Immediately following this, a roaster was put up by the defendants themselves, under the direction of Mr. Wehrum, at Scranton, closely following in general design the plans and suggestions submitted by the complainants; certain changes, however, in matters of detail, being introduced, on which Mr. Wehrum at a later date applied for and obtained two several patents. This roaster was subsequently taken down and removed to Lebanon, where it is now in use. The facts with regard to the original relations of the parties, while given at this length, are not very material, except as they go to show that infringement, if found to exist, is deliberate, and Mr. Wehrum is properly joined as a defendant on account of his individual participation in it.

The roasting furnace which is the subject of the two Greer patents is made up of three vertical chambers, each coextensive with the other two, the center one being designed to hold the ore to be roasted; and having openings at several points into each of the others, the combustion chamber on the one side being fed from below with fuel gas intermixed with air to insure combustion, and the heat and flame being drawn therefrom through the ore by means of the openings provided for the purpose and the draft obtained from the stack chamber on the other; the sulphur being expelled from the ore and carried off in the process. In the first Greer the form of the furnace shown—although none is specified—is circular and the chambers annular; but in the second Greer, as in the defendants' structure, the chambers are rectangular. The latter construction is shown in the following diagrams taken from the second patent; one being an elevation in section, and the other a ground plan:



It will be noted that the several chambers referred to are made high and narrow, and set side by side; the object being to present to the flame from the combustion chamber a thin body of ore, through which it can effectively penetrate; gradually calcining and desulphurizing it as it descends. The Greer invention is in some respects ex-

pressed in its broadest terms in the third and eighth claims of the second patent, as follows:

"(3) An ore roasting or calcining furnace, having a rectangular stack, a rectangular combustion chamber, and a rectangular ore roasting chamber, said roasting chamber being located between said combustion chamber and stack, and communicating on one side at different points in its height with said stack, and on its opposite side at different points in its height with the combustion chamber, said combustion and ore roasting chambers being of substantially the same height, substantially as set forth."

"(8) In an ore roasting and calcining furnace, the combination of the rectangular stack and the rectangular combustion chamber, located at opposite sides of the furnace, with the rectangular roasting chamber between said stack and combustion chamber, said combustion and roasting chambers being of substantially the same height, and said roasting chamber having communication on one side at different points in its height with said combustion chamber, and on its opposite side at different points in its height with said stack, substantially as described."

Infringement of these claims is conceded, but their validity is denied; the defense being that they have been anticipated by other existing devices.

The prior art is unusually free from anything that can properly be called an anticipation. The very primitive arrangement known as the "Gjers Kiln," which is nothing more than a great open-bottom pot, with alternate layers of ore and fuel, was still in use at the time the Greer roaster was patented, and there is very little to fill in the intervening gap. The Knox and Osborn (1870), which is cited as a reference, is a reducing furnace for the treatment of cinnabar and other volatile ores. It has, like the Greer, an ore chamber designed to hold a vertical body of ore, which is "roasted," as it is said, as it passes downwards, by the process of fuel combustion drawn into and through it from a fireplace adjoining, by force of a draft chamber on the opposite side; the metallic vapors expelled from the ore being caught and condensed in appliances beyond. Passing by the fact that this is found in the reducing, and not in the roasting, art, notwithstanding the term applied to the process by the inventor, and that it relates to a volatile metal, such as mercury, which is reduced from its fumes, broadly speaking the same elements which are found in the plaintiffs' structure may be said to be employed. But it is conceded that it does not anticipate the particular claims under discussion, which require the combustion and the stack chambers to be of equal height with the ore chamber, and rectangular in shape; and neither can it, the other claims relied upon, to be presently mentioned, in view of the specific combinations there found. The suggestion of counsel that the operation on the ore is the same, which may well be doubted, loses sight of the fact that we are dealing with a structure, and not a process—a point that is made, per contra, to sustain the Kleeman patent as an anticipation, of which more later.

The Sibley (1886) is a desulphurizing apparatus, designed not only to expel the sulphur from ores, but also to obtain sulphuric acid as a product, by the treatment of iron pyrites. Its portable character, which is a distinct merit claimed for it by the inventor, precludes the idea that it was ever intended for a furnace proper, and there is much in it to suggest that in any character it was commercially use-

less. Its resemblance to the Greer structure consists solely in the fact that it has an ore chamber intermediate between a combustion chamber and the circumscribing annular space beyond, and that the ore is supposed to be subjected to the action of the products of combustion and the oxidizing influence of the air forced into and through it from the combustion chamber. But notwithstanding this three-chamber arrangement, the outer is in no sense a stack chamber, as called for in the Greer, with its draft for drawing through the ore the heat and flame from the combustion chamber within, this being effected by an air blast below; neither are there any openings between the different chambers, the inventor, to secure circulation, relying simply on the interstices between the loosely fitting brick partitions, which are not laid up in mortar, and the porosity of the bricks themselves—a very doubtful expedient. This is altogether too dissimilar both in form and purpose to be effectively cited here. Remotely there may have been something of the same idea in the mind of the inventor, but the structural means for carrying it out is widely different. The Valentine (1891) is for an improvement in roasting kilns. Passing by the declared object of the invention, which was to provide a special construction for supporting the stack or chimney above the ore or working chamber, whereby the wall of the latter might be repaired or removed without interference with the chimney, the patent exhibits a circular kiln or furnace, having a central stack chamber and an adjoining ore chamber, with openings between them; but it fails to show anything like a combustion chamber on the other side. Instead of this, it is said that the ore may be heated by fuel fed into the top of the ore chamber, as in the Gjers kiln, or be supplied through flues and fire arches independently piercing the outer walls, to which the gas is conducted by suitable mains. Where flues and fire arches are used, the process, to a certain extent, may be the same as that made use of in the patents in suit, but that by no means identifies the two structures by which it is severally accomplished; and the entire absence in the Valentine kiln of anything to correspond to a combustion chamber is too marked to require discussion.

This brings us to the Kleeman, which is confidently relied on by the defendants, and is the only device that approaches structurally to anything like the one in suit. It is designed for the reducing or smelting of zinc ore, and was patented in England in 1885, in Germany in 1887 (being allowed to lapse there, however, in 1891, for nonpayment of dues), and in the United States in 1889. Like the Knox and Osborn, it is found in the reducing, and not the roasting, art—processes which are said to be metallurgically antithetical. It is not necessary, however, to go into the distinction between them, nor to determine how far, on the strength of it, the perception of the availability of the Kleeman structure for roasting purposes could be regarded as a transfer and adaptation to a nonanalogous art involving the exercise of invention. Instructive examples where this has been held to be the case are to be found in *Potts v. Creager*, 155 U. S. 606, 15 Sup. Ct. 194, 39 L. Ed. 275, *Carnegie Steel Company v. Cambria Iron Company*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968, and *Tannage Patent Company v. Zahn*, 70 Fed. 1003, 17 C. C. A.

552; but I shall not stop to discuss them. Adhering strictly to the position that equivalency of structure is to control, the lacking feature of the Kleeman is a stack chamber. It has an ore or reducing chamber, and a combustion chamber adjoining, and both are rectangular and vertically coextensive, with openings between to permit the ore in the one to be acted upon by the combustion proceeding from the other. So far there is a similarity, which is not disturbed by the fact that the two chambers are set end to end, instead of side by side, as in the Greer, the result of which is that the ore body is presented to the flame in its thickest direction, instead of in a thin layer; this being a feature which cannot be relied upon under the terms of the patent, however important to the roasting process. But distinctly and positively the third member of the combination, an adjoining stack chamber, is wanting. In its place is an extension of the reducing chamber, through which, in flues or retorts, the zinc fumes are conducted to a tubular recipient beyond, and then by tortuous passages to where they are condensed and reclaimed. Neither structurally, nor as a matter of process, is there any resemblance in this to the stack chamber found in the Greer. Whether the latter be regarded as a draft-producing, or simply as a draft-equalizing, chamber, auxiliary and leading on to the actual chimney or stack at a greater or less distance beyond, the material thing is that the roasting is complete when it is reached, while in the Kleeman the reducing process is continued on through the extension chamber, with its flues and retorts, into still other and ulterior parts. Differing in both function and structure as they do, the two chambers are in no sense equivalent, and there is nothing therefore in this reference on which to predicate an anticipation of what we have here. This disposes of everything that is cited against the claims under discussion, and their novelty and validity being thus established, and infringement conceded, the bill to that extent, at least, must be sustained.

But there are other important elements which it is claimed that the defendants have appropriated. Underneath the combustion chamber, for the purpose of supplying fuel, is a gas chamber, with exits from it and air ports adjoining, to insure combustion; and opening into the combustion chamber at various points above are other inlets for a similar purpose. The object of this arrangement is to secure a suitable supply and admixture of gas and air, and to secure it at the proper place. Bearing as this does on the efficiency of the furnace, the devices employed must be regarded as patentable elements in the combination in which they are found. They are embodied in the third and fourth claims of the first Greer patent, and the fourth and fifth claims of the second, as follows:

Patent 495,883.

"(3) In an ore roasting or calcining furnace, the combination with the stack and an ore roasting chamber of a combustion chamber having communication with said roasting chamber, said combustion chamber having in its base a gas chamber, D, formed in its top with exit openings, d, and also having air ports, e, e', opening into it adjacent to the gas exits, d.

"(4) In an ore roasting or calcining furnace, the combination with the stack and an ore roasting chamber of a combustion chamber having communica-

tion with said roasting chamber, said combustion chamber having in its base a gas chamber, D, formed in its top with exit openings, d, and also having air ports, e and e', opening into it adjacent to the gas exits, d, and holes, c', opening into it at various points, and means for closing said holes, c'."

Patent 508,542.

"(4) In an ore roasting or calcining furnace, the combination with the rectangular stack and rectangular ore roasting chamber of a rectangular combustion chamber having communication with said roasting chamber, said combustion chamber having in its base a gas chamber, D, with gas exits in the top of same, and also having air ports adjacent to said gas exits, substantially as set forth.

"(5) In an ore roasting or calcining furnace, the combination of the rectangular stack, the rectangular ore roasting chamber communicating therewith, and the rectangular combustion chamber communicating with said ore roasting chamber, said ore roasting chamber being located between said combustion chamber and stack, and said combustion chamber having in its base a gas chamber, D, with gas exits in the top of same, and also air inlets opening into it adjacent to said gas exits, and air inlets opening into it at various points, substantially as set forth."

The same references as before are brought forward to invalidate these claims, but with no better success. It is true that, in the Kleeman furnace, air inlets are shown on either side of the gas flue leading up into the combustion chamber from the gas chamber below; and there are openings in the outer wall of the combustion chamber, similarly located to those of the Greer. So far as these particular features of the combination are concerned, this might affect the novelty of the fourth and fifth claims of the second patent, which are in general terms; but not the third and fourth claims of the first, which are narrower, one of the air inlets into the combustion chamber being specifically located between the gas exit and the ore chamber, insuring the presence of a suitable supply of oxygen at this point. But it is not material to insist on any such saving distinction. It is to be remembered that in each of these claims we are dealing with a combination from which it does not in the least detract that certain of its features are not new. We are not concerned, therefore, whether the air inlets in juxtaposition to the gas flue in the Kleeman furnace are duplicated in the claims of the second Greer or not. Novelty is to be predicated upon the combination found in each as a whole, and this includes the three co-ordinate combustion, oge, and stack chambers, as to which, in correlation, the prior art, as we have seen, has nothing to suggest.

As to the infringement of these claims, it seems to me there can be no serious question. So far, in either, as there is a reference by letter to the accompanying diagrams, they are, of course, confined to the specific combination thus shown; but even on that basis the defendants' structure offends. A gas chamber at the base of the combustion chamber is employed, opening up from which into the combustion chamber is a set of exits, and adjacent to them (that is to say, between them and the ore chamber) is a corresponding set of air inlets. Leading in also through the outer wall of the combustion chamber, on opposite side of the gas exits, are passages which have the same relative position as the second air inlet specified in the claims of the first Greer, while similar inlets or passages open into

it at various points in tiers up to the top of the furnace. It is said that these inlets are merely dust holes for cleaning out the furnace, and that the gas from the combustion chamber forces its way out through them to such an extent as to require that they shall be kept permanently closed. But in one of the Wehrum patents, according to which the defendants' structure is supposed to be built, they are described as affording communication with the outer air, and in the other are said to furnish means for inspecting the ores in process of roasting; and, while their use for cleaning purposes is also declared, this additional function does not do away with the others mentioned, which are the same as specified in the patents in suit. It is true that these openings in the defendants' roaster are closed with doors, but this is specified in the fourth claim of the first Greer as to the so-called peepholes, and is shown as to the second air inlet in the other. But the variance, if any, is not material. The openings are none the less ports or inlets, within the terms of the patents, because means are provided for opening and closing them. Nor, in judging of their equivalency, is the particular use which may be made of them to govern. Structure, as has been observed, is what we are especially to look to; and, while the function to which a particular part is devoted is not to be altogether lost sight of, where the form is practically the same as in the case before us, the possible, rather than the accidental, use must decide.

So far the case is clearly with the complainants, but not so as to what which remains. Experience has determined the necessity for strengthening the wall between the ore and the combustion chambers, weakened as it is by the requisite openings, and made thin to facilitate intercommunication, in order to resist the outward thrust of the ore body within. This is accomplished by means of light buttresses set up in the combustion chamber, and the idea, being regarded as a novel one, has been made the subject of a patent to O. W. Davis, Jr., now held by the complainants. It was shown as a feature in the plans for the roaster which the latter were to erect at Scranton, and, having been carried into the structure which was subsequently put up there by the defendant company under the direction of Mr. Wehrum, infringement of this patent is therefore charged. But it is manifest that the mere use of buttresses in the general way suggested is too obvious an engineering expedient to involve invention, and that, where it is claimed to exist, some other novel and beneficial purpose must at the same time be in view. The broad idea by itself is not patentable. The Davis invention, therefore, can only be sustained, if at all, because of some special and peculiar form and advantage which the defendants must have distinctly appropriated in order to infringe. The first claim is relied upon for this, as follows:

"(1) In an ore roasting kiln having inner and outer walls forming a combustion chamber, vertical buttressing walls connecting said inner and outer walls, and forming subdivisions of said chamber, said buttressing walls being formed in openwork or with passages, substantially as described."

It must be recognized that, in what is thus given, the inventor had in mind not only to buttress the chamber, but also to arrange for proper circulation through it, which he was required to do in order not

to interfere with its primary function, but it is with the way that he has undertaken to do this that we are concerned. This in the claim in question consists simply in inserting vertical buttressing walls subdividing the chamber; such walls being formed in openwork, or with passages between them. We have nothing to do here with buttressing secured by a subdivision into horizontal chambers, which is a separate and distinct form, and made the subject of other claims; and the difficulty with that with which we have to deal is its indefiniteness, which neither the specifications nor the diagrams help to relieve. There is nothing to explain what is meant by "openwork walls," and very little as to just what is intended by "passageways." So far as indicated, the latter are simply openings or apertures breaking through the otherwise solid vertical walls of the buttresses, which, being multiplied, produce, as we may assume, the openwork spoken of as an alternative. To enlarge the claim so as to include every character of construction that could in any sense be regarded as openwork would be to treat it with a liberality to which it is not entitled by anything to be found in the patent. It is important to note that no especial function is claimed for the particular form of buttressing adopted, except the very general one of providing for circulation through it, neither the purpose nor effect of which is anywhere indicated. True it is that the inventor has the right to all the advantages that reside in his invention, whether claimed or not; but we are entitled to know something of the benefit intended, in order to judge whether inventive skill has been actually displayed. Taken at its best, therefore, this claim seems to be of doubtful validity.

But without definitely determining that question, I am satisfied that the defendants' structure does not infringe. While the buttressing is effected by vertical walls subdividing the chamber, they are broken up into short sections, each one arched, and staggered with respect to the one above and below it, the result of which is not only to maintain the entire continuity of the combustion chamber, but at the same time to deflect and mix the currents of air and gas passing through it. This is the function expressly claimed for this character of buttressing in the Wehrum patents, and we may therefore assume that it was part of the design of the defendants in adopting it. Standing quite apart as it does, both in form and purpose, from the construction specified in the claim under discussion, it cannot be held to infringe upon it.

As the result of the views so expressed, the bill must be sustained as to the third and fourth claims of the first Greer, and the third, fourth, fifth, and eighth claims of the second, but dismissed as to the Davis on the ground of noninfringement. Let a decree to that effect be drawn, referring the case to a master to state an account.

WRIGHT et al. v. ELLWOOD IVINS TUBE CO.

(Circuit Court, E. D. Pennsylvania. February 16, 1904.)

No. 27.

1. LIEN—ADVANCES FOR PURCHASE OF MATERIAL FOR MANUFACTURE—RESERVATION OF TITLE.

Where, by a contract between them, a commission firm were to act as selling agents for a tube company, and were to make advances for the purchase of steel, and further advances on such of the finished product as was sold through their agency, settling the final balance in cash, a provision of such contract that the steel so purchased should remain the property of the commission firm, in whatever state of manufacture it might be, until the tubing made therefrom was delivered to them, is valid as between the parties, and is enforceable against a receiver appointed for the company in proceedings to wind up its business.

2. CONFUSION OF GOODS—IDENTIFICATION OR PROPORTIONATE DIVISION—BURDEN OF PROOF.

The tube company having mingled its own unfinished tubes with those made from steel purchased by the agents under such agreement in such manner that they could not be identified, although such confusion was innocent, the burden rests upon the company or its receiver to establish the proportion which was made from its own steel; otherwise the lien of the agents extends to all.

On Exceptions to Master's Report.

Frank A. Hartranft and Francis S. Laws, for exception.

Thomas Leaming, opposed.

J. B. McPHERSON, District Judge. It is, no doubt, true that the agreement between the tube company and Herman Boker & Co. provided that the tube company should buy steel at market rates, should manufacture it into tubing, and sell a part of it through Boker & Co., as their factors or general selling agents, and that Boker & Co. were to make advances after the usual manner of commission merchants—first by paying for the raw material, and later by advancing a further sum upon the manufactured product, or upon such part of it as the tube company might sell through their agency—and were to settle the final balances in cash. But I see nothing in such an agreement to invalidate the fourteenth article of the contract, which reads as follows:

"This steel will be the property of Herman Boker & Co., whether in billets or in more or less state of manufacture, and remain their property until the tubing to be made of same is delivered to Herman Boker & Co."

Whatever might be the effect of the contract, taken as a whole, if the controversy were between Boker & Co. and the creditors of the tube company, it seems to me that it was competent for the parties, as between themselves, to make the foregoing agreement concerning the title to the steel; and, since the right of the receiver rises no higher than the right of the tube company, it follows that the title to the partially manufactured steel in question was in Boker & Co. when this bill to wind up the corporation's business was filed. This being so, it follows, also, that as the tube company mingled with its own unfinished tubes similar merchandise that was made from the steel that came into its hands by virtue of the agreement with Boker & Co., and as it is con-

fessedly impossible to point out which particular tubes belonged to the one owner and which belonged to the other, a confusion of goods has resulted. The question to be now decided is, what consequences are to follow? The confusion was innocent, and, as the different sizes of tubes are practically alike in appearance and in quality, if the proportion to which each owner is entitled could be ascertained there would be little difficulty, I think, in making a fairly accurate separation. But I cannot agree with the master that the burden was on Boker & Co. to establish what proportion was theirs. On the contrary, I think the authorities show clearly that the burden of separation rests upon him by whose act, innocent though it was, the confusion came about. In *The Idaho*, 93 U. S. 586, 23 L. Ed. 978, the Supreme Court say with reference to a willful intermixture:

"But even if they [the bales of cotton] were of the same kind and value, the wronged party would have a right to the possession of the entire aggregate, leaving the wrongdoer to reclaim his own, if he can identify it, or to demand his proportionate part."

In *Story on Bailments* (8th Ed.) on page 41, the rule is thus laid down:

"The conclusion to be drawn from these decisions and other authorities seems to be that in cases of negligent and inadvertent mixtures (perhaps even of willful mixtures), if the goods can be easily distinguished and separated, then no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, yet if a division can be made of equal value (as in the case of a mixture of corn, or of coffee, or tea, or wine of the same kind and quality), there each may claim his aliquot part. But, if the mixture is undistinguishable, and a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each, there the party who occasions the wrongful mixture must bear the whole loss."

In *The Distilled Spirits*, 78 U. S., on pages 368 and 369, 20 L. Ed. 167, the Supreme Court say:

"It needs no learned examination of the doctrine of confusion or mixture of goods to make it apparent that if certain spirits belonging to the government by forfeiture are voluntarily mixed with other spirits belonging to the same party, and passed through the process of rectification in leaches, he cannot thereby deprive the government of its property; and, if the government only claims its fair proportion of the rectified spirits, he certainly cannot complain of injustice. The only result of applying the doctrine of confusion of goods would be to forfeit the entire mixture."

The rule is thus stated in 6 *Am. & Eng. Ency. of Law* (2d Ed.) 598, note 1:

"If a party having charge of the property of another so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon him who produces it, and it is for him to distinguish his own property, or lose it." Citing *Hart v. Ten Eyck*, 2 Johns. Ch. 62, and other cases.

I think it is clear from these citations, and upon reason, that, even although the confusion be innocent, nevertheless it is a legal wrong to the party whose goods are thus put beyond his reach, and therefore that the tortfeasor is bound to repair his wrong as far as possible, and

separate his own goods from the mass, at the risk of losing them to the innocent party. The exceptions of Boker & Co. must be sustained.

With regard to the exceptions of George Kelly, I see no reason for interfering with the discretion of the master in refusing to reinstate the exceptions after they had been withdrawn. The petition to file the exceptions in court is therefore refused.

A decree of distribution may be entered in accordance with this opinion.

HREGLICH et al. v. ONE THOUSAND TONS OF COAL.

(District Court, S. D. New York. February 11, 1904.)

1. SHIPPING—CHARTER PARTY—CARRYING CAPACITY OF VESSEL.

Evidence *held* insufficient to sustain the claim of a charterer that the vessel did not have the carrying capacity guarantied by the charter.

In Admiralty. Suit to recover charter money.

Ullo & Ruebsamon, for libellants.

Roger Foster, for claimant.

ADAMS, District Judge. This action was brought by Augusto Hreglich, as master of the steamship Marianne, and Alberto Cosulich and Calisto Cosulich, trading under the firm name of Fratelli Cosulich, as managing owners of the same, to recover a balance of charter money, said to amount to \$1,500, alleged to be due under a charter of the steamship to the William W. Brauer Steamship Company, dated the 8th day of October, 1902.

The charter covered a voyage from Hamburg to New York, with general cargo, for the carriage of which the ship was to receive a lump sum of £2,430. The cargo consisted partly of 2,000 tons of coal and upon default in this payment of full charter money, 1,000 tons thereof were seized, after delivery to the respondent, under process issued upon the libel.

The Brauer Company appeared to defend the coal, alleging that a cargo capacity of 5,400 tons, guaranteed by the charter, was incorrect and that the steamship never had such capacity, and particularly did not on this occasion, because an excessive amount of coal was carried by the steamship above her requirements for her own use on the voyage. The answer also alleges that the cargo carrying deficiency was not discovered by the claimant until after the steamship was loaded, and it claimed a right to offset the damage it sustained, amounting to \$2,000, against the libellants' balance.

The evidence on the part of the libellants shows that the steamship had previously carried cargoes of greater weight than was guaranteed by this charter party, in addition to several hundred tons of coal for the steamship's use. On this occasion, she had a full cargo of general merchandise, besides about 700 tons of coal for her own use, when she started on her voyage. Some of this coal she carried in her bunkers and some in the alley ways and on deck. A part of the cargo was light and bulky. The libellants' evidence tends to show that the vessel

actually had the guaranteed capacity, exclusive of the coal carried for her own use.

The only testimony offered to support the defense is the opinion of one of the Brauers, reached by figuring up the capacity of the vessel from a plan, which showed a total dead weight cargo capacity of 5,700 tons. He said that after making necessary deductions, her carrying capacity was not more than about 4,800 tons. I do not consider, however, that the estimate of the witness, based upon a plan of the vessel, is sufficient to overcome the testimony of the libellants' witnesses with respect to the vessel's cargo capacity, which was the result of actual experience.

Decree for the libellants, to be settled upon one day's notice.

ROOSEVELT v. NASHVILLE, C. & ST. L. RY. CO.

(Circuit Court, S. D. New York. March 7, 1904.)

1. CORPORATIONS—BONDS—GUARANTY BY ANOTHER CORPORATION—ULTRA VIRES.

Defendant railroad company, as a part of a contract for the extension of its road and for the construction of a blast furnace by an iron company, agreed to guaranty the iron company's bonds issued for the construction of the blast furnace, and on receiving the bonds executed a guaranty thereon, and sent them to a bank in New York for sale. Plaintiff purchased certain of the bonds of the bank, the proceeds being remitted to defendant, by which the money was paid to the iron company in satisfaction of the amount which the iron company expended under its agreement with defendant in the erection of the furnaces. *Held*, that defendant's receipt of the proceeds of the bonds completed the transaction so far as plaintiff was concerned, and that defendant was therefore liable to plaintiff on the guaranty without regard to whether defendant had power to bind itself by guaranty for the benefit of the iron company.

At Law.

George H. Yeaman, for plaintiff.

George W. Wickersham, for defendant.

WHEELER, District Judge. The defendant had a contract with the Ætna Manufacturing, Mining & Oil Company, by which it was mutually agreed that the defendant should extend its Centerville branch to the iron company's ore beds, about 11 miles, including a bridge over Duck river; that the iron company, for the purpose of aiding in the construction of the bridge, should take, at 90 cents on a dollar, 30 of the defendant's 6 per cent. 40-year \$1,000 gold bonds, and take and pay for at par 20 more of said bonds, to aid in the construction of the railroad; and that the iron company should erect a blast furnace at Ætna, near the line of that branch, at a cost of not less than \$50,000, with provisions for rates and amount of transportation over the defendant's road; and the defendant was to guaranty and indorse \$105,000 of the bonds of the iron company, the proceeds of which were to be alone invested or expended in the erection of the furnace or furnaces and buildings and improvements at the ore beds of the iron company's property on the defendant's branch line.

The iron company borrowed money and erected the furnaces, and made and executed 105 \$1,000 mortgage bonds, dated December 1, 1883, due December 1, 1913, with interest at 6 per cent. semiannually, due June 1st and December 1st in each year at the Chemical National Bank in New York City, which were delivered to the defendant, and upon which the defendant's president, pursuant to a vote of its stockholders and directors, indorsed on each bond: "For value received the Nashville, Chattanooga and St. Louis Railway guarantees the payment of the principal and interest of the within bond. Jas. D. Porter, Prest."—and sent them to the Gallatin National Bank at New York for procuring certification by the National Trust Company, trustee in the mortgage, and for sale.

The plaintiff's firm, of which he is the survivor, purchased and paid for to the Gallatin National Bank 100 of these \$1,000 bonds with the guaranty thereon, the proceeds of which the bank credited to the defendant, and which the defendant paid over to the iron company to replace money borrowed by the iron company for the erection of the furnaces and increasing its facilities. The iron company and its successor, the Southern Mining Company, paid the interest on the bonds purchased by the plaintiff's firm to 1893. After that the defendant paid the same to December 1, 1902, and refused to pay further. This suit is brought to recover the interest next due at that date. The defendant resists payment on the ground that the guaranty was wholly without the corporate power of the defendant, and not binding upon it.

It may be true that the defendant had not corporate power to bind itself by guaranty for the benefit of the iron company in its own business as such, and that recovery could not be had on the mere strength of the guaranty as a separate undertaking; but, if so, it is not disputed that the defendant would have power to negotiate paper with its guaranty thereon, as in this case, for the purpose of using the avails in its own business, whereby it would bind itself according to the terms of the guaranty. The evidence shows that the sale of these bonds to the plaintiff's firm was promoted by an officer of the iron company in its interest, but it does not show that the bonds were purchased from the iron company, or in any other manner than as stated from the Gallatin National Bank, where they had been sent by the defendant for the purpose of certification and negotiation.

The transaction for the erection of the furnaces upon the defendant's extended branch, in promotion of its own business, was one into which the defendant might well enter for its own pecuniary advantage. The proceeds of the bonds came directly to the defendant, so far as the purchaser of the bonds was concerned. When the defendant sent them to the iron company, where it had agreed they should go, potentially or otherwise, it used them for its own purposes; that is, for the payment to the iron company of the amount which the iron company expended upon its agreement with the plaintiff in the erection of the furnaces. Whether that use of the money was warranted by the defendant's corporate powers was a matter which did not concern the plaintiff's firm. The taking of the proceeds of the bonds, which was as far as the firm needed to go, was well within them. This was a mere pecuniary transaction, consisting of the purchase of the bonds,

with the defendant's guaranty upon them as a part of them, which the defendant could well enter into with the plaintiff's firm as purchasers of the paper, as was done. When the bonds were purchased from where the defendant placed them, and the consideration for them reached the defendant at the Gallatin National Bank, where the defendant had sent the bonds, the transaction was complete, and the plaintiff was not under any obligation to see what use the defendant made of the proceeds. Whether it wasted them, or squandered them, or made good corporate use of them, would be immaterial.

These facts, which were not in dispute at the trial, placed this case outside of those where contracts and undertakings have been held not to be binding, because not within the scope of the powers of parties entering into them. Upon the undisputed facts in the case, as they stood at the trial, the plaintiff appeared to be entitled to a verdict for the interest accruing, due as sued for.

Upon this review of the facts, the verdict which was directed for the plaintiff at the trial seems now to be correct. There was no disputed question of fact to be submitted to the jury, wherefore the verdict was directed then, and upon these considerations the motion to set it aside must be overruled now.

Motion overruled, and judgment on the verdict.

LEWIS GERMAN & CO. V. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1904.)

No. 3,258.

1. CUSTOMS DUTIES—CLASSIFICATION—CRACKED GINGER ROOT.

A by-product in the process of extracting the essence of ginger root, which results from cracking the crude root in a machine and running it through a still, and consists of the residue of the process pressed into cakes, is not within the provision in paragraph 687, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], for "ginger root, unground." Cracking the root, so that it is reduced to small particles and pulverized, is a process of grinding.

On application by Lewis German & Co., importers, for review of a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York. See G. A. 5439.

Albert Comstock, for appellant.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. This merchandise appears to be a by-product produced by cracking crude ginger root in a machine, running it through a still, and extracting the essence for medicinal and other purposes, and left pressed into cakes. It has been assessed as a "spice at 3c. a pound," under paragraph 287 of the tariff law (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653], against a protest that it should be assessed as "ginger root, unground and not preserved or candied," in the free list at paragraph

667, § 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]. It is not "preserved or candied," and the question here is whether it is "ginger root, unground." That it came from ginger root is unquestioned. As this paragraph 667 is the paragraph named in the protest, there is no other question here than whether it is ginger root, unground. That reduces it to the question whether cracking the crude root in a machine, and reducing it to finer particles, is any process of grinding. "Unground" means wholly unground or not at all ground, and, if cracking is any part of the process of grinding, it is not unground.

One definition of "grind" is to "crush into small fragments," as given by Webster; and another is to "triturate," one definition of which is to "pulverize," as given by the Standard Dictionary. By this process of cracking the crude ginger root appears to be reduced to small particles and to be pulverized. It is therefore to that extent ground. It cannot be considered as wholly ground, or unground. It is not the "unground ginger root" of paragraph 667. Whether it may fall under some other paragraph of the tariff law, as has been suggested and said to have been since held, is not here material. This case must be decided upon this protest, which raises merely this question.

Decision affirmed.

KAUFMANN v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1904.)

No. 3,342.

1. CUSTOMS DUTIES—CLASSIFICATION—APPLIQUÉ MOTTOES—HAUSSEGEN.

Certain so-called "Haussegen" or wall mottoes, consisting of pasteboard cards with mottoes sewn thereon, and with various pictures surrounded by wreaths, affixed thereto by some adhesive material, are dutiable under paragraph 339, Tariff Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], relating to appliquéd or embroidered articles, and not under paragraph 407 of said act (Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]), as manufactures in chief value of paper.

On application by Ernst Kaufmann, importer, for review of a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York.

Albert Comstock and Percy W. Crane, for appellant.
Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. These articles are Haussegen or wall mottoes imported from Germany, and returned by the appraiser as appliquéd articles (vegetable fiber), on which a duty has been assessed at the rate of 80 per cent. ad valorem, under paragraph 339 of the Tariff Law (Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]), which covers "wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéd articles, fabrics or other wearing apparel." They are claimed to be dutiable under, among others, paragraph 407 (Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]), at 35 per cent. ad

valorem, as "manufactures of paper, or of which paper is the component material of chief value." They are found to consist of perforated pasteboard cards, upon the surfaces of which are sewn mottoes in fancy letters with woolen and metal threads, and upon the face of which, within the mottoes, are affixed, by paste or other adhesive material, various pictures surrounded by wreaths. This description appears to be entirely correct, and the articles plainly fall within those provisions of paragraph 339, for embroideries and appliquéd articles. Those provisions are limited to articles composed of vegetable fiber, but with a proviso that no duty on embroideries shall be less than that imposed on any embroideries of the same materials, and those of these materials do not appear to be less than 60 per cent. There does not appear to be any evidence taking these articles away from this classification. The reference to another decision does not seem to be a finding of the same facts, but only an application of the same principles.

Decision affirmed.

MILLER, SLOANE & WRIGHT V. UNITED STATES.

(Circuit Court, S. D. New York. January 29, 1904.)

No. 3,282.

1. CUSTOMS DUTIES—CLASSIFICATION—PRINTING PAPER—HANDMADE PAPER.

Held, that handmade printing paper, suitable for books and newspapers, is more specifically provided for under paragraph 396, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1671], as "printing paper * * * suitable for books and newspapers," than as "handmade * * * paper," under paragraph 401 of said act, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672].

On application by Miller, Sloane & Wright, importers, for a review of the decision (In re Miller, G. A. 5,067) of the Board of General Appraisers, which affirmed the assessment of duty by the Collector of Customs at the port of New York.

Albert Comstock, for appellants.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The tariff law provides for a duty of 15 per cent. ad valorem, by paragraph 396, for "printing paper, unsized, sized or glued, suitable for books and newspapers." Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1671]. And by paragraph 401 of 15 per cent. ad valorem and 3½ cents per pound for "writing, letter, note, hand-made, drawing, ledger, bond, record, tablet, and typewriter paper." 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672]. This importation is of handmade printing paper suitable for books and newspapers. It was assessed under paragraph 401, against a protest that it should be assessed under paragraph 396. It comes exactly within the description of paragraph 396, as printing paper "suitable for books and newspapers," although it is handmade. There are handmade writing papers which would undoubtedly come under paragraph 401, but this being printing paper specifically mentioned under paragraph 396 as suitable for books and news-

papers, this latter seems to be the most specific provision. The paper provided for under paragraph 401 seems to be that which is surfaced suitably for being written upon, while that under paragraph 396 is wholly unsuitable for that purpose. The two paragraphs divide writing and printing paper into these two classes. This seems to fall within the class provided for under paragraph 396. As there is handmade writing paper, the provision for handmade paper under paragraph 401 has something to apply to besides this handmade printing paper. This leads to the conclusion that the assessment under paragraph 401 should be reversed, and the assessment made under paragraph 396.

Decision reversed.

BOAS v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1904.)

No. 3,418.

1. CUSTOMS DUTIES—CLASSIFICATION—MINIATURE STEAMSHIPS—MODELS OF IMPROVEMENTS IN THE ARTS.

Exact models of steamships of improved design, showing the details of the vessels, valued at about \$1,000 each, and intended for exhibition in steamship offices, are models of improvements in the art of shipbuilding, and are free of duty, under paragraph 616, Tariff Act July 24, 1897, c. 11, Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], covering "models of inventions and of other improvements in the arts."

On application by Emil L. Boas, importer, to review a decision of the Board of General Appraisers, which affirmed the assessment of duty by the Collector of Customs at the port of New York. See G. A. 5,234.

Howard T. Walden, for appellant.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. This importation consists of two models of steamships of the Hamburg-American Line, made at the shipbuilding yards in Germany by the same company as that which constructed the steamships of which they are exact models on a scale of 75 to 1, showing in detail the hulls, upper works, hoisting engines, propellers, twin screws, etc., and of the value of about \$1,000 each, intended for exhibition in the steamship company's offices. These steamships were of the latest and highest types of express passenger steamships for ocean travel. The models have been assessed for duty at "45 per cent. ad valorem," under paragraph 193 (Act July 24, 1897, c. 11, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]), as "articles or wares not specially provided for, composed wholly or in part of iron, steel," etc., against a protest that they are free under paragraph 616 (Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]), as "models of inventions and of other improvements in the arts." These are not models of inventions, but shipbuilding is of itself an art, and these small models of the latest and most improved steamships seem, strictly speaking, to be improvements in the arts. Such articles are, by the provision of paragraph 616, not to be deemed "models" if they can be fitted for use otherwise. These obviously cannot be

fitted for any use otherwise than as such models, and they appear to fall within this paragraph 616 of the free list. The decision must therefore be reversed.

Decision reversed.

VEIL BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. January 29, 1904.)

No. 3,174.

1. CUSTOMS DUTIES—CLASSIFICATION—JEWELRY—LEATHER WATCH GUARDS.

Leather watch guards, mounted with cheap miniature bits, stirrups, etc., intended to be worn by horsemen, are not "articles commonly known as jewelry," as provided for in paragraph 434, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], but are dutiable as manufactures of leather, under paragraph 450 of said act, c. 11, § 1, Schedule N, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678].

On application by Veil Bros., importers, to review a decision of the Board of General Appraisers which affirmed the assessment of duty by the Collector of Customs at the port of New York. Note G. A. 4,646.

Howard T. Walden, for appellants.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The tariff law of July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], provides for a duty on "articles commonly known as jewelry and parts thereof, finished or unfinished, not specially provided for," of 60 per cent. ad valorem; and by paragraph 450, Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], on "manufactures of leather, or of which it is a component material of chief value," of 35 per cent. ad valorem. These articles in question are leather watch guards mounted with cheap iron bits, spring loops, and stirrups in imitation of harness, bridle, and saddlery materials, and worn by horsemen. They have been assessed for duty as jewelry, under paragraph 434, at 60 per cent., against a protest claiming them to be dutiable under paragraph 450, as a manufacture of leather, or of which leather is the component material of chief value, at 35 per cent. ad valorem. These articles do not appear to be commonly known as jewelry, although they are used for some of the same purposes for which jewelry is used. They are not dealt in by jewelers, but more by dealers in leather goods. Paragraph 434 does not apply to jewelry generally, but to articles commonly known as jewelry, which do not appear to include these. Apparently they should have been assessed at 35 per cent. under paragraph 450.

Decision reversed.

VICTOR v. UNITED STATES.

(Circuit Court, S. D. New York. January 29, 1904.)

No. 8,856

1. CUSTOMS DUTIES—CLASSIFICATION—NICKEL-PLATED ZINC SHEETS.

Zinc sheets, when nickel-plated, do not fall within the provision in paragraph 192, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], for "zinc * * * in sheets," but are dutiable under paragraph 193 of said Act, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], covering "articles or wares not specially provided for, * * * composed wholly or in part of nickel, * * * zinc, * * * whether partly or wholly manufactured."

On application by Ludwig Victor, importer, for review of a decision (In re Victor, G. A. 5,296) of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York.

Howard T. Walden, for appellant.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. The tariff law by paragraph 192, Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], provides for a duty on "zinc in blocks or pigs, 1½c. per pound; in sheets, 2c. per pound." And by paragraph 193, Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], on "articles or wares not specially provided for in this act, composed wholly or in part of * * * nickel, * * * zinc, * * * and whether partly or wholly manufactured," of 45 per cent. ad valorem. This importation is of zinc in sheets, nickel-plated. It is claimed by the importer that they are in fact zinc in sheets, and therefore come within paragraph 192, and that they are dutiable at 2 cents per pound only. It is true that they are zinc in sheets, but they are more than that. Zinc in sheets does not accurately cover them. It requires the added description of "nickel-plated" to include them. Therefore they do not fall exactly or substantially within paragraph 192. They are articles or wares composed of zinc and nickel, wholly within the description of paragraph 193. Therefore the assessment of 45 per cent. ad valorem appears to be correct.

Decision affirmed.

GEO. MEIER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 29, 1904.)

No. 8,829.

1. CUSTOMS DUTIES—CLASSIFICATION—FLITTERS—COMPOSITION METAL.

So-called "flitters," made from sheets of copper and zinc, and reduced to a fine condition for use in the same manner as bronze powder, are free of duty, under the provision in paragraph 533, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1682], for "all composition metal of which copper is a component material of chief value."

On application by George Meier & Co., importers, for a review of the decision (In re Riessner, G. A. 5,150) of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York.

Albert Comstock, for appellant.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. The Tariff Law, Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], provides for a duty on "articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal and whether partly or wholly manufactured, 45% ad valorem"; and puts in the Free List, by paragraph 533, Free List, § 2, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1682]: "Old copper, fit only for manufacture, clipping from new copper, and all composition metal of which copper is a component material of chief value, not specially provided for in this act." This importation is of fine pieces of metal, called "flitters," made from sheets of copper and zinc composed into bars, and reduced without other change to fineness for use in the same manner as bronze powder. It has been assessed for duty as a manufacture of metal at 45 per cent. under paragraph 193, against a protest that it was free as "composition metal" under paragraph 533.

That this article was "composition metal," within paragraph 533, is unquestioned. It has not been in any manner changed as to its constituent parts, or in any wise altered, except as it has been made finer by reducing the size of the particles. It is now, as it was before, in fact "composition metal," and has not been wrought into anything new except as it has been prepared for use as such metal for the purposes for which it may be used. The case seems to come within the principle of *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686, where it was held that steel rail crop ends were dutiable as steel because they remained steel, although cut off as waste, and not wrought into anything else.

Decision reversed.

UNITED STATES v. STRAUSS BROS. & CO.

(Circuit Court, S. D. New York. January 29, 1904.)

No. 3,396.

1. CUSTOMS DUTIES—CLASSIFICATION—PING-PONG BALLS—TOYS.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674], ping-pong balls of celluloid are dutiable as "toys * * * not specially provided for," under paragraph 418, and not as "articles of which collodion or any compound of pyroxylin is the component material of chief value," under paragraph 17, Schedule A, § 1, c. 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628].

2. SAME—BOARD OF GENERAL APPRAISERS—REVIEW OF FINDINGS OF LOCAL APPRAISERS—EVIDENCE.

A collector of customs assessed duty in accordance with the findings of the local appraiser who had examined the merchandise. In reviewing

the collector's action the Board of General Appraisers reversed his decision without any new evidence, though the question involved was one of fact. *Held*, that the board may make a different finding from the local appraiser without taking additional evidence, and that its action was without error.

On application by the United States to review a decision of the Board of General Appraisers, which reversed the assessment of duty by the collector of customs on certain merchandise imported at the port of New York by Strauss Bros. & Co. See G. A. 1,644.

Charles D. Baker, Asst. U. S. Atty.
Albert Comstock, for appellee.

WHEELER, District Judge. These articles are ping-pong balls, and have been assessed for duty as "toys at 35% ad valorem," under paragraph 418, Tariff Law, July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674], against a claim by the government that they are "manufactures of celluloid or pyroxylin at 65c. per pound and 25% ad valorem," under paragraph 17, Schedule A, § 1, c. 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628].

There is no evidence in the case, except the articles themselves and the finding of the board of appraisers, contrary to the return of the appraiser that they are toys. It is insisted that the return of the appraiser as to the classification of the importation could not be changed by the board without additional proof. But the board decides, on review, upon any evidence in the case, the same as the appraiser originally does, and is not confined by the statute to new evidence or additional evidence. Their inquiry is the same in scope as that of the appraiser from whom they may differ in judgment, and when they do their judgment stands unless it is reversed. Their judgment here seems to have been correct.

Decision affirmed.

KANE v. ERIE R. CO.

(Circuit Court, N. D. Ohio, E. D. April 4, 1904.)

No. 5,786.

1. MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—STATE STATUTES—FEDERAL COURTS—EFFECT.

Since, in the federal courts, negligence of a superior servant does not create liability of the master for injuries to an inferior servant, Rev. St. Ohio, § 3365-22, providing that every person in the employ of a railroad company, having charge or control of employes in any separate branch or department, shall be held to be the superior, and not the fellow, servant of employes in any other branch or department who have no power to direct or control in the branch in which they are employed does not create a liability of the master to an inferior servant for injuries sustained through the negligence of the superior servant, enforceable in the federal courts.

2. SAME—CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

Rev. St. Ohio, § 3365-22, providing that every person in the employ of a railroad company, having charge or control of employes in any separate branch or department, shall be held to be the superior, and not the fellow,

servant of employ es in any other branch or department who have no power to direct or control in the branch or department in which they are liable, is in violation of Const. Ohio, art. 1,   2, providing that government is instituted for the equal protection and benefit of the people, in that the benefits of the section are restricted to those who have no power to direct or control in the branch or department in which they are employed.

This is an action brought by the plaintiff, as administratrix, to recover for the alleged wrongful death of Thomas M. Kane, a fireman in the employ of the defendant company, which occurred December 17, 1897.

The petition alleges that the death of the plaintiff's decedent was caused by the negligence of an engineer, who was running another of the defendant's company's trains than that on which said decedent was employed, and the right to recover is based upon section 3365-22 of the Revised Statutes of Ohio, under the provisions of which the alleged negligent engineer would be held to be the superior, and not the fellow, servant of said decedent. At the trial the defendant objected to the introduction of any evidence under plaintiff's petition, for the reason that said petition did not state facts sufficient to constitute a cause of action, and moved the court to enter final judgment upon the pleadings in favor of the defendant and against the plaintiff.

Geo. F. Arrel and T. McNamara, Jr., for plaintiff.
Cushing & Clarke, for defendant.

WING, District Judge (after stating the facts as above). My first reason for sustaining the objection to the introduction of any testimony under the petition in this case is that in the case of *Baltimore & Ohio Railroad Company v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, it was decided that a question of liability by reason of the negligent acts of a fellow servant, and what relation constituted one a fellow servant, was a question of general law, and that the solution of the question as to whether one person is the fellow servant of another is not based upon the superiority of one over the other, but upon the character of labor in which they are engaged, and that, if two are working together, they may be fellow servants, notwithstanding that one is superior in authority to the other. The statute relied upon in this case (section 3365-22 of the Revised Statutes of Ohio), when forming the basis of an action in the courts of the state of Ohio, has read into it the ruling of the Supreme Court of Ohio, to the effect that the negligence of a servant superior to another servant is, with respect to the latter, by reason of such superiority, the negligence of the master. When an action is brought in the federal courts, the statute should have read into it the decisions of the federal courts with respect to fellowship in service. The statute does not, in terms, create liability, and only has that effect when it is assumed that negligence by a superior servant creates liability of the master to the inferior. But since, in the federal court, negligence of a superior does not create liability of the master to the inferior, the statute creates no right of action in the federal court.

My second reason is that, in my opinion, the third section of the act, which is section 3365-22 of the Revised Statutes, is in contravention of section 2 of article 1 of the Constitution of Ohio, which provides that government is instituted for the equal protection and benefit of the people. Assuming that the section of the statutes referred

to creates a liability, and consequently a right of action, it withholds that right of action by the exception found in the last two lines of the statute from general operation. The provision of the statute is:

"* * * that every person in the employ of such company having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

We may understand the operation of this provision of the statute by applying it to the incident which gives rise to this suit. Two engines belonging to the defendant railroad company collide. This collision is occasioned by the negligence of the engineer of engine No. 1. Such engineer has control of his fireman. The collision results in the injury of both the engineer and fireman of engine No. 2. If the negligence of the engineer of engine No. 1 is attributable to his master, then there should be a right of action, on account of such negligence, in favor of both the engineer and the fireman of engine No. 2, except for the defense of fellow servant. The right of action, however, by the statute, is allowed to the fireman, and withheld from the engineer, by a fact which has in no wise had to do with the causing of the injury. We may go further, so as to relieve the question from the level rank of the two engineers. Suppose that on engine No. 2 there is a coal passer, who, by the rules of the company, is under the charge or control of the fireman, and who has no one under his charge or control. Then a right of action for this accident would be given to the coal passer, and withheld from the fireman, by the arbitrary distinction made in the statute. Before the passage of the statute, no right of action, under similar circumstances, would have existed in favor of either the engineer, fireman, or coal passer of engine No. 2. The statute attempts to make a classification between individuals who may have a right of action, and bases that classification upon a fact which has had nothing to do with occasioning the accident, and over which the person injured has had no control. The law does not operate to equally protect the persons injured, or liable to be injured. Although I have used the word "classification," we cannot say that the Legislature, in enacting this section of the statute, has made a classification. It rather has delegated to the railroad company the right to make the classification which will serve as the criterion of its own liability, because by its rules and its acts a right of recovery for an injury can be prevented. It lies entirely within the power of a railroad company as to whether or not a servant shall have charge and control of another servant, as, we may suppose, a railroad company, for the purpose of relieving itself from liability, puts upon each of its trains a boy, who, under its rules, is in the charge and under the control of every other employe on the train. The only liability, then, of the railroad company, for a collision occasioned by the negligence of an employe on another of its trains, would be to this boy; and this, by reason of the creation of facts which are the basis of the assumed classification established by the statute. The statute might as well have read that, "in the event of injury occasioned by the negligence of an employe in a separate

branch or department, right of action, notwithstanding the doctrine of fellow servant, shall exist in favor of those only whom the railroad company shall designate." For the reasons given, I hold that so much of section 3365-22, Rev. St. Ohio, as provides that "every person in the employ of such company having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed," is unconstitutional, because its benefits are restricted to those who have no power to direct or control in the branch or department in which they are employed.

ASTRICH v. GERMAN-AMERICAN INS. CO.

(Circuit Court, M. D. Pennsylvania. February 19, 1904.)

No. 4.

1. FIRE INSURANCE—VIOLATION OF CONDITIONS BY INSURED AFTER LOSS—SALE OF UNDESTROYED PROPERTY.

A policy issued by defendant insuring merchandise against fire to the extent of the actual loss, not exceeding its face, provided that in case of loss the insured should exhibit the property remaining to the representative of the company as often as required; that the loss or damage should be ascertained by agreement, or, if the parties differed, by appraisement; that it should be optional with the company to take any part of the remaining property at the appraised value, and also to replace or repair the property lost or damaged on giving notice of its intention within 30 days after receipt of the proofs of loss. There was a loss; the property being also covered by other policies. The insured separated the damaged from undamaged property remaining, and it was examined by the adjusters. Failing to agree as to the loss, they went away, and plaintiff, the insured, without notice to defendant, sold out the remaining goods at retail, commencing such sale before making proofs of loss. Defendant, learning that such sale was about to be held, notified plaintiff not to sell the goods, that it desired to exercise its right to further examine the same, calling his attention to the terms of the policy, and stating that, if he proceeded with the sale, it would render the policy void. *Held*, that the rights so secured to defendant were substantial, and that plaintiff, having deprived it of the further right to examine the goods, in order to have the same appraised, and to exercise its option to take the same at appraised value, after the distinct notice that it insisted upon such rights, could not recover on the policy.

2. SAME—RIGHT TO HAVE DAMAGED GOODS EXHIBITED—RIGHT TO AN APPRAISAL—SALE OF GOODS IN DISREGARD OF SAME.

The provisions of a policy of fire insurance, giving the right to the insurer to have the damaged goods exhibited to it as often as required, and to have the loss, in case of a disagreement, determined by appraisement, looking as they do to the correct ascertainment of the loss, cannot be disregarded by the insured; and a sale of the goods by him, by which these rights are cut off, avoids the policy and prevents a recovery thereon.

3. SAME—RIGHT TO APPRAISEMENT—TIME FOR EXERCISE—DETERIORATION OF GOODS—NOTICE.

(a) The right to have the loss determined by appraisement, where no time is fixed for its exercise, must be demanded within a reasonable time.

(b) Where, therefore, goods are deteriorating or becoming rotten and unhealthy, a notice to the insured of the necessity for a prompt disposition

of them would seem to meet the difficulty, compelling an exercise of the right, without abridging it.

4. SAME—PUBLIC SALE OF GOODS AS EVIDENCE OF VALUE.

It is no defense to a sale to say that the object of an appraisal is merely to determine the value, which is sufficiently shown by the sale itself. This is not the method provided by the policy, and cannot be substituted by the insured at will.

5. SAME—WAIVER OF APPRAISEMENT.

Neither is it a waiver of an appraisement that one of the adjusters, who was present when a preliminary examination of the goods was being made, declared that an appraisement would be useless, without a statement from the insured as to the amount of the goods burned out of sight, which he declined to give.

6. SAME—RIGHT TO HAVE DAMAGED GOODS EXHIBITED—INSPECTION BY ADJUSTERS.

The right of the insurer to have the goods exhibited as often as required is not affected by the fact that they were examined by adjusters of the company at a preliminary stage of the controversy, in an effort to arrive at an amicable settlement of the loss.

7. SAME—REASONABLE CONSTRUCTION OF POLICY—NOTICE TO INSURED TO RETAIN GOODS—SALE IN DISREGARD OF SAME.

While the provisions of a policy as to an appraisal are to receive a reasonable construction, with the proofs of loss only just made out, and not yet on the way, it was not unreasonable to require the insured, who was about to make sale of the damaged goods, to retain them to await the possible exercise of the right of inspection and of appraisal, and, having gone on and sold in disregard of such notice, he could not recover.

8. SAME—RIGHT TO TAKE AND REPLACE GOODS DAMAGED—SALE IN DISREGARD OF—DIFFERENT INSUREES—SEVERAL OR JOINT ELECTION.

(a) Where the right to take and replace any part or all of the goods damaged is given by a policy of fire insurance, to be exercised within 30 days after receipt of proofs of loss, the company is ordinarily entitled to the full period to decide, and a sale of the goods by the insured meanwhile, in the face of the protest of the company, materially abridges this right and avoids the policy.

(b) This is not affected by the fact that there are several insurers who are only ratably liable, and may have divergent views. This does not prevent a several election, and they may conclude to join, with neither of which has the insured a right to interfere.

At Law. On rule for judgment in favor of defendant non obstante verdicto on reserved point.

This was an action on a policy of insurance for \$4,500 on a stock of millinery goods. The total amount of insurance carried was \$22,000, which the plaintiff claimed was exceeded by his loss. The jury having found in favor of the plaintiff for practically the full amount of his claim, the verdict was taken subject to the following point of law reserved:

"It being the undisputed evidence that the plaintiff's stock of goods was insured to the extent of twenty-two thousand dollars (\$22,000) in thirteen (13) different companies, of which the defendant was one, the insurance in such company being \$4,500; that a fire occurred on December 16, 1902, during the life of the said policy, by which a large part of the said stock was entirely consumed, and other parts damaged by fire, smoke, and water; that immediately after the fire the plaintiff put in order the stock that was left, separating the damaged from the undamaged goods, and arranging, scheduling, and valuing the damaged goods; that on December 29th and 30th, after due notice, agents and

¶ 8. See Insurance, vol. 28, Cent. Dig. § 1292.

adjusters representing the said several insurance companies, including the defendant, went upon the premises and investigated the loss, and, for the purpose of ascertaining the extent of the same, examined the books, bills, and accounts of the plaintiff carefully and thoroughly, and inspected the damaged and undamaged stock, being occupied in such examination more or less for two (2) days; that as the result of the same they collectively offered, on behalf of all the said companies, to pay the plaintiff in settlement of his said loss the sum of twenty-two thousand dollars, the aggregate amount of his insurance, the said companies to take the stock which remained and wreck the same—that is to say, ship it to New York or some such general market, and there have it put in order by persons experienced in such business, and then and there sell it by auction or otherwise for such price as it would bring, the plaintiff to receive all that it brought up to five thousand dollars, after deducting expenses, and the insurance companies to receive the excess above that sum, which offer the plaintiff refused; and that the said agents then and there made a further offer to pay the plaintiff, in settlement of his said loss, the sum of \$17,500, he retaining for his own benefit the said stock on hand, which offer the plaintiff also refused; that thereupon he was told by the said agents to read his policy, and observe its terms, on which the parties then and there separated; that afterwards the plaintiff made out due proofs of loss, which he forwarded to the defendant company on January 9th following, which were duly received by said company; that on January 8th—the day before he furnished said proofs—after first having advertised the damaged stock for sale, the plaintiff, without notice to said companies, began to make private sale thereof, and continued to sell the same for the three days next following, until the said goods were disposed of, realizing therefrom the gross sum of about sixty-two hundred dollars (\$6,200), and being at the expense of about two thousand dollars (\$2,000) in so selling them; that the insurance companies, including the defendant, having learned that such sale was about to be made, notified the plaintiff by telegram and letter, both dated January 7th, and duly received in advance of such sale, that he should not dispose of the said goods, that they desired to exercise the rights, given them by the policies of insurance which he held, of further examining said goods to determine their value and the loss or damage sustained thereon, and calling attention to the fact that the said companies had the right, if they desired, to take the stock, or, in case of disagreement as to the extent of the loss, to have the same determined by appraisement, and thereupon notifying plaintiff that, if he proceeded with the sale, his policies would be rendered null and void; and that, notwithstanding such notice, the said plaintiff proceeded to make sale of the said goods; whereupon, in view of the provisions of the policy in suit, a copy of which is attached to plaintiff's declaration or statement, and is made a part of this point, the question of law is reserved whether the policy, by reason of the said sale so made by the plaintiff, was avoided, and whether the plaintiff is entitled to recover thereon in this action; with leave to the court to enter judgment in favor of the defendant notwithstanding the verdict if it be found that such is the law."

It was provided, in substance, in the policy on which suit was brought, which was of the standard form, that the loss or damage should be ascertained or established by the insured and the company; or, in case they differed, then by two competent and disinterested appraisers, each party choosing one, and the two so chosen selecting an umpire; the award of any two in writing to determine the amount of the loss. Also, that the insured, as often as required, should exhibit to any person designated by the company all that remained of the property insured; and that it should be optional with the company to take all or any part of the articles at the ascertained or appraised value, and also to repair or replace the property lost or damaged with others of like kind and quality within a reasonable time, on giving notice within 30 days after the receipt of the proofs of loss of its intention so to do.

Cyrus Derr and W. M. Hargest, for the rule.
Charles H. Bergner and John E. Fox, opposed.

ARCHBALD, District Judge. The undertaking of the defendants as insurers was one of conditional indemnity only, their liability in case of loss being limited to the actual damage sustained—not exceeding the amount of the policy—upon compliance on the part of the insured with the terms and conditions there named. To assist in the correct ascertainment of it, certain duties were imposed upon the insured, prominent and primary among which was that he should give immediate notice of the fire; forthwith separate the damaged from the undamaged property, putting the same in the best order possible, and making a complete inventory of it; and within a specified time furnish itemized proofs of loss made up and verified in a stated way. So far the plaintiff complied with the demands of his contract, but the difficulty lies with that which remains. Among the general provisions of the policy it was made the duty of the insured, as often as required, to exhibit to any person designated by the company all that remained of the property injured. It was also provided that, in the event of a disagreement as to the amount of the loss, it should be ascertained by competent and disinterested appraisers to be chosen by the parties; and that it should be optional with the company to take all or any part of the articles insured at their ascertained or appraised value, and to replace those lost or damaged by others of like kind and quality, on giving notice of their intention so to do within 30 days after the receipt of proofs of loss. It is because the defendants, as they claim, have been deprived by the acts of the plaintiff of the rights so secured to them by the policy, that defense is made.

The fire occurred December 16, 1903, and a large part of the stock insured was entirely destroyed. The total insurance carried was \$22,000 (\$4,500 of which was with the defendant company), and, according to the plaintiff, was exceeded by the loss incurred. On December 29th the agents and adjusters of the several companies involved appeared on the scene, and, after going over the books and papers of the plaintiff, and carefully inspecting the stock which remained, endeavored to arrive at an amicable settlement with him of the loss. An offer was made to collectively pay the full amount of the insurance (\$22,000), with the proviso that the companies should take the damaged goods, and, after shipping them to New York or Philadelphia, and having them put in order there, should have them sold in the general market, the plaintiff to receive all that was realized up to \$5,000, and the companies whatever there was above that. This was rejected, and they then offered as an alternative to pay \$17,500, the plaintiff to keep his goods, and get out of them what he could on his own account. This also was refused, and the parties separated, the plaintiff being notified to read his policy and observe its terms. This occurred on December 30th, and the plaintiff immediately arranged for a fire sale of the damaged goods. It took place on January 8th, and continued for the next three days, the whole lot being disposed of at retail at prices to suit customers. The insurance companies, having learned that the sale was to take place, gave notice to the plaintiff by telegram

and registered letter, which were both received the day before it began, that he should not go on with it, as they desired to exercise the right given them of further examining the goods, calling attention also to the fact that they had the right, if they wished, to replace any part of the stock, and, in case of a disagreement as to the amount of the loss, to have it determined by appraisal; and notifying him that it would avoid his policies if he proceeded; notwithstanding which he went on and sold. All this occurred in advance of the proofs of loss, which were not started on their way until the day after the sale began, nor received until the day following, January 10th, at which time the goods had been substantially disposed of.

The provisions of the policy to which reference has been made, looking as they do to the correct ascertainment of the loss sustained by the insured, cannot be disregarded by him. *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525; *Thornton v. Security Ins. Co. (C. C.)* 117 Fed. 773. Like the giving of immediate notice of the fire, the furnishing of proofs of loss, or the submission to an examination under oath, and the production of books and papers, with which they are closely associated and allied, they are conditions of the contract, inserted for the protection of the insurers, who are entitled to the full benefit of them. If, therefore, they are deprived of them by the act of the insured, he cannot expect to enforce the contract which he has thus broken, there being no way by which compensation can be made, or the rights that have been set aside restored. The right to an appraisal was absolute, if the insurers found that they desired it, and it was essential to this that the damaged stock should be retained. Looking into the evidence for the sake of argument, one of the most serious points of difference between the parties at the time the adjusters were there was the salvage value of the goods unburned. On the one side they were held to be worth \$10,000 above the expense of putting them in order and selling them, and on the other but \$3,000; while, as sold by the plaintiff, they realized \$4,200. On an appraisal the amount to be allowed for them could only be determined by inspection, for which, of course, the goods themselves would have to be on hand. An attempt to fix the loss without them, if not impossible, would be seriously hampered; the opportunity to examine them being one of the merits of this course. But by a sale and dispersal of the goods, such as took place, that opportunity was entirely cut off, and an attempt to hold an appraisal after it would be practically useless. If the goods, as it is claimed, were deteriorating by being held, or had become rotten and unhealthy, the difficulty could easily have been met without abridging the right in question. No time is fixed in which an appraisal is to be asked for, and it must therefore be demanded within that which according to the circumstances is reasonable. *Chainless Cycle Mfg. Co. v. Security Ins. Co.*, 169 N. Y. 304, 62 N. E. 392. A notice, therefore, to the insurers, of the condition of the goods and the necessity for promptly disposing of them, would have compelled them—if this was found true—to exercise their rights, or else to forego them. It is no answer to say that the only object of an appraisal is to determine the value, and that this was sufficiently shown by the sale. That may be some evidence on the subject, but it is not the method provided by the

policy for determining it if the appraisal is desired, nor can the insurers be put off with any such substitute. It is to be remembered also that the sale was private, and at prices fixed by the plaintiff, and that the goods were mixed with others, to their possible disadvantage; the object being to dispose of both together. The prices obtained at a sale carried on in this way, to which buyers are drawn by the expectation of bargains, is very imperfect evidence on the question of value.

It cannot be charged that the right to an appraisal is not asserted in good faith, advantage being taken of the situation to defeat by a technicality an honest loss. Whatever might have been the case had the insurers suffered the sale to go on without challenge, as in *Davis v. American Central Ins. Co.*, 7 App. Div. 488, 40 N. Y. Supp. 248, nothing of that kind can be predicated of what we have here. Acting on the information which they had of the sale—not obtained from the plaintiff, who took no pains to let them know—they gave immediate notice in the most positive terms of their intention to stand on their rights, and of the result to the plaintiff if he went on in disregard of them. It was his duty, on the receipt of this, to stop; and, if any bad faith was exercised at this juncture, it certainly cannot be charged upon the insurers. When the plaintiff went on and sold, as he did, in the face of it, he took the risk of what should follow, and has only himself to blame.

It is said, however, that at the time when the adjusters were there it was declared by Mr. Berkey, speaking for the rest, that without a statement from the plaintiff as to the amount of the goods burned out of sight an appraisal would be useless. This is not found in the point reserved, and is not, therefore, a part of the record. But, even if it were, it could have no effect. At the most it was a mere expression of opinion, based on the alleged recalcitrancy of the plaintiff in refusing to give an estimate of the value of the goods destroyed—a casual observation, which cannot be wrested into a waiver without which the provision of the policy of course remains.

Important, also, to the insurers—as we must assume—were the other rights involved. It is true that the agents and adjusters who were present on December 29th and 30th inspected with some thoroughness the damaged goods, and on the strength of their examination made the offers of settlement mentioned. But this was in the preliminary stage of the controversy, when an effort was being made to reach an amicable adjustment. When it failed, and the parties fell apart, they were remitted to their several rights, which each side was bound to respect and observe. Recognizing this, the plaintiff drew up and forwarded his proofs of loss, on the receipt of which the insurers were entitled, if they found it necessary, to require a new exhibition of the damaged goods, just as they had the right to call for his books and papers, or to demand that he should submit to an examination under oath. Undoubtedly, this provision of the policy is to receive a reasonable construction; but with the proofs of loss only just made out, and not yet on their way, it certainly cannot be held to have been unreasonable to require of the insured that he should retain the goods to await the possible exercise of the right of further inspection, if desired.

The same is true with regard to the right to take and replace any

part or all of the goods lost or damaged. This, be it noted, is not simply the right to replace, and so confined to the property actually destroyed, but is to take and replace, and so extends also to that which is only damaged. Unquestionably, therefore, it was materially abridged by the plaintiff's sale. Notice of the intention to exercise this right did not have to be given until 30 days after the receipt of proofs of loss, and the insurers were entitled to this full period in which to make up their mind. They did not have to decide on the spot, and could not be made to do so. It is no objection, therefore, that in notifying the plaintiff not to sell they did not say positively that they proposed to exercise the right, but only that they might want to. They were not bound to do more. The notice was precautionary merely, so that they could not be charged with having kept silent in the face of it, and that is all that could be asked of them at that time. I do not lose sight of the fact that there were several insurers who were only ratably liable, and might have divergent views. But that did not prevent a several election (*Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 454, 88 Am. Dec. 396; *Good v. Buckeye Mut. F. Ins. Co.*, 43 Ohio St. 394, 2 N. E. 420; *Hartford Fire Ins. Co. v. Peeples' Hotel Co.*, 54 U. S. App. 215, 82 Fed. 546, 27 C. C. A. 223), or they might have concluded to join; with neither of which the plaintiff had any right to interfere (*Beals v. Home Ins. Co.*, 36 N. Y. 522).

Let judgment be entered in favor of the defendants non obstante veredicto on the reserved point, with costs.

CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG. CO.

(Circuit Court, D. Connecticut. February 26, 1904.)

No. 927.

1. ATTACHMENT—SURRENDER OF PROPERTY TO RECEIVER UNDER STIPULATION—INSUFFICIENT DESCRIPTION IN SHERIFF'S RETURN.

The right to certain personal property of a corporation being in dispute between an attaching creditor and a receiver subsequently appointed by a federal court in a suit to foreclose a mortgage given by the company, a stipulation was made and approved by the court in the foreclosure suit by which the property was turned over to the receiver, to be sold without prejudice to the right of either party to assert his claim against the proceeds. Subsequently a trustee in insolvency was appointed for the corporation by a state court, who by leave intervened in the foreclosure suit, and asserted his right to the property, which he admitted in his pleading was retained by the sheriff under the attachment until surrendered to the receiver under the stipulation referred to. Some time after such surrender the sheriff made return on the attachment, in which, through mistake, he failed to describe certain of the property as required by the law of the state, although such property had been actually seized by him, and was surrendered under the stipulation. *Held* that, as the making of the return after the surrender of the property was unnecessary, it could not affect the rights of the attaching creditor under the stipulation, which estopped both the receiver and the trustee, who succeeded to the rights of the corporation, from denying the right of the attaching creditor to assert his claim to all of the property surrendered thereunder.

2. SAME.

The right to certain property being in dispute between a mortgagee, an attaching creditor and a trustee in insolvency of the debtor, the mortgagee and the trustee entered into a stipulation to divide the proceeds. *Held*, that such stipulation operated to surrender any rights of the mortgagee in one-half of the proceeds, but did not affect the right of the attaching creditor, who was not a party thereto, to assert his claim to such half as against the trustee.

3. SAME.

Where an attaching creditor has surrendered property to a receiver under a stipulation and order of the court appointing the receiver preserving his right to assert his lien against the proceeds, the court will not permit his rights therein to be defeated by the receiver, or others subsequently intervening in the suit, on any technical ground.

In Equity. On motion to accept master's report.

Breed & Abbott, for petitioner.

Perkins & Jackson and S. C. Loomis, for trustee.

C. Walter Artz, for receiver.

TOWNSEND, Circuit Judge. On or about June 10, 1897, J. Burnett Nash began an action in the superior court of the state of Connecticut, for the county of Middlesex, against the Worcester Cycle Manufacturing Company, by virtue of a writ directing the attachment of the defendant's property. By virtue of said writ the sheriff levied upon and attached all of defendant's property, both real and personal, within said Middlesex county, and took possession of all of its personal property. Said property was afterwards appraised as being of the reasonable value of \$100,000. On or about June 26, 1897, the Central Trust Company of New York instituted a suit in this court to foreclose a certain mortgage, under which it claimed a lien on certain property of said Worcester Cycle Company located in said Middlesex county, and in said suit Frank Sullivan Smith was appointed receiver. At the time of his appointment the sheriff was in possession of all of said personal property as aforesaid. The receiver duly demanded said property, and the sheriff refused to yield possession thereof.

On or about the 10th day of July, 1897, said Nash and said receiver entered into a stipulation which recited that, whereas said Nash—

"Contents that he has certain valid and subsisting attachments * * * against the real and personal property of the said defendant, * * * and said Nash has levied thereunder upon all the personal property of the said defendant; and whereas, the said receiver maintains that he is at present entitled to the actual possession of all of said property of defendant in said state of Connecticut, and that his appointment as such receiver has dissolved said attachments, and is anxious to proceed at once as receiver, without the necessity of instituting legal proceedings for the purpose of obtaining possession of said personal property; and whereas, both parties agreed that the personal property of the defendant can be realized upon to the best advantage of all parties concerned by being speedily disposed of, and each party is desirous of preserving intact, with the least possible expense, all his personal rights in the premises, the parties stipulate and agree as follows:

"The receiver shall, as soon as he can obtain a hearing, with the full consent of the said Nash, move in the proper courts in Massachusetts and Connecticut for an order embodying the following directions, to the granting and entry of which this stipulation and agreement is subject:

"First. That the said Nash withdraw the sheriff's keepers in possession under his said attachments.

"Second. That such withdrawal of keepers by said Nash, and the taking possession of said attached property by said receiver, and the disposal of said personal property by said receiver in accordance with the orders of the said courts, shall be without prejudice to the said rights of said Nash under said attachments, or the claims upon which the same are based, to all intents and purposes as if this consent had not been given.

"Third. That the said Nash, without hindrance, allow said receiver to dispose of said personal property as directed in said first-mentioned orders, or as may be directed by future orders of the said courts, entered upon three days' notice in writing to said Nash or his attorneys, Messrs. Perkins & Jackson, of 115 Broadway, New York City.

"Fourth. That the present rights of said Nash to the said attached property shall, if the same be sold by the said receiver, be transferred to the proceeds of the said property in the hands of the said receiver, who shall hold the said proceeds subject to the said rights, and that if the said attached property be hereafter manufactured up, together with other property not in any way bound by the said attachments, then the said receiver shall hold, subject to the said rights, a sum equivalent to the proper appraised value, as shown in the said receiver's inventory, to be filed within ten days from the date of said order, of such attached materials as enter into the construction of such manufactured articles.

"Fifth. The right of the said Nash to accrued legal costs and disbursements on said attachments, and the amount thereof, shall be passed upon by said courts, and the said receiver shall reserve in his hands a sum sufficient to pay such costs as are provided for in the statutes of Connecticut and Massachusetts, and shall pay the same as directed by the said courts.

"J. Burnett Nash,

"By Perkins & Jackson, Attys.

"Frank Sullivan Smith, Receiver."

This stipulation was presented to, and ratified and approved by, this court; and an order was entered that said Nash should withdraw the sheriff's keepers in possession under his said attachment, and that such withdrawal and taking possession and disposition of said property by said receiver should be without prejudice to the rights of said Nash in said attachment, or the claims upon which the same were based. The court further ordered that said Nash allow said receiver to dispose of said personal property as directed by order of court, and that the present rights of said Nash in said property, if sold by the receiver, should be transferred to the proceeds of said property, as provided in said stipulation. Under said stipulation and order the sheriff, by direction of said Nash, surrendered possession of said property to the receiver.

On or about November 5, 1897, Charles C. Goodrich, of Hartford, in the state of Connecticut, was, on the application of a creditor of said Worcester Cycle Company, duly appointed by the probate court for the district of Middletown trustee in insolvency of said company for the benefit of the creditors, and duly qualified as such trustee, and petitioned for leave to intervene and answer in said foreclosure suit, which petition was granted; and upon appeal the Circuit Court of Appeals modified the decision so as to allow the intervener to be heard by proof and argument on behalf of the parties whom he represented, namely, the creditors of the defendant. In said petition to intervene, said Goodrich alleged, inter alia, that "the said sheriff retained possession under certain attachments of all of said personal and mixed property of the defendant," etc., until after the filing and entry of said stipulation and order. In his answer, subsequently filed, said Goodrich,

trustee, makes the same allegation and admission, and later, namely, on October 11, 1898, said Goodrich, trustee, made an express stipulation to the same effect; and this court, in its interlocutory decree, filed November 23, 1898, expressly found the fact of said possession by the sheriff until the delivery of the property to the receiver as aforesaid. Afterward said Goodrich, trustee, contended, and the Circuit Court held, that said mortgage was invalid as to the personalty because the property attempted to be covered thereby was not "particularly described," as required by the Connecticut statutes, and the mortgagee had not taken possession thereof. The Court of Appeals, in affirming said decision, held that the taking possession by the receiver was not a taking possession by the mortgagee, and that the rights of the creditors represented by the trustee were superior to those of the mortgagee, "since they have shown that, down to the time the court seized the property, nothing which mortgagor and mortgagee had done had operated to impair their rights to proceed against the res." The reason why the mortgagee had been unable to take possession of said personalty under its mortgage was that said personalty was in the possession of the sheriff under the Nash attachment. The receiver was originally authorized by order of court to "take immediate possession of, all and singular, the property; to continue, operate, and carry on the business of the defendant cycle company in such manner as the same is now conducted, or in such manner as will, in his judgment, produce the most satisfactory result." Pursuant to this order, he carried on said business for some two years, manufacturing bicycles, as far as possible, out of the stock included in the personal property delivered to him by the sheriff, and purchasing material necessary to complete said bicycles and make them salable; and he received large sums of money on such sales. The report of the receiver, however, shows that the management of the business has been attended by most disastrous results, and that while, according to his accounts, there is a balance due him from the Worcester Cycle Company of \$600, he has no assets in his hands or under his control except certain personal property at Middletown, worth, perhaps, \$3,000, which was part of the property delivered to him by the sheriff, and a fund amounting to \$3,000, which is held under the following circumstances: On August 13, 1898, the American Surety Company brought its bill in this court to foreclose a first mortgage on the plant of said company. One Edward C. Beecher was appointed special master to sell certain personal property in part satisfaction of said first mortgage. There being a dispute as to whether certain of the said property was or was not included in said mortgage, the said Goodrich, trustee, made a stipulation with counsel for complainant in said American Surety Company suit whereby it was agreed that a certain parcel should be sold, and a further stipulation entered into that one-half of the proceeds should be paid over to the trustee, and the other one-half should be paid to the American Surety Company. No further stipulation was made, except as hereinafter stated. Counsel for J. Burnett Nash was not a party to this agreement, and it does not appear that he had any knowledge thereof. He was, however, a party to the foreclosure suit, and refused to allow said property to be sold under said foreclosure, except upon a stipula-

tion whereby his rights thereto should be protected. Thereupon a stipulation was entered into providing that said parcel might be sold, free from the lien of said Nash, and that the one-half claimed by the trustee should be paid to the special master, and should remain subject to the liens, if any, of the attachment procured by Nash; and a further stipulation was entered into between Goodrich, trustee, and Nash, that nothing done by reason of said sale should affect the rights of the trustee or of said Nash in said property. Under said stipulation, said Beecher now holds said sum of about \$3,000, being one-half of the net amount realized on said sale, subject to the order of this court, for the satisfaction of the claim of said Nash, or to the credit of said trustee. Thereafter said Nash brought a petition for an order that Special Master Beecher pay over to him, in satisfaction of his claim, the money in his (Beecher's) hands, and for leave to said Nash to issue execution against the property of defendant in the hands of the receiver, and for an order authorizing the sheriff to levy thereon and sell so much as would be sufficient to satisfy the balance of Nash's attachment, and that, in case of a dispute as to the facts alleged, the same might be referred to a master. Various objections were raised to this petition by Goodrich, trustee, on a motion to dismiss the same. The grounds on which this motion was argued will be found in the opinion of this court in *American Surety Co. v. Worcester Cycle Co.*, 114 Fed. 659. Briefly, this court held that the attachments were not dissolved by the appointment of the receiver; that the possession of the receiver under said stipulations and order of court was, in effect, the possession of the attaching creditor; that the Nash attachment was not lost because the time of its duration given it by statute after judgment rendered had expired; and finally held, upon all the facts, that good faith required that the confidence reposed by the attaching creditor in the order of this court that his rights be preserved should not be misplaced. Thereupon the court denied the motion to dismiss the petition, and appointed Edwin E. Marvin master, to find the facts and report the same to this court. This hearing is upon the acceptance of the master's report.

Counsel for the trustee has filed 26 exceptions, most of which are based upon the refusal of the master to find certain facts. Counsel for the trustee, however, does not otherwise except to the report of the master, nor press the exceptions for refusal to find said facts, unless this court shall reach a conclusion adverse to the claims of the trustee, in which event said findings of fact, it is claimed, would be material in the determination of his legal rights. Counsel for the receiver has filed eight exceptions, most of which are based upon the alleged findings of law by the master, whereas it is said the master was appointed to find the facts only. Counsel for the petitioner, Nash, does not except to the finding of facts by the master, but only to his findings of law. The master's report finds that the petitioner did obtain a valid attachment against all the property of the defendant, both real and personal, situated at Middletown, in so far as the same is specifically named in the officer's return. Said officer's return purported and was intended to cover all of the real, and every item of the personal, property of the Worcester Cycle Company that was in the factory at Middle-

town while he was in possession. It appears, however, that by some mistake a considerable portion of said property was not included in said return, although it remained in the possession of the sheriff.

The provisions of the General Statutes of the state of Connecticut (Revision of 1888) § 907, are as follows:

"A writ of attachment shall be served by attaching the estate of the defendant, personal or real, or both. * * * And, in every case of attachment, the officer serving the process shall leave with the person whose estate or body is attached, or at the place of his usual abode, if within the state, a true and attested copy of the process and of the accompanying declaration or complaint; and of his return thereon, describing any estate attached."

Under this statute it has been repeatedly decided that it is essential to the validity of the attachment that the property should be described in the officer's return. *Ahern v. Purnell*, 62 Conn. 21, 25 Atl. 393; *Price v. Heubler*, 63 Conn. 374, 28 Atl. 524; *Metcalf v. Gillet*, 5 Conn. 400, 404. The officer was directed to attach to the value of \$5,000. It is admitted that the receiver has sold and received payment for property described in the return which is sufficient to satisfy said attachment. The report of the master, in connection with the facts already stated, shows that the stipulation between Nash and the receiver, ratified by the order of the court, and the surrender of the property to the receiver thereunder, were all long prior to the making of the return by the sheriff. Counsel for Nash therefore contends that as the sheriff was in full possession of all the property at the time when he surrendered the same, and had no further relations thereto at the time when he made the return, no act on his part, when he had delivered possession, could either increase or diminish the rights of the creditors. The making of the return was, if not unauthorized, at least an unnecessary act. Certainly the surrender of said property by the attaching creditor on the faith of said stipulation and order of court, and the subsequent admission of the trustee, already referred to, that the sheriff was in possession of said property, would estop the receiver to set up any such claim. Counsel for the trustee, it is true, contends that, as he had not been appointed, and was not a party to said stipulation, he is not bound by its terms. But the corporation, of which he was afterwards appointed trustee, was notified thereof, and of the application for the order ratifying same, and made no objection thereto.

In view of the foregoing considerations, and of the admissions made by the trustee, as aforesaid, in his petition to intervene and answer, and the findings of the court already referred to, I think the claim of the petitioner is not limited or in any way affected by the return of the sheriff, and that he is entitled to press his claim against any property surrendered to the receiver under said stipulation, or to the proceeds thereof sold by him under said stipulation.

As to the one-half of the proceeds of the parcel sold by Special Master Beecher, the trustee contends that neither the receiver nor the attaching creditor has any rights therein, for various reasons. The first reason assigned is that by the decree of foreclosure in the American Surety Company suit the rights of all of said parties in said property were cut off. But this would apply equally to the trustee. In fact, none of the parties were affected by the foreclosure of this parcel,

by reason of the stipulations already referred to, by which the American Surety Company surrendered its rights to the proceeds of one-half of said property. The agreement for a further stipulation between the American Surety Company and the trustee that one-half of said property should belong to him, while it would estop the American Surety Company, cannot affect the rights of the receiver, who was in possession as trustee for the attaching creditor, nor the attaching creditor, neither of whom was a party to said agreement. Furthermore, their rights to said property have been preserved by reason of the stipulation entered into by all parties, already referred to, that the rights of the attaching creditor should be transferred to one-half of the proceeds of said sale. The report of the master states clearly and accurately the facts shown upon the hearing before him. His statement of opinion as to certain questions of law presented seems to have been made for the purpose of explaining his rulings upon the introduction of testimony, and of placing the whole situation of the parties before the court as it appeared to him at said hearing. The question as to the respective rights of the receiver and attaching creditor is expressly reserved for the determination of this court.

The situation, so far as is pertinent to the disposition of this case, is as follows: The mortgage of the Central Trust Company was found by this court and the Court of Appeals to be invalid, so far as the personal property is concerned, because said property was not described in the mortgage as required by the provisions of the Connecticut statutes, and the mortgagee had not taken possession thereunder. Apparently, the only thing which had prevented it from taking possession prior to the appointment of the receiver was the taking possession of all of said property by this attaching creditor. By his attachment he saved property, inventoried by the receiver at cost prices at over \$100,000, which, after the payment of his claims, would have been available for the satisfaction of the claims of the trustee, as representing other creditors. Under stipulations and the order of this court, he surrendered said property to the receiver, and in all the subsequent proceedings and litigation it has been stipulated by all parties that his original rights should not be impaired. The receiver admits the validity of said claim. The trustee insists that the attaching creditor is deprived of all right to the property at Middletown, and the proceeds of sale in the hands of Special Master Beecher, because the receiver has sold sufficient of the other property to satisfy his attachment, and that his rights are only against the proceeds of said sale. But it appears that, through a series of disastrous experiences, the responsibility for which it would not seem necessary at this time to determine, the receiver has lost all of said property and said proceeds, and now has a claim of some \$600 against the estate, as already stated.

Counsel for the trustee claims that, as the mortgage to the Central Trust Company was invalid, the trustee would have been entitled to its possession, in any event. Whether the trustee owes his standing in court, and his right to such assets as may be paid after satisfying said attachments, solely to the intervention of the attaching creditors, is perhaps immaterial upon the question of law presented. "The trustee * * * must take the estate with the burdens placed thereon by him,

with all outstanding equities against it." *Merwin v. Austin*, 58 Conn. 22, 34, 18 Atl. 1020, 1030, 7 L. R. A. 84. See, also, *Vansands v. Middlesex County Bank*, 26 Conn. 144, 153; *Palmer v. Thayer*, 28 Conn. 237, 245; *Cooke v. Thresher*, 51 Conn. 105, 107.

The receiver obtained possession from the attaching creditors of all of said property, under the stipulation and order of court, which preserved the rights of the attaching creditors. As is said by the Court of Appeals in this case (*Central Trust Company v. Worcester Cycle Mfg. Co.*, 93 Fed. 712, 35 C. C. A. 547):

"The property is taken by the court, and is put into the hands of its officer to hold for the benefit of 'whom it may concern.' He holds and manages it for the benefit of the party to whom the court may ultimately decide that it belongs."

Clearly, the lien of the attaching creditor should take precedence of all other claims. It was clearly the duty of said receiver, as such officer of the court, to hold the proceeds of the sale of said property, or a sufficient part thereof, for the satisfaction of said claim. For this purpose all the property and proceeds of its sale should be marshaled and subjected to the payment of said claim. It does not lie in the mouth of the receiver or trustee to assert any technical claim to defeat the rights of this attaching creditor, who during all these years has postponed proceedings for the collection of his claim in order to avoid embarrassing by unnecessary litigation the trustee and receiver in their attempts to realize on said property.

My conclusion is that the attaching creditor is entitled to have his claim paid, and that, if the receiver has no other available funds in his hands, he should apply the property remaining at Middletown, or forthwith dispose thereof, if necessary, for the purpose of satisfying said claim, and that, if said property is not sufficient, the special master, Beecher, should pay over the sum in his hands, or so much thereof as is necessary, in addition to the amount realized from the sale of said property, to satisfy said claim. Inasmuch, however, as the original instruction to attach was limited to the amount of \$5,000, the amount of Nash's recovery should be limited to the amount named in the order of attachment, and in addition thereto he should be allowed a reasonable sum out of said fund for his reasonable costs and disbursements necessarily incurred and expended in the protection of his legal rights during the pendency of these proceedings.

Counsel unite in asking for a speedy disposition of this motion. Their briefs have been filed so late that it is impossible at this time to discuss at length all the propositions argued therein. The questions argued as to the duty of the receiver forthwith to turn over the property to the trustee, and as to the status of property purchased by him and commingled with the other property, or as to his personal liability, do not seem to be raised by the motion, or covered by the prayer for relief. It is stated that an accounting by the receiver has been begun. I think it is the duty of the receiver to complete his account, turn over to the trustee such property as may remain after the settlement of the claims of the attaching creditor, and such other claims, if any, as, on the settlement of the account, may be found to be prior to the rights of the trustee.

The claim of the judgment creditor, McBurney, was not argued, but it was stated by counsel that, so far as the conclusions herein are relevant, they will be applied in its disposition.

The report of the master upon the facts herein is accepted. Inasmuch as the finding of the court is adverse to the claim of the trustee, and he insists that certain other facts should be found in order to present and preserve his rights, the report may be referred back to the master, to incorporate therein such further finding of facts as may be necessary.

RIGGS et al. v. CAPITAL BRICK CO. et al.

SAME v. ELDRED et ux.

(Circuit Court, D. Connecticut. March 2, 1904.)

Nos. 1,132, 1,133.

1. BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE BY RECEIVERS—STATEMENT OF ACCOUNT WITH BORROWING STOCKHOLDER.

In a settlement of account between an insolvent building and loan association and a borrowing member, payments made by the latter on account of premium on his loan are to be credited as payments on the loan and not on his stock, since such premium arose out of his contract as a borrower, and not out of his contract or relationship as a stockholder. In a suit to foreclose he is to be charged with the amount received and interest, and credited thereon with the interest and premium payments made.

In Equity. Suits to foreclose mortgages.

Hasbrouck & Johnson and E. H. Rogers, for complainants.

Wm. F. Henney, George W. Klett, and W. S. Allis, for defendants.

PLATT, District Judge. The same question arises in each case, and a brief statement of the facts in the first named will disclose its nature.

The plaintiffs are the receivers of the Republic Savings & Loan Association, a corporation organized under the laws of New York, and now insolvent. The Capital Brick Company, a Connecticut corporation located at Hartford, borrowed \$3,500 of the New York corporation. The shareholders of the insolvent corporation were divided into borrowers and nonborrowers. To obtain a loan, it was necessary to subscribe for such a number of shares as at their par value would equal the loan, and assign the shares of stock to the corporation as collateral security for the loan. The Capital Brick Company, therefore, subscribed for 35 shares of short-term stock, and assigned the shares as collateral. It also, on July 9, 1897, executed and delivered its bond for \$3,500, and mortgaged certain real estate in Hartford to secure the same. It agreed in said bond to pay interest at 6 per cent. per annum upon said sum, payable monthly, and premiums at the rate of 40 cents upon each \$100 of said principal sum of \$3,500, payable monthly, until the whole of said principal sum was

¶ 1. See Building and Loan Associations, vol. 8, Cent. Dig. §§ 61, 63, 66.

paid, and dues at the rate of 50 cents per share of stock per month until said shares attain the ultimate value of \$100 each, and fines and other payments provided for under the articles of association and by-laws.

In these circumstances, it is essential to determine which of the payments made by the defendants to the corporation prior to its insolvency shall be credited upon the mortgage indebtedness. I do not deem it necessary to decide whether or not the plan of settlement to be adopted shall be governed exclusively by the expressed views of the highest court in the state of New York, or by those of the highest court in the state of Connecticut. The reason for passing that contention is this: When the views of the two courts are examined and subjected to a strict analysis, the differences in the rule applicable to such matter are more than minimized; they are practically extinguished. I shall not advert, in extenso, to the lines of reasoning adopted by the two eminent tribunals, and shall expect any doubting Thomas, if such there may be, to examine the decisions on his own account.

The Connecticut court speaks with no uncertain sound in *Curtis v. Granite State Ass'n*, 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17. Premiums were there credited to the borrower, because in the contract they were plainly stated to be payments upon the loan, and the reasons given therefor are sound and unanswerable.

Upon examination, I can find only one authoritative utterance by the Court of Appeals of New York. 173 N. Y. 632, 66 N. E. 1115, sustains the opinion of the Appellate Division in *Riggs v. Carter*, 77 App. Div. 580, 79 N. Y. Supp. 177, without opinion. It is fair to say that such action leaves the *Riggs v. Carter* opinion, and the opinion in *Hall v. Stowell*, 75 App. Div. 21, 77 N. Y. Supp. 953, which is quoted approvingly and followed in *Riggs v. Carter*, forming the substantial basis therefor, as the law of the highest court of the state of New York.

Now, in *Hall v. Stowell*, supra, *Strohen v. Franklin*, etc., 115 Pa. 273, 8 Atl. 843, is accepted by the Appellate Division as the first of a long list of cases, which indorse the principle that, after a building and loan association has been dissolved and gone into the hands of receivers, the borrower shall repay what he has borrowed, with interest, less what he has paid on the loan, with interest. That borrower and shareholder are distinct relationships. As shareholder, he should bear his share of the loss. As borrower, he should have the benefit of the rescission of the contract, and should repay what he has received, less what he has paid on account thereof. The facts in the *Hall v. Stowell* Case are illuminating. Mrs. Stowell borrowed \$2,250. She bid 10 per cent. premium for the loan. The loan, with premium added thereto, amounted to \$2,475. She then subscribed for 24¾ shares of stock at par value of \$2,475, and assigned the stock to the corporation as collateral security for the loan. Thus the premium bid was added to the stock, and the stock was to be paid for in monthly payments. The payments were to be 80 cents a share of stock until loan was fully paid. The 80 cents a share was made up of 50 cents a share, which equaled 6 per cent. interest on \$2,475, and 30 cents a

share toward payment of stock. The corporation had assumed a first mortgage of \$1,800, and advanced to Mrs. Stowell \$450. Mrs. Stowell paid 6 per cent. interest on the entire \$2,475. The corporation paid 5 per cent. interest on the first mortgage. In this situation the court made up the account in this way:

Defendant received	\$450 00	
She paid out, excess of interest for ten months on the \$1,800..	\$33 00	
Also interest for ten months on premium.....	24 75	57 75
Balance due corporation	\$392 25	

Such method of adjustment, the court says, compels the defendant to lose the \$24.75 paid originally on the stock, and also the \$7.42 paid by her each month upon the stock. "She is allowed, however, all her counsel asks for her in his brief submitted upon the argument, and substantial justice and equity are apparently done in the premises." It will be noticed that the Hall v. Stowell Case which I am examining was a submission to the Appellate Division under section 1279, Code N Y., and that the main contention therein was upon the question of usury.

In Breed v. Ruoff, 173 N. Y. 341, 66 N. E. 5, the Court of Appeals refuses to sustain the action of the Trial Court, which had been affirmed by the Appellate Division. The Trial Court refused to assist the receivers to gather in the assets, but there is not one word in the opinions, below or above, showing what portion of the estate was to be sold under the mortgage, and the case is distinctly sent back, so that the trial court may "ascertain the amount, if any, due upon said mortgage."

In Riggs v. Carter, 77 App. Div. 581, 79 N. Y. Supp. 178, among the facts set forth before the opinion itself is reached, and upon which, presumably, the opinion is based, it appears that on September 18, 1897, Carter executed a *bond and mortgage*. The mortgage contained a condition as follows: "** * * And a monthly premium of \$4.80 for the cash advanced on the maturity value of said share.*" (The italics are my own.)

Neither the Trial Court nor the Appellate Division vouchsafes to explain why they devote their attention to the language which is found in the matter descriptive of the obligation, rather than to the wording of the obligation itself, and it seems unimportant to inquire.

The vital point is this: The court finds, and the Appellate Division so interprets that finding, that nothing except interest was paid by the defendant, which was referable to the loan itself. In other words, the lower court found as a fact that under the contract between the parties the premiums were payments upon the stock.

It is true that I am dealing with the same corporation which the trial court had before it in Riggs v. Carter, but I am unaware of any rule which compels me to agree with that court in its finding, even if the facts were identical. The facts, however, are not identical. The Connecticut mortgage fails to contain the descriptive language quoted by the New York courts. The bond explains what the real contract between the parties was. That is identical in its terms in both cases. If the description thereof in the Connecticut mortgage were

the same as in the New York mortgage, I should be forced to look to the terms in which the parties themselves expressed their contract, rather than to an explanation thereof made by some conveyancer.

The premiums in our cases are, beyond the shadow of a doubt, referable to the loan itself; and so we find, at last, that in the matter at issue there is no difference between the highest courts, and any fancied difference grows out of one of two things: Either a misinterpretation of law in the lower New York court, by assuming that what some one has said the parties agreed to do expresses their intention, rather than what appears in the very paper in which the intention is set forth in plain words; or a finding of fact based upon some evidence which is not accessible to our eyes in the printed report of the New York case.

If I were driven to the point, however, I should not hesitate to say that the question before me is one of general law, over which the federal judiciary is entitled to hold an independent judgment. I could not sacrifice my own sense of equity and fair dealing at the behest of any judicial body, except those which I am bound in law to obey. And as I say this I feel it a duty, as well as a privilege, to express my sincere respect for and abiding faith in the court of last resort in the state of New York. My loving respect for the Supreme Court of my own state, as well as for its individual members, does not, I fervently hope, need expression; it exists, and is absolute, complete, and unreserved. I am comforted with regard to my independent judgment in this matter to find that the same point has been reached by a large number of courts of last resort in different states, all of high worth and esteem.

My attention has been called to a few instances in which the federal courts have followed the rule of settlement of the domiciliary state, but those are cases in which the local judge was dealing with an ancillary receivership, and the principal receivership arose under a federal appointment. Naturally, and for obvious reasons, the rule of settlement adopted by the court making the main appointment was followed by the court which dealt with the ancillary matter. In the case at bar the main receivership is the creation of a tribunal of a sister state. It would be pleasant to co-operate in producing a homogeneous rule of settlement for all borrowing shareholders in this dissolved corporation, but I cannot sacrifice my settled convictions to produce such a result, and I beg to suggest to the counsel for the receivers that our state tribunals were at their disposal, and, having begun in a neighboring local forum, it was not illogical for them to continue their efforts in the same direction.

Towle v. Am. B. & L. Ass'n (C. C.) 61 Fed. 447, can, I agree, be distorted into a sanction for the plaintiffs' contention, but I must beg leave to doubt whether Judge Grosscup himself would sustain the position which is required herein; and, beyond that, I am unable to agree with his original premise, and his general conclusion is somewhat isolated. I do not think that these associations, especially when dissolved by failure of the scheme, are in any reasonable sense of the term business copartnerships.

The association is a corporation, with corporate rights, and the members are the stockholders. As stockholders, pure and simple, the members have a distinct contractual relation. When a member becomes also a borrower, he makes a separate and distinct contract. He plays a double part, it is true, which is frequently called a dual role, but each part is distinct, and clearly defined. The duties and advantages of the one relation do not in any sense add to, diminish, or change the duties and advantages pertaining to the other.

From this viewpoint it becomes appropriate to remark that the doings of a building and loan association are *sui generis*. The wrecks of such corporations along the shores of the judicial tribunals tend very strongly to sustain the conviction that the plan upon which they were organized was Utopian, and slightly lacking in plain, practical, ordinary common sense. The words in which to dress such a plan were inevitably vague and hazy, and it is therefore not surprising that the painful absence of set terms and clear expressions has led the judicial interpreters in the earlier stages of the litigation into a veritable quagmire of opinions. But whenever and wherever a clear distinction exists in the contracts between payments to be applied to loans and payments to be applied to stock, it is a simple matter to carry out the intention of the parties as expressed in their contract, and this position in these latter days has been consistently and uniformly taken by the courts.

If in any case the scheme materializes, it is true that a time must come when the reduction of the loan on the one hand, and the payments toward stock on the other, will bring the parties to a point where one hand washes the other, and the complicated figuring will be wiped from the slate, the stock becoming full paid and the loan extinguished. Such a chimerical moment, however, is part of the Utopian dream, and when death arrives, as it naturally must, before maturity, the attempt at *legerdemain* vanishes into the air from which it was evoked, and the parties are thrown back upon and into their original undertaking.

It follows, from what has been said, that I am unable to accept the English plan of settlement, which has been followed occasionally in the past on this side of the ocean. I am in hearty accord with the plan adopted by many eminent courts, among which the Supreme Court of my own state is not the least. The borrowers should be charged with the amounts which they borrowed, with 6 per cent. interest thereon, and from those sums should be deducted in each instance the interest and premiums which they have paid, applied according to the rule of partial payments. The balance found will be the amounts due the complainants. It has been agreed that the time for redemption shall be three months.

Let decrees be entered in each case in accordance with this opinion.

PURNELL v. PAGE, Sheriff.

(Circuit Court, E. D. North Carolina. April 28, 1903.)

1. FEDERAL COURTS — JURISDICTION — TAXATION — INJUNCTION — AMOUNT INVOLVED.

Under Act Aug. 13, 1883, c. 866, § 1, 25 Stat. 434 [U. S. Comp. St. 1901, p. 508], limiting the jurisdiction of the Circuit Courts of the United States to suits where the matter in dispute, exclusive of interest and costs, exceeds the sum or value of \$2,000, such court had no jurisdiction of a suit to restrain the enforcement of a personal state tax amounting only to \$80, though the tax constituted a cloud on the complainant's title to realty the value of which exceeded \$2,000.

In Equity.

Edw. J. Best and F. H. Busbee, for complainant.
Locke Craig and Watson & Buxton, for defendant.

SIMONTON, Circuit Judge. This is a bill filed by the Honorable Thomas R. Purnell, District Judge of the United States for the Eastern District of North Carolina, in behalf of himself and all other federal officeholders in that state, against the sheriff of Wake county, of that state, praying an injunction. The North Carolina corporation or tax commission, under an act of the Legislature of that state imposing a tax on income, had assessed a tax on the salary of Judge Purnell as District Judge in the sum of 1 per cent. on the said salary; the whole tax assessed being \$80. Upon his failure to pay this tax, execution was issued, and placed in the hands of the sheriff of said county. The sheriff, proceeding under said execution, has levied upon property of Judge Purnell amounting in value to several hundred dollars to enforce the payment of this tax, beside which, the lien of the execution clouds the title of realty worth over \$5,000. The bill is filed to restrain the sheriff upon the ground that said tax is wholly unconstitutional and void. The illegality of the tax is not the sole ground upon which the injunction is sought. Various equitable considerations are also stated, which must be passed upon, and thus the jurisdiction of the court is sustained. *Milwaukee v. Koefler*, 116 U. S. 219, 6 Sup. Ct. 372, 29 L. Ed. 612; *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 68, 22 Sup. Ct. 26, 46 L. Ed. 86.

Judge Purnell is an officer of the United States. His court and his office and himself are among the means created by acts of Congress, within the provisions of the Constitution, to carry on the powers vested in the general government. The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of such laws, or offices and officers created under them. *Van Brocklin v. Tennessee*, 117 U. S. 155, 156, 6 Sup. Ct. 670, 29 L. Ed. 845; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Provi-*

¶ 1. Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 38 C. C. A. 459.

See Courts, vol. 13, Cent. Dig. § 890.

dence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939; Weston v. City Council, 2 Pet. 449, 7 L. Ed. 481; Banks v. Mayor, 7 Wall. 16, 19 L. Ed. 57. The same limitation exists as to the taxing power of the United States. "As the states cannot tax the powers, operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax the instrumentalities nor the property of the state." *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 584, 15 Sup. Ct. 690, 39 L. Ed. 759. The precise point involved in this case was decided by the Supreme Court of the United States in *Dobbins v. Commissioners of Erie county, Pa.*, undertook to tax the salary of a captain of a United States revenue cutter under an act prescribing a tax to be paid by all taxable persons, and on all officers and positions of profit, without qualification. In an elaborate opinion, the Supreme Court reversed the judgment of the Supreme Court of Pennsylvania, which had sustained the tax. Among other things, the court says that the act of Congress fixed the compensation of this officer, who was one of the means established by Congress to carry out its constitutional powers. The state, by taxing this compensation, diminished the recompense which Congress had determined the officer must have. In this the act of the state conflicted with the law of Congress made in pursuance of the Constitution, the supreme law of the land. Judge Purnell has his salary secured to him, under the Constitution, from any diminution, so long as he remains in office. Article 3, § 1. A fortiori, no state by any act can diminish his compensation. *Commonwealth v. Mann*, 5 Watts & S. 403. And so, applying the same principle, the Supreme Court, in *Collector v. Day*, 11 Wall. 113, 20 L. Ed. 122, held that it is not competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a state.

It is earnestly contended that the income, only, of Judge Purnell has been assessed. But in estimating his income his salary is included. So it is a direct tax on his salary. If on its receipt he had invested it in any real or personal property, such property could be taxed. But assessing his salary as it comes into his hands as salary is a direct tax on the salary, and a reduction thereof pro tanto.

Whilst, however, there can be no doubt that this attempt to tax the salary of the complainant is invalid and contrary to the Constitution and law of the United States, there is an objection to this bill of a character so formidable that it is doubtful if it can be entertained by this court. This objection is to the jurisdiction of the court, and it is an objection of which the court itself must take notice before it can adjudicate the cause. *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; *Shreveport v. Cole*, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589. This objection is that the amount in controversy is not within the jurisdiction of the court. The act of March 3, 1887, c. 373, § 1, 24 Stat. 552, corrected in 1888 (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 434 [U. S. Comp. St. 1901, p. 508]), declares "that the Circuit Courts of the United States shall

have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution and laws of the United States or treaties made, or which shall be made, under their authority." This provision was discussed in *United States v. Sayward*, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508. The court there held that the Circuit Court cannot, under the statute, take original cognizance of a case arising under the Constitution or laws of the United States, unless the sum or value of the matter in dispute, exclusive of interest and costs, exceeds \$2,000. It is true that in that case the only question was, did the limitation apply to suits by the United States? And it was held that it did not apply. But the conclusion reached was sustained by a comparison of the phraseology used when suits by the United States were provided for, and the omission to restate these words of limitation which had been used in the other subdivisions prescribing the jurisdiction of the Circuit Court. The point, however, was explicitly decided in *Fishback v. Western Union Telegraph Co.*, 161 U. S. 99, 16 Sup. Ct. 506, 40 L. Ed. 630. And it was again affirmed in *Holt v. Indiana Manufacturing Co.*, 176 U. S. 72, 73, 20 Sup. Ct. 273, 44 L. Ed. 374. "The difficulty," says the court, "is that the pecuniary limitation of over \$2,000 applied, and the taxes in question did not make that amount. And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute." This case quotes as authority for this *New England Mortgage Co. v. Gay*, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; *Clay Center v. Farmers' Loan & Trust Co.*, 145 U. S. 224, 12 Sup. Ct. 817, 36 L. Ed. 685; *Citizens' Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; *Walter v. N. E. R. Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Carne v. Russ*, 152 U. S. 250, 14 Sup. Ct. 578, 38 L. Ed. 428. And this conclusion was maintained notwithstanding the fact that under operation of the act of 3d March, 1891, there is no pecuniary limitation on appeals directly from the Circuit Court to the Supreme Court, under *The Pagueate Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. Evidently this means that, when the jurisdiction of the Circuit Court is in question, the act of 1887-88 is still unrepealed, and fixes the law. The amount of the taxes in this case is \$80, and from this case it would appear that this is the amount in controversy. It is charged that a cloud has been created on the title of property largely exceeding this amount, and perhaps greater in value than \$2,000, but this will not affect the question. In *Ross v. Prentiss*, 3 How. 772, 11 L. Ed. 824, the court says:

"The motion to dismiss the appeal is resisted by the appellant, who insists that the jurisdiction depends on the value of the property on which the execution has been laid, and the amount of appellant's interest in it, and, as the property is worth much more than the sum required to give jurisdiction, he has the right to appeal to this court from the decree of the Circuit Court, because he may lose the whole benefit of his property by a forced sale. We think otherwise. The only matter in controversy is the amount claimed in the execution. The dispute is whether the property in question is liable to be

charged with it, or not. The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them, and, as that amount in this case is below \$2,000, the appeal must be dismissed."

With a clear conviction that the action of the sheriff in this matter is entirely invalid, I have reached reluctantly the conclusion that the court is without jurisdiction to offer the relief asked. The bill, therefore, must be dismissed, but without prejudice to the right of the complainant to seek his remedy in any other tribunal. Nothing is now decided, except that the case does not come within the limited jurisdiction of this court.

STANWOOD et al. v. WISHARD et al.

(Circuit Court, S. D. Iowa, Central Division. March 2, 1902.)

1. ATTORNEY AND CLIENT—DUTY OF ATTORNEY TO KEEP CLIENT ADVISED—ACQUIRING TITLE TO PROPERTY ADVERSE TO CLIENT'S INTERESTS.

It is the duty of an attorney to keep his client advised at all times of any facts which may affect the client's rights, and a court of equity will not permit him to acquire title to property in any way the subject of the litigation without the knowledge of the client, and adverse to his rights or interests, but will decree that he holds such title as trustee for the client, although acquired with his own money.

2. SAME—SUIT BY CLIENT TO DECLARE TRUST—DEFENSES.

A bill alleged that complainants were owners of obligations of a trust company which became insolvent and went into the hands of a receiver; that at the time defendant held the title to real estate, subject to certain mortgages, in trust for the company, to secure obligations which had been substantially paid before the insolvency, and was receiving rents therefrom far exceeding the charges thereon; that complainants, who resided at a distance, employed defendant as their attorney to represent their interests, and he placed their claims in judgments, no part of which has been paid; that, pending the receivership, defendant, without their knowledge, purchased the mortgages against the property he held in trust, foreclosed the same, and acquired the title in his own name, and has since collected a large amount in rents therefrom. The bill prayed that defendant be decreed to hold the property in trust for complainants, and required to account for the rents, and to convey to them on payment of any sum found to be justly due him for money expended by him in the purchase. *Held*, that a plea setting up that shortly before the foreclosure sale the receiver had sold the property with other assets of the company, and received payment therefor, stated no ground of defense, it not appearing that defendant notified complainants of such impending sale, and the trust alleged by complainants having arisen through his action in subsequently acquiring title to the property while acting as their attorney, and without their knowledge, and while he was receiving the rents therefrom.

This action is by bill in equity. Defendant Wishard has filed a plea, now for determination. The bill is as follows:

For many years prior to 1896 the defendant the Des Moines Loan & Trust Company, of Des Moines, Iowa, was engaged in loaning money on real estate security in Iowa and other northwestern states, and in selling notes, bonds, and securities to parties in the East. Defendant Wishard, of Des Moines, for many years has been a practicing lawyer in the United States and state courts of Iowa, and from 1892 to 1896 was president of the said trust com-

¶ 1. See Attorney and Client, vol. 5, Cent. Dig. §§ 251, 256.

pany. Prior to 1896, complainants, residing in the East, relying on Wishard's professions of friendship, and his full knowledge of the condition of the trust company, were induced by him to loan large sums of money to the trust company, and to purchase securities from, indorsed and guarantied by it. January 1, 1896, Wishard retired from the trust company, but continued in the practice of law. A few months thereafter the district court of Polk county, Iowa, appointed a receiver of the trust company because of its insolvency, and to conserve its assets, and for winding it up. Therefore Wishard, both claiming to have and having full knowledge of the affairs and conditions of the trust company, and still professing friendship for complainants, and his ability to fully and promptly collect the sums due them, undertook said duties; they wholly relying on his efforts. Wishard put their claims in judgments against the trust company, which as yet are wholly unpaid. He acted in like capacity for others, and obtained judgments, and for those who may join brings this action.

While Wishard was still president of the trust company, at his instance the company made an agreement with one Kennedy by which Kennedy became the owner of a large portion of the assets of the company, including more than 5,000 acres of land, and the trust company became the owner of valuable real estate in Des Moines. But in making this exchange Kennedy conveyed the legal title of the Des Moines property to Wishard, but in trust for the trust company. Wishard has been in possession of this property ever since receiving said conveyance, in September, 1895. This property has been covered by buildings of high earnings or rentals, far exceeding the taxes and other charges. Wishard took this property under a writing with the trust company to hold the property in trust for the payment of certain indebtedness of several parties, creditors of the company, of \$7,500, and for such sums as the company then or thereafter might be owing to him, and to indemnify him by reason of a bond he had signed for the company. Prior thereto Kennedy had given mortgages thereon aggregating \$33,000. Prior to April 30, 1896, the trust company had paid off all indebtedness for which Wishard held the property in trust, excepting \$754.16, which, as he claimed, was owing him for services, and \$1,000 of said mortgage indebtedness, which he had guarantied, and a contingent claim on a bond which he had signed; but that during or prior to March, 1897, the rents of the property had fully wiped out all sums for which he took the property in trust. The mortgages referred to aggregate \$33,000, as follows: One for \$2,000, one for \$6,000, one for \$25,000. The largest one was to the defendant Des Moines Savings Bank. These three mortgages rested on separate pieces of property. Wishard's duties as attorney for the complainants required him to preserve the property from foreclosure, and to establish complainants' claims as liens on and against the Des Moines real estate referred to. But, to prevent complainants from participating in the rents and collecting the sums due them, and to cut them off in their claims to said property, Wishard undertook to and did purchase the mortgages of \$2,000 and \$6,000, and had them assigned to himself; and with a like fraudulent purpose he, as attorney for complainants, and also as attorney for the savings bank, entered into a contract with the bank by which the bank assigned to him the \$25,000 mortgage. Wishard undertook in his own name, but for the joint benefit of himself and the bank, to foreclose the three mortgages, and thereby cut off complainants from participating in said rents, and from asserting claims or liens against any of the property, both Wishard and the bank being charged with knowledge and knowing of complainants' rights, and that said contract with the bank was in violation of Wishard's duties to complainants. In 1897 said foreclosure suits were brought, and soon thereafter they went to decrees in his (Wishard's) name. No one of complainants were made parties thereto, excepting Annie W. Stanwood. She was induced to appear, but made no defense by Wishard, her attorney, he advising her that she had no rights therein, and he filing her answer for her, she wholly relying upon him to protect her rights, and she being wholly ignorant of her rights in the matter. The decrees were for more than \$33,000, an amount in excess of what was owing by him to the mortgagees. Under special executions the property was sold; Wishard receiving certificates of sales, he paying no money, but credit.

ing the judgments for the amounts of the sales. July 31, 1898, there being no redemption, Wishard received sheriff's deed for all the property. All of these things were done by him in violation of his duties to complainants, and in hostility to their interests. August 10, 1898, Wishard gave to the bank a mortgage on all the premises to secure \$20,000, due July 1, 1903, still unsatisfied of record, and yet held by the bank. This mortgage was in pursuance to the plan engaged in by Wishard as against complainants and the trust company as to the title of said premises, in violation of his duties toward complainants, as both he and the bank knew, as he still held the title in trust, and the mortgage of the bank is junior to complainants' rights. Since July 31, 1898, Wishard has received \$25,000 in rents from the property in excess of the taxes and other charges, which should be credited as against sum required to make redemption. Complainants submit that they have their election at final decree to have Wishard account for said rents to them, or to have their claims established as a first lien against the property. Wishard, holding the legal title to the real estate, was not competent to take assignments of the three mortgages; and in the foreclosures he did not disclose his trusteeship, and the decrees do not purport to and do not cut off his right as trustee. But then, and at all times since, the bank well knew that Wishard held the property in trust. By reason of his bad faith he can assert no just claim for fees or compensation in and about the matter. Complainants are willing to pay to Wishard what may be due him on an accounting by reason of any liens prior to theirs. Florence G. Wishard is the wife of Edward S. Wishard. The prayer is that Wishard and wife be decreed to have no interest in the property other than that Mr. Wishard holds it in trust until the sums justly due him are paid; that he be required to account for said rents and profits; that his attorney's liens on their judgments be declared void; that they be allowed to redeem the said premises from the foreclosure proceedings; that the amount to redeem be fixed, on payment of which Wishard be required to convey the legal title to them; and a prayer for general and equitable relief. Such, in a general way, is the bill in so far as it is now for consideration.

Defendant Wishard's Plea.

In effect it is that by virtue of certain proceedings complainants are barred from a recovery herein. The plea, when summarized, is as follows: The insolvency and proceedings resulting in the appointment of a receiver for the trust company are recited. The legal title to the real estate in controversy, at the instance of the company, was placed in him, by virtue of a resolution of the board adopted in October, 1895, to be by him held in trust for the payment of certain investors with claims against the company aggregating about \$7,300, for what the company then or thereafter might owe him, to pay him for the care of the property, and to reimburse him on account of what he might pay out by reason of being on its bonds and obligations; upon the payment of said claims the property to be that of the company. And there was a contract between him and the company of the same date to the same effect. Said debts thus provided for had not been paid when said receiver was appointed, and said trusteeship and said matters and the ownership of said property all appeared on the books of the company, and were known by its officers and the receiver, who filed his report June 1, 1896, setting forth said facts about the real estate. Afterwards the receiver brought suit to recover said property, setting up the trust, and claiming that Wishard owed the company, instead of the company owing Wishard. And Wishard, by answer, pleaded that the reverse was true. In October, 1896, the case went to decree in favor of Wishard that the company owed him \$754, reciting said trust, and empowering him to continue in possession of the property, and continuing the case to the end that Wishard's suretyship for the company could be provided for later on. The receiver borrowed money and paid off all the debts connected with said trust, excepting that owing Wishard. The complainants employed him to put their claims in judgments, which he did. Pursuant to a decree in the receivership case, the receiver, as he was authorized to do, did sell to himself said property and other assets for \$12,800, which sale to said Marquis was approved June 30, 1897, and the proceeds passed into his hands as receiver, and a deed to said Marquis was approved by the court, and filed of record. Said judgments in

favor of the complainants were after the appointment of a receiver, and were not liens on said real estate. By virtue of said sale by the receiver the complainants have received the full benefit of said property to which they are entitled. Said real estate was sold under foreclosures of the prior mortgages after the sale by the receiver, and, having received said benefits in the receivership proceedings, the complainants have no rights therein, and the rights of redemption passed to said Marquis under the receiver's sale, and that he (Marquis) alone had the right of redemption under the foreclosure proceedings. At all times since purchasing the said property at the receiver's sale Marquis has claimed to own said real estate, and now has a suit pending in which is involved the title thereto. And he pleads said matters in bar of complainants' bill.

Charles A. Clark, for plaintiffs.

J. M. Read and W. L. Read, for Wishard.

McPHERSON, District Judge (after stating the facts as above). The rights of a client as against his attorney are involved in this case. Opposing counsel are practically agreed as to the general rules. These rules are quite generally known by the profession. The purpose of the courts is to enforce them in all the cases if the facts warrant. The opinion of Judge Sanborn in the recent case of *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, before the Circuit Court of Appeals for this circuit, states the rules as recognized by the profession generally. While that case was one between principal and agent, the rules, in a measure, are those which govern the relations between client and attorney. The only difference is that an attorney is held to a higher degree of accountability than is an agent. This is so because of the superior knowledge the attorney has as to the matters connected with the litigation. And in so many ways the attorney has the client and his interests in his grasp if he is disposed to make use of his power. So that the attorney must not only at first advise the client of his rights, but must keep on advising him. What the attorney knows about the situation, and the status of the litigation from time to time, the client must know. The attorney must not purchase or obtain an interest in the property the subject of litigation, adverse to the interest or rights of the client. And the fact that the attorney furnishes the money with which to make the purchase does not lessen the rights of the client. In short, the attorney must keep hands off in every sense, excepting to faithfully inform and represent the client, and in all respects conserve the interests of the client. And whether during the time he is acting as an attorney or after such relations have ceased, and whether with his client's money or with his own money, he purchases or acquires an interest in the property in any way the subject of litigation, a court of equity will decree that he holds such interests as trustee for the client. The cases are uniform upon the subject. *Harper v. Perry*, 28 Iowa, 57; *Polson v. Young*, 37 Iowa, 197; *Phillips v. Blair*, 38 Iowa, 649; *Reickhoff v. Brecht*, 51 Iowa, 633; *Lynn v. Morse*, 76 Iowa, 665, 39 N. W. 203; *Insurance Co. v. Perry*, 65 Iowa, 709, 22 N. W. 937; *Prouty v. Bullard*, 77 Iowa, 47, 41 N. W. 559; *O'Dell v. Rogers*, 44 Wis. 136-178; *Moore v. Bracken*, 27 Ill. 23; *Stockton v. Ford*, 11 How. (U. S.) 246, 13 L. Ed. 676; *Baker v. Humphrey*, 101 U. S. 500, 25 L. Ed. 1065. The rule was as well stated in the 28 Iowa case as can be found:

"The application of this rule forbids the attorney to purchase, against the interest of his client, property sold in the course of litigation in which he

is retained: and such sales will be held void, or the attorney will be held as the trustee of his client, and required to account as such."

Perry on Trusts, § 202, is to the same effect.

And an attorney must keep his client advised of what is being done, to the end that the client can attend sales and give directions in the business affairs of the litigation, and at judicial sales become a purchaser, and at private sales buy in outstanding titles or liens, to either perfect his title or make his claim. This phase of his duties is well stated by Justice Nelson in *Stockton v. Ford*, above cited, as follows:

"There is another ground of defense set up in the pleadings, and supported by the proofs, which has not been satisfactorily answered. And that is that the plaintiff was the attorney of Pryor in the judgment against Ford, employed to enforce its collection; and while holding this relation to him, and after the assignment of Jones to the latter, he became the purchaser in his own name, without communicating the fact to his client, and obtaining his consent. Holding this relation to Jones at the time of the purchase, it was his duty to have advised him of the seizure and sale, so as to have enabled him to prevent a sacrifice of the judgment on the sale; and, having not only neglected to do this, but having purchased the judgment himself, a court of equity will fasten upon the purchase a trust for the benefit of the client."

And the duty of an attorney to report to his client and keep him advised of the facts is illustrated and enforced in *Insurance Co. v. Perry*, 65 Iowa, 709-711, 22 N. W. 937.

It is to be seen whether, under the recitals of the bill and the plea, Wishard holds this property in trust. From the bill it has been seen that the trust company owned the property, subject to liens of about \$33,000. It was turned over to Wishard in trust, which burdens were soon practically all lifted. From the time the trust company became the owner of the property until the present, Wishard has been in possession of it, receiving the rents, until he has received sums sufficient to discharge all incumbrances and burdens, excepting \$20,000 of the Kennedy mortgages, and has received most of that \$20,000. While attorney for complainants, he acquires the legal title by foreclosing and bidding in under the Kennedy mortgages. The plea, which goes to the entire bill, recites many facts, some of which are not in avoidance, but which, so far as material, conduce to a single point. And that is that this and other property were sold at a receiver's sale under the direction of the state court, and the purchaser paid \$12,000 for this and other property, the benefits of which were enjoyed by the complainants. The allegations that such purchaser obtained a title, and that such title is still outstanding, and that such purchaser in some court is asking for a decree for the property, are utterly immaterial. There is no denial in the plea that Wishard owns the legal title, and no claim by him but that he does in fact own the property, and that he acquired the title in the way charged. And he does not admit that the purchaser has any right to or interest in the property. This matter merits but a brief argument. It is not apparent what such purchaser ever acquired. He has never been in possession, and has never received a farthing in rents, nor been at an expense of a cent on account of taxes, repairs, insurance, or other burdens. He only acquired a paper title, and then not any title the

trust company had, but Wishard's title, as is to be seen from the deed set forth in the plea. He did not receive the title of the trust company. The title Wishard then had was one in trust for the trust company. Suppose that was cut off? And suppose complainants did receive benefits therefrom? The title complainants are now seeking to have declared a trust is the title he acquired later on by purchase at foreclosure sale. The insufficiency of the plea is apparent from the transactions and the dates thereof. Wishard took the property in trust for the trust company in October, 1895. The receiver for the trust company was appointed in March, 1896. The trusteeship of Wishard appeared from the books, and the receiver from the first recognized it, and it was specifically decreed in October, 1896. The plea is silent, but it is evident that Wishard filed petitions on some of complainants' claims in 1896, as they went to judgment in January and June, 1897. The deed, bill of sales, and assignments by the receiver to the receiver's suit, and "other property" was made July 6, 1897. The Kennedy or prior mortgages were taken by Wishard in March, 1897, and he took a decree thereon in June, and a sheriff's certificate of sale in July, 1897, and a deed in July, 1898. From which it appears at the times he was representing complainants against the trust company he was wrecking the company by "bearing" it, and for personal gain buying up its assets. But it is said that Marquis paid \$12,000 for this and other property. How much did he pay for this property? How much of the \$12,000 did complainant receive? How much of the \$12,000 was on account of this property? The plea is silent as to all these questions. The bill charges that Wishard placed complainants' claims in judgments, and that no part of them have ever been paid. And in the light of such allegations, which stand as verities, it is difficult to see how complainants have been benefited by the receiver's sale. The plea recites that the receiver sold the property to himself. This was done with the approval of the court. It may be supposed, therefore, that the sale should be treated as if the sale had been made to a stranger. But the complainants resided far away. They were in ignorance of what was going on. The plea does not recite that Wishard did not know all. By inference, at least, it can be said he did know. And the plea only recites that such purchaser of "this and other" property was the highest bidder. It is not alleged that the bid was adequate. No reason is pleaded why Wishard did not bid for his clients, and no reason is pleaded why his clients were not advised, to the end that they for themselves, or for themselves with others in like interests, could bid. The paper title of the purchaser at the receiver's sale was cut off by the foreclosure of Wishard, and Wishard now has the title and is in full enjoyment of the property. And there need be no discussion as to whether the judgments of complainants were at any time a lien on the property, for the reason that it was in the custody of the state court. That is not material. The property, subject to certain burdens, belonged to complainants and others, as creditors of the trust company. It was once theirs, and now it is in the name and hands of their attorney, without cash by him, other than his efforts to preserve it, and remove the liens, all of which has been done

with the profits from the property. That is the whole story. This had been brought about by shuffling the liens and mortgages and the title, which, if allowed, gives forms greater force than substantial rights. And this is what a court of equity, as between clients and attorneys, will not and should not allow to stand.

Therefore the plea is wholly insufficient, and is overruled.

CUTTER v. IOWA WATER CO. et al.

(Circuit Court, S. D. Iowa, E. D. March 8, 1904.)

No. 219.

1. CORPORATIONS—REGULARITY OF FORECLOSURE PROCEEDINGS—ALLEGATIONS OF FRAUD BY BONDHOLDER.

A bill by a bondholder of a water company, filed a year and a half after the conclusion of a foreclosure suit, in which the property of the company was purchased by a committee of the bondholders, and afterward sold by such committee for the benefit of all bondholders who joined in the plan of reorganization, seeking to obtain full payment of complainant's bonds from the sum so received for the property, does not state a cause of action, where, although fraud is alleged, no facts are pleaded to substantiate the charge, and where it appears from the bill that plaintiff was cognizant of the entire proceedings, except as to the amount the committee received on the resale of the property, and made no objection thereto, and that he was fully advised by circulars sent by the committee of the facts existing and the proposed action, and solicited to join therein.

2. SAME—PURCHASE BY REORGANIZATION COMMITTEE.

That a number of the bondholders of a defaulting water company voluntarily constituted themselves a reorganization committee, and acted for themselves and all other bondholders who saw fit to join them, in looking after foreclosure proceedings, and in the purchase of the property therein, does not affect the validity of the proceedings or sale to give a nonjoining bondholder any greater rights.

3. SAME.

In a foreclosure suit against a corporation by a mortgage trustee, in which the proceedings were directed by a committee of the bondholders, who also purchased the property on behalf of themselves and other bondholders joining with them, the fact that not all of the bonds were formally proved, where their existence is undisputed, does not affect the validity of a decree for the amount represented by all, nor give a bondholder who proved his bonds a right in equity to have the proceeds of the property divided between the bonds so proved to the exclusion of all others.

4. EQUITY—PLEADING—ALLEGATIONS TO AVOID DEFENSE OF LACHES.

To avoid a defense of laches, general allegations in a bill that the fraud on which it is based was not sooner discovered are not sufficient, but there must be allegations and evidence showing what the complainant did, and which establish his diligence.

In Equity. On demurrer to amended bill.

This case is pending on an amended bill in equity and demurrers filed by defendants. From the amended bill it appears that the defendant water company owned a system of waterworks at Ottumwa, Iowa. April 15, 1887, it executed 400 of its mortgage bonds, of \$1,000, each bearing 6 per cent. interest, payable semiannually, secured by a mortgage on its property, rights, franchises, which mortgage was made to the defendant trust company. Of

these bonds but 349 were issued or outstanding, of which complainant owns 15. The company having defaulted in its interest, the trustee filed a bill in this court in July, 1894, to foreclose the mortgage, and defendant Brownell was appointed receiver and managed the property and received the income until September, 1897. The defendants Potter, Smith, Sanford, and Mills were a self-selected committee, who had the oversight and directed the trust committee in the foreclosure case. The committee issued a circular to all bondholders, inviting them to join with them, deposit their bonds with the trust company, take certificates therefor, join in the foreclosure, and bid at the sale, and, if the purchaser, take certificates showing their proportionate ownerships. Many other things were set forth in the circular, all tending to the reorganization, and, as is usual in such cases, the case was referred to a master, who heard the case, who made a report, and the case went to a decree of foreclosure in February, 1897. The amount found due on the 349 outstanding bonds was \$349,000 principal and \$69,810 interest, aggregating \$418,810. The committee, to depreciate the value of the assets and prevent bidders, prevailed upon the trust company, and in collusion with it, to attack the validity of the appointment of the receiver and all his acts, claiming them to be void, which was by the court overruled; and, for the like purpose of depreciating the value of the assets, the committee in June, 1897, issued another circular, setting forth the advantages offered by reason of the size, location, etc., of the city of Ottumwa, the upset price to be bid, as per the terms of the decree, and that \$12,379.68, costs of the case, and receiver's certificates of \$21,500, aggregating \$33,879.68, would have to be paid in cash by the reorganization committee, if it were the successful bidder. Later on, viz., July 6, 1897, the committee issued another circular addressed to the bondholders. The sale was advertised for July 10, 1897, but in fact took place July 12, 1897, subject to a prior mortgage to a Boston company, when in fact the mortgage to the Boston company was on but part of the property, and the property not covered by the mortgage to the Boston company had cost \$430,000. The decree of foreclosure was drawn by counsel for the committee, with the aid of counsel for the trust company, so as to allow indefinite and unknown claims to be asserted against the fund arising from the sale, and was so drawn as to leave uncertain the amount of the incumbrances on part of the property. The sale was for \$75,100, which went to deed to the committee, and was approved by the court. The master and court allowed unproven bonds and unproven coupons. While the receiver had the property he received \$110,438.39, and disbursed \$108,975.60, leaving \$1,507.79, which was paid over to the committee, and in no way accounted for, and which was revenue of the property, subject to the payment of the bonds of complainant. The price bid was, as above stated, \$75,100, of which \$21,799.17 represented expenditures of the receiver for permanent improvements, leaving \$53,300.83 actually bid for property which had cost more than half a million, with annual earnings of about \$30,000. The said bid was the nominal amount of the sale only. Prior to the sale the said committee and the trust company, acting in collusion, had arranged for a sale to the defendant City Water Supply Company for \$524,000, and did convey the plant to it for a consideration of \$524,000, which sum the committee appropriated to its own use, all in connivance with the trust company. The defendants deny that plaintiff has any rights excepting to the \$1,538.79. There were only 44 bonds, including 15 of plaintiff's, that were proven up in the case. Complainant had no knowledge of the turning over of the \$1,507.79 until just before this case was brought, nor did he have actual knowledge that the consideration of said sale was for \$524,000 until said case was disposed of. The prayer of the bill is for an investigation as to the alleged frauds, and that complainant's interest be fixed as $\frac{15}{44}$ of the purchase price of the property, including said sum of \$1,507.79, and that the purchase price be declared to be \$524,000, and not \$75,000, and that complainant's interest is $\frac{15}{44}$, or such other share as may seem equitable, up to a sum sufficient to pay his bonds, principal and interest, and for judgment accordingly, concluding with a general prayer for equitable relief.

It is not necessary to recite the several demurrers. They raise the question as to the sufficiency of the amended bill and complainant's right to recover.

W. E. Blake, for complainant.

W. A. Underwood and William McNett, for defendants.

McPHERSON, District Judge (after stating the facts as above). The bill, being as hereinbefore stated, is insufficient, more for what it does not state than for what is alleged. There is no one allegation of fact, of anything fraudulent, that either the committee or the trust company was guilty of. The word "fraudulently" is used many times, but in what it consisted is not made known. The one possible exception to this will be noticed later on.

It is not alleged that there was one untruthful statement in any of the three circulars sent out to the stockholders, including complainant. A reading of the circulars impresses me with the belief that they are just what should have been sent out, as a plain statement of facts of the situation; and whether they tended to depreciate or enhance the selling price of the property is not material, unless it is material for a committee to suppress the truth. The attack made by the trust company on the acts of the master is not made to appear to have been detrimental to complainant or any one. The truth is, as all connected with this case well know, that it was not only a debatable but a serious question whether the attack was not justifiable, owing to the fact that the wife of the judge and the wife of the master were sisters. See Opinion by Judge Thayer in *Trust Company v. Water Company* (C. C.; in the original case herein) 80 Fed. 467. It was entirely proper that the question was presented.

It is not alleged that the receiver did any act but that he promptly reported it to the court, and that the court approved his acts. It is not alleged that complainant did not have full knowledge of anything and everything that was done in the case from first to the conclusion, excepting as appears near the end of the foregoing statement of facts. It is not alleged that plaintiff at any time complained either to the committee or to the trust company of what was being done, or that he ever complained, by motion or otherwise, to the court. So far as appears, he sat idly by, and allowed the committee and trust company to proceed, expending their time and money to obtain the foreclosure, sale, and reorganization. Whether complainant could have intervened need not be decided. In fact, that question cannot now be decided, because such interventions are, in a measure at least, discretionary. But he could have offered to intervene, or at least in some way gotten the facts before Judge Woolson, then presiding. The amended bill is silent as to all these matters. The amended bill does not allege that the sale to the defendant supply company was for money, or that it was an exchange for certificates or bonds in the new company. The amended bill does not allege whether the earnings of the plant of \$30,000 per annum were gross earnings or net earnings. Nor does he allege that he is denied his right to the \$1,500 or more now on hands with the committee. On the contrary, it appears that they are willing for plaintiff to have it, as they concede it to him.

As to the allegation that only 44 bonds were "proven," it is not alleged that there was any deceit or fraud practiced on the court.

On the contrary, it is alleged that there were \$349,000 of bonds outstanding, all which plaintiff now affects to believe would be in harmony with honesty and fair dealing to cut out, excepting as to \$44,000, including \$15,000 of his own.

The amended bill is entirely silent as to who participated in the reorganization, or the sale or change of title over to the City Water Supply Company. All that is made known is that plaintiff did not. He was invited to join and participate, but probably did not because to do so he would have had to contribute in money his share of the foreclosure expenses and to take up the receiver's certificates.

Assuming that the stock was of no value, and that the property as of right belonged to the bondholders, he owned the proportion or share of 15 divided by 349. But now he says without having contributed to the expense of bringing about the sale, or taking up the receiver's certificates, he should own a proportion or share represented by 15 divided by 44, or practically one-third, at least up to the face value of his bonds and interest coupons; and this at the expense of bondholders as innocent of wrongdoing as plaintiff can claim to be. To convince one that such a claim is grossly inequitable, the facts need only be stated, and an argument thereon need not be made.

Something over \$1,500 is awaiting plaintiff, as his amended bill makes plain; and, if that is but a small return for his investment, it is because of his mistake, with all others, in investing in the original enterprise. And, if he does not have an interest in the reorganized company, it is because he preferred to stay out and avoid further investment. Be all this as it may, after standing out, incurring no further expense, knowing practically all that was being done, he now has no right to say that his bonds must be paid in full by the holders of \$334,000 of other bonds.

The allegation that the committee was self-appointed is of no importance. Such committees, and such sales to a reorganization committee, are usual, and such plans have been recommended by the courts. *Wetmore v. Railroad* (C. C.) 3 Fed. 177-189, by Justice Miller; *Vose v. Cowdrey*, 49 N. Y. 336; *Thornton v. Railroad*, 81 N. Y. 462; *Shaw v. Railroad*, 100 U. S. 605, 25 L. Ed. 757; *Bound v. Railroad* (C. C.) 71 Fed. 53; *Armour v. E. Bement's Sons* (C. C. A.) 123 Fed. 56.

Plaintiff had his election whether to join or stay out. He and his friends had the right to bid. The upset price was fixed by the court. The sale was for that amount, and it was approved by the court. And, if all that is charged be true, they were only irregularities, subject to correction in that case, on proper proceedings. And this is not a bill of review, and it was so disclaimed at the argument. And I do not stop to discuss whether the recovery of the \$1,500 can be had by an action at law or in equity. Plaintiff concedes that this is offered to him, and has never been denied him. But this action is not for a recovery of that; and, if that were attempted by amendment, the bill most clearly would be multifarious.

But the plaintiff says he had no notice of the \$1,507.79 until just before this suit was brought. He also says that he had no actual notice of the consideration of the transfer to the new company until

the case was disposed of. The original bill herein was filed November 2, 1898, or a year and a half after the last transaction complained of, and much longer, after many things done. He pleads conclusions only, and states no facts showing diligence, or why he did not know such facts at an earlier day. In some respects, and oftentimes by analogy, the doctrine of laches is like the statute of limitations.

Both Indiana and Iowa have a statute, one copied from the other, that an action founded on fraud shall not be barred until five years after the fraud is discovered. But the Supreme Court in *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, in construing the Indiana statute, held that the general allegations or general proofs that the party had not earlier discovered the fraud is not sufficient. There must be allegations and evidence showing what he did to discover the fraud, and a showing why he did not discover it. The same rule should, and no doubt does, apply to the doctrine of laches.

Plaintiff knew of the circulars, of the committee and its purchases, of the attack upon the master's acts; of the foreclosure and upset price, and practically everything before the transfer of the title. But he remained silent until long after the whole situation is changed. He should now remain silent.

In passing upon the case I have not deemed it necessary, even if proper, to consider the history of the case, as shown by the original bill, proceedings in the main case as appears from the records of this court, and those of the Circuit Court of Appeals or of the Supreme Court. Nor have I considered the question, either of duty or propriety, of following the rulings of the judge who passed upon the original bill. But only considering the amended bill, independently of the original bill, and independently of the history of this matter, either as to what preceded or what followed, in my judgment it is without merit.

The several demurrers will be sustained.

SALT LAKE HARDWARE CO. v. CHAINMAN MINING & ELECTRIC CO.

(Circuit Court, D. Nevada. March 21, 1904.)

No. 758.

1. MECHANICS' LIENS—ORIGINAL CONTRACTOR—MATERIALMEN—FILING LIEN—TIME.

Where complainant contracted with defendant, the owner of certain premises, to furnish mining machinery, appliances, and materials, and install the same in a mill to be erected at defendant's mines, and constructed by defendant without any other contractor, plaintiff was an original contractor, and not a materialman, within Cutting's Comp. Laws, § 3885, and therefore was entitled to 60 days within which to file his claim for a lien.

2. SAME—WAIVER OF LIEN.

A contractor for the sale of machinery to be set in an ore-concentrating mill does not waive his right to a mechanic's lien by stipulating in the contract that the title to the machinery should not pass to the purchaser until all payments should be fully made in cash.

¶ 2. See *Mechanics' Liens*, vol. 34, Cent. Dig. § 394.

Demurrer to Complaint.

Torreyson & Summerfield (Chas. C. Dey, of counsel), for complainant.

Cheney, Massey & Smith, for defendant.

HAWLEY, District Judge (orally). This is a suit to foreclose a mechanic's lien upon defendant's mill and mines. The complaint shows that the last materials were furnished July 16, 1902; that the statement of lien was filed September 6, 1902. The first contention of the defendant is that the complainant is a "materialman," and not an original contractor, and that its lien should have been filed within 30 days after the completion of the mill, and, not having filed its lien within the time provided by the statute of this state, the lien cannot be enforced.

The particular section of the statute relied upon by the defendant provides that:

"Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, * * * must, within thirty days after the completion of any building, improvement, or structure, * * * file for record with the county recorder of the county in which the property, or some part thereof, is situated, a claim containing a statement of his demand, * * * with a statement of the terms, time given, and conditions of his contract. * * *" Cutting's Comp. Laws, § 3885.

Was complainant's lien filed in time? The complaint alleges that complainant entered into a written contract with the defendant, the owner of the premises described in the complaint, to furnish mining machinery, appliances, and materials, and install the same in the mill to be erected upon defendant's mines, and that all of the materials and machinery specified in the contract to be furnished were used and installed in the construction of the mill. There was no other independent contractor for the construction and erection of the building. The defendant was the builder of the mill. Is complainant, under these facts, a "materialman," or should it be treated as an "original contractor"?

This question is to be considered in the light of the special facts alleged, and should be determined by reference to the mechanic's lien law of this state, which is to be interpreted so as to carry out "the intention of the Legislature, and to give the lien claimants the benefits they are entitled to under the law, by a fair and liberal construction of the statute." *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, 239; *Hunter v. Truckee Lodge*, 14 Nev. 24, 28; *Malter v. Falcon M. Co.*, 18 Nev. 209, 212, 2 Pac. 50. The decisions from California cited by defendant (*Hinckley v. Field Biscuit Co.*, 91 Cal. 136, 27 Pac. 594; *Roebling's Sons Co. v. Humboldt E. L. & P. Co.*, 112 Cal. 288, 44 Pac. 568; *Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684, 54 Am. St. Rep. 354) tend to support the position that the complainant herein could only be treated as a materialman; but the statute of California, in its provisions, is somewhat different from the statute of this state, and for that reason ought not to be followed. But independent of this I am of opinion that under the

facts of this case, in order to carry out the true intent and spirit of the statute, the complainant should be treated as an original contractor, and, as such, entitled to the 60-days time provided by statute within which to file its lien. This view of the question presented is sustained by authorities rendered in other states under statutes substantially identical with the statute of this state. *Colorado Iron Works v. Riekenberg*, 4 Idaho, 262, 265, 38 Pac. 651; *Matthews v. Wagenhaeuser B. A.*, 83 Tex. 604, 606, 19 S. W. 150; *Hearne v. R. R. Co.*, 53 Mo. 324; *Ambrose M. Co. v. Gapen*, 22 Mo. App. 397; *Western S. & D. Co. v. Buckner*, 80 Mo. App. 95, 99; *Geiger & Co. v. Hussey*, 63 Ala. 338, 341; *Lane Co. v. Jones*, 79 Ala. 156, 160. As shedding some light on the proposition, see: *Boisot on Mechanics' Liens*, § 220; *Phillips on Mechanics' Liens* (3d Ed.) § 40; *Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 224, 232, 39 Pac. 758; *M. & M. Savings Bank v. Dashiell*, 25 Grat. 616.

2. The second contention of the defendant—that complainant waived its lien because it stipulated in the contract that the title to the machinery furnished by it should not pass from complainant until all payments therefor should be fully made in cash—is not, in my opinion, well taken. *Hooven v. Featherstone's Sons*, 111 Fed. 81, 95, 49 C. C. A. 229, and authorities there cited.

The demurrer is overruled.

THE ON-THE-LEVEL.

(District Court, E. D. New York. December 29, 1903.)

1. SHIPPING—INJURY OF STAKEBOAT BY CAPSIZING OF MOORED SCOW—NEGLIGENCE OF CARE TAKER.

Claimant's scow, with a deck load of earth and stones, piled to a height of 14 feet in the center, and no load in its hold, tied up to a scow which was made fast to another scow of libellant, used by him as a stakeboat for scows of his own. While so placed, claimant's care taker left the scow, and did not return. The wind increased, and, one of the lines of claimant's scow having parted, it swung around; and, to prevent injury to the other boats, the master of the stakeboat brought it around and made it fast to the stakeboat. Some time during the night it capsized—presumably from the shifting of the load, due to the rocking motion—and injured the stakeboat. *Held*, that the proximate cause of the injury was the negligence of the care taker in leaving his boat unattended, and that libellant was entitled to recover for the resulting damage.

In Admiralty. Suit in rem to recover for injury to scow.

Benedict & Benedict (E. C. Benedict, of counsel), for libellant.

James J. Macklin (Mr. Gove, of counsel), for claimant.

THOMAS, District Judge. The libellant's scow was lying south of Liberty Light, off the Jersey shore, and was used as a stakeboat; that is, scows bringing dirt to be delivered on an improvement along the waterway made fast to such stakeboat until there was an opportunity for them to go in and deliver their cargo. However, the stakeboat was intended only for such scows as brought dirt for delivery to the libellant. Nevertheless the scow On-the-Level on Thurs-

day, December 11th, did make fast to the libelant's scow Frolic, as follows: On the stern of the Frolic, on the starboard side, singled out, were two Brown & Fleming scows. On the port side was a scow called the "Bouker." After the Bouker, the claimant's scow was made fast. On Saturday the care taker on claimant's scow went to town, for the alleged purpose of getting provisions, and was not seen again, so that the scow was left without a care taker. On Saturday the wind decreased, and in the evening the claimant's scow broke her starboard fastening to the Bouker, and swung around on her port mooring so that some portion of her stern was on the port side of the Frolic. As her iron corners would injure the Frolic on account of this action, the keeper of the Frolic cast her off from the Bouker, brought her up alongside the port side of the Frolic, and made her fast by forward and aft lines. About 11 o'clock at night the keeper of the Frolic went down into the hold of the claimant's scow, and found it free from water. Early on Sunday morning the claimant's scow capsized towards the Frolic, and her outboard side went so high onto the Frolic as to strike the top of the latter's house, some 22 feet above the water, crushing it in. It is for this injury that the action is brought. The claimant's scow was loaded with dirt and stones, with the sides sloping to the center, where the height was 14 feet; the master of the Frolic testifying that he measured it with a pole. It had a list to port of about a foot. It was the opinion of the master of the Frolic that the action of the water kept driving the dirt onto the inboard side of the scow until it accumulated in such quantity there that she went over as stated. Her load was entirely above the deck, there being nothing in her hold, which was 9 feet deep. The action is entirely for negligence, so that the trespass in tying up to another man's boat is not in the case. It was gross negligence for the care taker of the scow to leave it on Saturday, and that may be deemed the proximate cause of the accident. Had he remained, where his duty was, it may be presumed that due watchfulness would have prevented the scow's mooring from breaking loose, and, even if it had, he might have replaced it. Instead of that, he left it for the captain of the Frolic to bear the consequences of his negligence, and, after the scow was made fast alongside of the Frolic, there was some change of conditions that caused it to capsize. It is not to be supposed that the cause was so occult that the absent care taker could not have discovered it and prevented its effect, had he been present.

The libelant will have a decree.

In re WHITE.

(District Court, E. D. Pennsylvania. March 10, 1904.)

No. 1,555.

1. BANKRUPTCY—SCHEDULES—AMENDMENT—EXEMPTIONS—WAIVER—MISTAKE—DELAY—PAROL EVIDENCE.

Where a bankrupt's schedules contained a waiver of his exemptions, and while the property was still in the hands of the trustee the bankrupt applied for leave to amend his schedules in that regard, parol evidence was admissible to show that the waiver was the result of accident and mistake and to show, also, an excuse for the bankrupt's delay in making the application.

2. SAME.

Where a bankrupt's schedules containing a waiver of exemptions were filed February 6, 1903, the bankrupt was not entitled to the granting of an application, not filed until January 25, 1904, to amend the schedules so as to claim his exemptions on the ground that the waiver was inadvertent, without showing a sufficient excuse for the delay.

In Bankruptcy.

J. Hibbs Buckman, for bankrupt.

R. Stuart Smith, for trustee.

J. B. McPHERSON, District Judge. The bankrupt's schedules, filed February 6, 1903, contained an express waiver of his right to the statutory exemption. In Schedule B-5, opposite the clause, "Property claimed to be exempt by state laws," etc., is written "None," apparently in the handwriting of the gentleman who was then his attorney. On January 25, 1904, he petitioned for leave to amend by inserting a claim to the exemption in place of the word "None," incorporating in the petition a list of the articles claimed at the value fixed by the appraisers. He averred that the person who prepared the schedules "inadvertently, by accident or mistake, * * * inserted the word 'None,'" and the referee certifies that an offer to prove this averment was made, but that he rejected the offer on the ground that the evidence was immaterial, because there was nothing on the record to be amended. As the question is presented to me, therefore, I must assume that the word was inserted "inadvertently, by accident or mistake," and the point to be determined is whether the mistake is curable. The property claimed by the bankrupt is in the hands of the trustee, awaiting decision upon this petition, and, so far as I am aware, no new rights have intervened that would be harmed by the allowance of the exemption, even after this considerable lapse of time. If the schedule had said nothing about the exemption, the application to amend for the reason stated would scarcely be resisted, and would probably be granted, although in that case also there would be nothing on the record to be amended. I can see no sufficient reason why the present application should be denied merely because a mistake of commission may have been made, instead of a mistake of omission. This is not an attempt to make something bet-

ter that is already in existence—an attempt with which most of the decisions on the subject of amendments are concerned. In such cases courts ordinarily do not permit a new subject-matter to be introduced under the guise of amending something else, and do not permit it at all when the rights of others would be injured thereby. But this is simply the familiar proposition to prove that, because of mistake, a writing does not truly express the mind of the writer. An instrument such as the schedule in question differs, of course, from a written contract, and the law does not require the quality of evidence to prove the mistake to be so high as if the writing were a contract; but undoubtedly the evidence must go so far at least as to be clear and satisfactory, or the instrument will stand as first written. If evidence of this quality is produced, however, I am unable to see why a schedule in bankruptcy may not be changed so as to tell the truth, as well as a receipt or other written declaration.

I think, therefore, that the testimony should have been heard and considered, and accordingly the order of the referee is set aside, with instructions to hear as speedily as possible such evidence as may be submitted concerning the subject-matter of the petition, and to allow the claim if the alleged mistake shall be clearly and satisfactorily established.

But before this evidence is heard the delay in making the present application should be accounted for. This the petition does not profess to do, but counsel for the bankrupt offered an oral explanation at bar, which may or may not be established by the proof, and may or may not be sufficient when all the facts are known. This is a preliminary question, which is also committed to the referee for hearing and appropriate action thereon. His report should embrace both subjects, whatever his opinion may be concerning the sufficiency of the bankrupt's excuse for the delay.

IONIA TRANSPORTATION CO. v 2,098 TONS OF COAL

(District Court, E. D. Wisconsin. March 14, 1904.)

1. SHIPPING—DEMURRAGE—IMPLIED OBLIGATION FOR DISPATCH IN DISCHARGING.

Where a charter party contains no express provision for demurrage, or fixing the lay days for loading and discharging, an implied obligation arises on the part of the consignee for reasonable dispatch in discharging, and demurrage is recoverable for delay beyond a reasonable time under the circumstances surrounding the case, and without the fault of the vessel; but the consignee is not an insurer against delay in the absence of a charter provision to that effect, and there is no liability for demurrage where delay occurs from circumstances beyond his control, and which could not have been anticipated, such as a temporary derangement of the dock machinery used for unloading, where there was no other dock available.

¶ 1. Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

See *Shipping*, vol. 44, Cent. Dig. §§ 576, 580.

In Admiralty. Suit for demurrage.

Libel for demurrage, alleging unreasonable delay in discharging a cargo of coal, under charter for delivery at "Clancy's dock," port of Racine, with no terms stated as to discharge. The rate was 60 cents per ton, being 10 cents in excess of the current rate to Milwaukee, Sheboygan, and Manitowoc; and the master states, as the ground for such excess, the insufficiency of channel at Racine for the general class of coal carriers. The facts which are material upon the primary issue of liability are undisputed, namely: The steamer Ionia received the cargo at Toledo, October 24, 1903, and arrived at Racine about noon, October 29th, when due report was made to the consignee. Arrangement for discharge at Clancy's dock had been made by the consignee, and that was the only coal dock at the port which was open to such service. The steamer Marina, laden with 3,200 tons of coal for the dock owners, was then at the dock in course of discharge, and was not unloaded until the evening of November 10th, when the Ionia moved into her berth; but discharge was not commenced until November 11th, at noon, owing to needful change in the dock equipment from "clam shells" to buckets, and discharge occupied four working days. The causes for these delays were: When the Marina arrived, about ten days in advance of the Ionia, the owners of the dock were engaged in changing the equipment from buckets to the "clam-shell system," under contracts which they claim were not duly performed as to time or character of work, so that discharge of the Marina could not be commenced until October 28th; and the time then required for discharging was at least double the usual time with the old equipment, due solely to defects in the new equipments. For unloading the Ionia, it was deemed best to resume use of the buckets, and the change delayed its commencement; but the work was pushed, and discharge expedited, so that the only objections raised in that particular are (1) the fact that defective clam-shell equipment intervened; and (2) the fact that the electric lighting system of the plant, destroyed by fire shortly before the arrival, was not in use, thus shortening the working hours. This aggregate detention caused damage to the libellant when the lay days were of special value, for making another trip before the close of the season, and occurred without fault on the part of the libellant. The respondent is equally free from fault, unless chargeable with the conditions referred to which were found at the dock.

John C. Richberg, for libellant.

Charles H. Lee and Van Dyke & Van Dyke & Carter, for claimant.

SEAMAN, District Judge (after stating the facts as above). The doctrine is well settled that the right to demurrage for failure of a shipper to promptly deliver the cargo, or of a consignee to promptly discharge it on arrival, rests upon the charter or affreightment contract, either in express or implied terms. Time is an element of special importance in such contracts, and it is well remarked that "a vessel should ordinarily have prompt dispatch, for such is essential to her profitable employment" (*Corrigan v. Iroquois Furnace Co.*, 100 Fed. 870, 41 C. C. A. 102), so that stringent terms for lay days are not uncommon in bills of lading. The right to exact such terms is recognized, and the authorities are harmonious for strict liability of the shipper or consignee in the event of breach. When no such express provisions appear in the contract, the modern authorities concur in the view that an implied obligation arises on the part of the consignee for reasonable dispatch, but they are not harmonious in the rule which governs the issue of reasonableness. As expressed in one line of opinions, and by distinguished maritime authorities, this implied liability of the consignees is absolute for de-

lay beyond the customary requirement at the port of discharge, "although no blame is imputable to them, provided the owner [or vessel] be not at fault" (1 Parsons on Shipp. & Admir. 314; MacLachlan on Shipping [3d Ed.] 523), while the other line excuses the consignee from such liability when the delay is not voluntary, but arises from circumstances beyond his control (*Empire Transportation Co. v. Philadelphia, etc., Coal & Iron Co.*, 23 C. C. A. 564, 571, 77 Fed. 919, 35 L. R. A. 623, and cases reviewed).

In the case at bar the causes of delay were obviously beyond the control of the consignee, and solution of the issue rests upon the adoption of one or the other of the lines of decision referred to. I have examined the cases cited in support of the broad contentions on behalf of the libellant, with others bearing upon the interesting question, but the opinion in *Empire Transportation Co. v. Philadelphia, etc., Coal & Iron Co.*, with its well-considered review of the authorities, impresses me as stating the true rule to be applied when the contract is silent as to lay days or dispatch; and this view is strongly fortified by its approval in the opinion by Judge Jenkins, speaking for the Circuit Court of Appeals, in *Corrigan v. Iroquois Furnace Co.*, 41 C. C. A. 102, 104, 100 Fed. 870. While the last-mentioned case is not directly in point, the statement of the rule as to reasonable dispatch—"that reasonable time is determined by the circumstances surrounding each case"—citing the *Empire Transportation Co. Case*, *supra*, is clearly pertinent. The doctrine for which the libellant contends implies an undertaking by the consignee as an insurer against delay from any cause not attributable to the vessel, and I am of opinion that no such obligation is incurred without an express provision in the charter to that effect. With such terms liberally construed and strictly enforced, no just ground appears for further liberality in favor of the vessel by raising an implied liability of like effect, when the express provision is voluntarily omitted. The question is not presented, upon this record, whether the consignee is bound to inform the vessel owners of local conditions known to him, and to them unknown, from which unusual delay in discharging the cargo appears to be probable or inevitable, for the reason that the conditions were not of such character, if known to the consignee, that delay must have been thus foreseen. Consideration, therefore, of duty in that regard, is not involved.

Finding no delay chargeable to the respondent, the libel upon that ground is without support. Upon the further cause stated for unpaid freight, the amount claimed is tendered by the answer, and the money deposited in court. The libellant will be allowed this amount, with costs to the date of such tender, and the respondent will recover its costs upon the demurrage issue.

Let decree enter accordingly.

NOTE.

Since filing the above opinion, recent English cases have come to my attention which disapprove the earlier decisions on which the authors of the text-books mentioned in the opinion predicated, in

part, at least, the rule of absolute liability, and adopt the rule and test of reasonable dispatch upheld in this opinion. The cases are *Postlethwait v. Freeland* (H. of L.) 5 App. Cas. 599, and *Lyle Shipping Co., Limited, v. Corporation of Cardiff* (C. of A.) 2 Law Rep. Q. B. D. 638, with review of authorities. In the former it is said the duty of the consignee "is not absolute, but to do his best." The last-mentioned case states that the rule was unsettled prior to *Postlethwait v. Freeland*, but that the test of reasonable dispatch, as thereby established, was "not a hypothetical state of things," not "an ordinary state of circumstances," but "the actual state of things at the time of discharge."

In re WATERLOO ORGAN CO.

(District Court, W. D. New York. March 7, 1904.)

No. 1,073.

1. CORPORATIONS—LEGALITY OF ACTS—DEFENSE OF ULTRA VIRES.

The plea of ultra vires will not prevail, whether raised for or against the corporation, when its effect would be to accomplish a legal wrong.

2. SAME—ISSUANCE OF BONDS—CONSIDERATION.

Under the New York statute (Laws 1890, p. 1073, c. 564) which permits corporations to issue stock or bonds only for money, labor, or property received, a corporation may lawfully issue its bonds in exchange for the promissory note of an individual who is solvent, where the transaction is in good faith.

In Bankruptcy.

See 118 Fed. 904.

Frederick L. Manning, for petitioners.

Hammond & Hammond, for First Nat. Bank and claimant Bacon.

HAZEL, District Judge. This is a review of the decision of Hawley, referee, allowing the claim of one Bacon, owner of two bonds of the bankrupt corporation. Bacon had previously sold his stock in the Waterloo Organ Company to one Reed, its president, and taken his note in payment therefor. Reed was admittedly solvent. The bonds were issued to Bacon in exchange for this note at the instance of the secretary of the Waterloo Company, and with the consent of the corporation. It is objected by the trustee that pursuant to section 42 of the New York State stock corporation law of 1890 (Laws 1890, p. 1073, c. 564), a corporation is forbidden to issue its stock or bonds in exchange for promissory notes. The trustee contends that such bonds may legally be issued for money, labor, or property actually received to carry out the purposes for which the corporation was primarily created, and that a negotiable note or uncertified check does not come within this classification. The evidence establishes that the bonds in question were issued for the benefit of the corpo-

¶ 1. See Corporations, vol. 12, Cent. Dig. § 1545.

ration, and for what must be legally regarded as property actually received. The validity of such bonds is therefore beyond legal dispute. That the promissory note for which the bonds in question were given was not paid is immaterial. It was an asset, and treated as such by the corporation, which regularly included the same in its inventory. There was nothing to prevent the transfer of the note or to enforce its payment during a long period, and to thus realize its actual cash value. Furthermore the Waterloo Organ Company was fully apprised of the sale of the bonds, and the consideration paid. It must be deemed to have ratified such transfer, in the absence of bad faith, especially as the capital stock of the corporation was largely, if not wholly, owned by the maker of the note and by members of his family. It is held to be a rule of general application that the plea of ultra vires will not prevail, whether raised either for or against the corporation, when its effect will be to accomplish a legal wrong. *Whitney Arms Company v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. Assuming, then, the transaction free from fraud as against creditors, it would be antagonistic to sound equitable principles to hold that the owner of the bonds must now be deprived of participating in the distribution of the assets of the corporation. Was fraud proved? Upon the question of the bona fides, the transaction might, upon the evidence, be found either innocent or culpable. The referee, after full and painstaking consideration, specifically found and decided that the transfer of stock by Bacon to Reed, president of the bankrupt, the acceptance of his promissory note in payment therefor, and the subsequent purchase for the said note of two bonds of the corporation at the instance of its secretary, was not tainted with fraud. As has been pointed out, the evidence and deductions that might fairly be drawn therefrom are capable of different impressions. Had the referee held the transaction colorable and in fraud of creditors, his finding would not be disturbed. He has, however, on the contrary, seen fit to draw an innocent inference from the proofs, and his views upon the facts adduced from witnesses who testified in his presence are entitled to great weight. The analysis by the referee of the facts and of the conflicting statements of the witnesses is persuasive of the correctness of his conclusions.

The report of the referee is sustained.

McKINLEY v. LLOYD et al.

(Circuit Court, D. Oregon. March 15, 1904.)

No. 2,737.

1. PARTNERSHIP—SALE OF LANDS—SHARE IN PROFITS.

An agreement to share in the profits of the sales of land to be purchased is not of itself sufficient to constitute a partnership.

2. SAME—AGREEMENT WITH REFERENCE TO LAND—STATUTE OF FRAUDS.

Where an alleged agreement provided that certain land to be purchased should be held in equal interests between plaintiff and two others, subject to a charge in favor of L. for the purchase price and interest, or that it should be partitioned between the parties as they might thereafter agree, the profits on such sales as the parties might consent to make, to be divided, such contract had reference to the title to land, and was therefore within the statute of frauds.

3. SAME—AGREEMENT TO REDUCE PRINCIPAL AGREEMENT TO WRITING.

Where a parol agreement for the purchase and sale of lands was void under the statute of frauds, it could not be aided by the further parol agreement to reduce the principal agreement to writing.

4. SAME—ADEQUATE REMEDY AT LAW.

Where plaintiff entered into a parol agreement to receive an interest in timber land to be purchased, in consideration of his services in selecting the same, which agreement was void, under the statute of frauds, because not in writing, plaintiff had an adequate remedy at law on breach of the agreement, by an action for the value of the services performed.

O'Day & Tarpley and Williams, Wood & Linthicum, for plaintiff.
Carey & Mays, for defendants Lloyd.
Mitchell & Tanner, for defendant Willis H. Gilbert.

BELLINGER, District Judge. It is alleged in the amended bill of complaint that the plaintiff and George L. and Clyde D. Lloyd in 1901 entered into a partnership, the terms of which were substantially as follows: The plaintiff was to employ his time, skill, and knowledge in securing desirable timber lands in this state, and in instructing and familiarizing Clyde D. Lloyd with such lands and with the timber business. The defendant George L. Lloyd was to furnish the money necessary to pay for any timber lands so selected, which, in his judgment, it was desirable to purchase; taking the title in his own name, or in the name of Clyde D. Lloyd. That, when any such lands were sold, George L. Lloyd was to receive from the proceeds of the sale the money paid by him in its purchase, and interest thereon. The plaintiff and the other Lloyd were to be paid any money necessarily expended by them "in securing said lands," and the residue was to be divided equally between the plaintiff, on the one part, and the two Lloyds, on the other. That plaintiff was to have a conveyance from George L. Lloyd of an undivided one-half interest in any lands purchased under the agreement, at his (plaintiff's) election, on payment of one-half of the price paid by Lloyd, with interest, or, upon further agreement to that end, such lands should be partitioned

¶ 1. See Partnership, vol. 38, Cent. Dig. §§ 18, 26.

between the parties. That no sale of land should be made without plaintiff's consent. That, under this agreement, lands aggregating about 4,000 acres were acquired, for which George L. Lloyd paid \$16,567.42. That there remained due to the state on account of these lands the sum of \$6,943.40. That thereafter the plaintiff procured a purchaser for such lands at the price of \$8 per acre, but that the Lloyds declined to sell the same, and, conspiring with the other defendants to defraud the plaintiff of his proportion of the proceeds of the sale of said lands, pretended to convey the lands to which title had been perfected to the defendant Gilbert, and to assign to said Gilbert the certificates representing the residue of said land. That Gilbert paid \$24 per acre to George L. Lloyd, but plaintiff does not know how said money was divided between the several defendants, and as to this he prays for a discovery. The suit is to establish the plaintiff's interest in the land in question, and for a cancellation of the deed and assignments to Gilbert, for a discovery as above stated, for an accounting, and for such other relief as may be equitable. To this bill the Lloyds and Gilbert file their separate demurrers.

The suit is not one to recover a share in profits resulting from the purchase and sale of lands, but to establish an interest in land, and to set aside a conveyance and assignments alleged to have been made to defraud the plaintiff of such interest. So far as any question of partnership is concerned, the case is within the principle of the decision in the case of *Blair v. Shaeffer* (C. C.) 33 Fed. 218; *Shaeffer v. Blair*, 149 U. S. 248, 13 Sup. Ct. 856, 37 L. Ed. 721. An agreement to share in the profits of the sales of land is not enough to constitute a partnership. The defendant George L. Lloyd was under no obligation to purchase any of the land which the "time, skill, and knowledge" of the plaintiff might secure. Said Lloyd agreed that, when he did purchase any of such land, the plaintiff had the option to receive conveyances for an undivided one-half interest therein upon paying one-half of the price paid by Lloyd, with interest, or that the parties might, by a further agreement, partition the land between them. There was no provision in the agreement for the sale of the lands purchased. On the contrary, it was provided that no sales should be made, except upon the consent of all the parties. The effect of the agreement touching sales of land related to a division of proceeds, should sales be made through the mutual agreement of the parties in interest, thereafter had. The alleged partnership agreement had reference to an interest in land—to the acquiring of title by the plaintiff in land selected by the plaintiff, and purchased by the defendant George L. Lloyd.

It is true, one of the prayers of the bill is for a decree for such sums as on an accounting may be adjudged to be due to the plaintiff, but there is nothing to authorize a money decree for plaintiff, unless the alleged illegal sale made by George L. Lloyd, instead of being set aside, as prayed for, is affirmed; and so of the prayer for a discovery as to how much of the purchase price at said sale has been disbursed by George L. Lloyd in connection with it. If the sale is set aside, as prayed for, discovery will avail nothing in the case.

The complaint charges a conspiracy to defraud the plaintiff by the

device of a sale of the lands in question to the defendant Willis H. Gilbert and others, and it is alleged that said Gilbert and those concerned with him in such purchase had at the time full knowledge and notice "of the claim, right, title, and equity" of the plaintiff "as a partner" with the Lloyds "in the said lands," "and in the proceeds thereof." The main purpose of the suit is to set aside the conveyance to Gilbert, and, to this end, Gilbert and those alleged to be interested with him in the sale are made parties defendant. By this means the plaintiff seeks to protect his alleged "title and equity" in the land purchased by George L. Lloyd under his agreement with the plaintiff.

As already stated, in effect, the alleged agreement was not with reference to profits in buying and selling land, but it had reference to the title to land, to be either held in equal interests between the plaintiff, of the one part, and the Lloyds, of the other, subject to a charge thereon in favor of George L. Lloyd for its purchase price and interest, or partitioned between the parties, as they might thereafter agree. The "profits" to be divided between the parties upon sales which the parties might consent to make represent the proceeds of the respective interests of the parties charged with the purchase price, and interest thereon, and expenses. Now, it does not admit of doubt that such a contract as this upon which plaintiff's alleged "title and equity" in land depend, not being in writing, is void, under the statute of frauds, and the statute cannot be avoided by including within the relief sought the specific performance of the alleged agreement to reduce the parol agreement for such "title and equity" in the lands in question to writing. A parol agreement void under the statute is not aided by a further parol agreement to reduce the principal agreement to writing. The cases where this has been permitted are cases where there has been such performance of the agreement by the party seeking relief, or his position has been so changed in reliance upon it, that his loss and injury cannot be measured in damages, and, without specific performance, there will be a failure of justice. In all cases involving the mere expenditure of money or the performance of services upon a parol agreement for an interest in land, the law affords an adequate remedy by an action at law for the money paid, with interest, or for the value of the services performed, or both, as the exigencies of the case may require; and, with these remedies, the party who, in the face of the statute, enters into parol contracts of the character in question, must be content. The court cannot, out of regard to the so-called "equities" of such cases, disregard the statute. It is for the Legislature, not the courts, to repeal it, if it deserves repeal.

The demurrers are sustained.

UNITED STATES v. LOUIE JUEN.

(District Court, D. Montana. March 11, 1904.)

1. CHINESE—EXCLUSION—WITNESSES—CREDIBILITY.

In Chinese deportation proceedings, the fact that accused was in the United States and engaged in business as a merchant at the time of the passage of Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], providing for the registration of Chinese laborers, may be established by Chinese witnesses.

2. SAME—REGISTRATION.

Where at the time of the passage of Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], providing for the registration of Chinese laborers, a Chinese person thereafter charged to be unlawfully in the United States was in the United States and engaged in business as a merchant, and was therefore not entitled to registration as a laborer under such act, he was not subject to deportation, though he subsequently became a laborer.

3. SAME—EVIDENCE.

Evidence in Chinese deportation proceedings held to establish that defendant was a resident of the state of Montana, and engaged in business there as a merchant, prior to the passage of Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and was therefore not subject to deportation.

Appeal from Order of United States Commissioner.

Carl Rasch, U. S. Atty.

Sanders & Sanders, for defendant.

KNOWLES, District Judge. Appeal from an order of deportation made by Edward C. Russel, United States Commissioner. Louie Juen was arrested upon a warrant charging him with being unlawfully within the United States, in violation of the acts of Congress excluding Chinese persons. At the time of his arrest, Louie Juen was engaged as a laborer. He claims, however, that he was a merchant, residing at Helena, Mont., at the time of the passage of the Geary act of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and during the time provided for the registration of Chinese laborers under that act. The question presented is as to whether said Juen was a merchant at that time, and engaged in that business. Capt. E. R. Tandy testified that he was a farmer and engaged in a mining enterprise from 1889 or 1890 to 1895, and that during that period he employed Chinese laborers, and during that time he was frequently at a Chinese store situated in the upper part of Helena, Mont., looking for laborers, and there saw Juen, who seemed to be occupied in conducting the business of said store. Gen. Charles D. Curtis testified that he had frequently seen Juen in the store testified to by Capt. Tandy. While it was evident from the testimony of Juen and others that Gen. Curtis was mistaken as to the time he saw the appellant in this store, still I do not think this destroys his evidence entirely. He might have been mistaken as to the dates when he saw

† 3. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Fay v. United States*, 35 C. C. A. 332.

him, and yet be correct as to the fact that he did see him. Witnesses are more likely to be incorrect as to dates than any other part of their evidence. There were, however, some three Chinese witnesses who testified that from about 1889 to 1903 said Juén did conduct business as a merchant in said Helena in the building named by Tandy and Curtis. One of these testified that, when Juén came to Helena to enter into this mercantile business, he borrowed \$300 of him, which sum, added to what he then had, amounted to \$1,000; that he had two partners, who each put into said business \$1,000; and that this firm carried on business as merchants in Helena from 1889 to 1903—about 13 years in all. One of these witnesses was known as "Chinese Charlie," who had lived in Helena for over 30 years, and was a respectable Chinese merchant himself. I can see no reason for disbelieving this witness. If his evidence can be considered by me, I am satisfied that during the time stated said Juén was a merchant, as he claimed in his own evidence. It was contended that the fact that he was a merchant during the time of registration under the Geary act could not be established by Chinese evidence. I find that this has not been a universal rule. In the case of *United States v. Sing Lee* (D. C.) 71 Fed. 680, Judge Bellinger says: "He swears and proves by the testimony of a number of Chinese witnesses that he is a merchant doing business in San Francisco." Upon this evidence he held that the Chinaman in the action was a merchant. In the case of *Quong Sue v. United States*, 116 Fed. 316, 54 C. C. A. 652, the Circuit Court of Appeals for the Ninth Circuit says: "This court has repeatedly held under this and other similar provisions in other of the Chinese exclusion acts that the court below must decide for itself whether the evidence is satisfactory or not." From this evidence, I hold that it satisfactorily appears said Juén was a merchant in Helena, Mont., from 1889 to 1903. The period during which he could have registered as a Chinese laborer was a part of this period.

The question then arises as to whether, having become a laborer during the year 1903, the appellant falls within the terms of the act. In the case of *In re Chin Ark Wing* (D. C.) 115 Fed. 412, it was held that under this state of facts he could not be deported. To the same effect is *United States v. Sing Lee*, above cited. He was a merchant during the time of the registration authorized by said Geary act, and hence could not register as a laborer. See cases last above cited.

It is therefore ordered that the order of the commissioner, Edward C. Russel, that Louie Juén be deported from the United States to China, be, and the same is hereby, set aside and reversed, and that the said Louie Juén be discharged from custody by the United States marshal.

POLK et al. v. MUTUAL RESERVE FUND LIFE ASS'N OF NEW YORK
et al.

(Circuit Court, S. D. New York. February 28, 1904.)

1. EQUITY PLEADING—BILL—DEFECTS WARRANTING STRIKING FROM FILES.

Mere prolixity and verbosity in a bill do not warrant striking it from the files, when the redundant matter can to a large extent be eliminated on exceptions.

2. SAME—IMPERTINENCE.

In a bill filed against an insurance association by members to secure its dissolution on the ground of insolvency and the illegality of a reincorporation, specific allegations of mismanagement and fraud on the part of certain officers who are not parties, and as to whom no relief is asked, are impertinent, and on exceptions will be stricken out.

In Equity. On report of special master.

See 119 Fed. 491.

Russell & Winslow (D. L. Snodgrass, Caruthers Ewing, R. F. Jackson, Wm. Hepburn Russell, Wm. Beverley Winslow, of counsel), for complainants.

George Burnham, Jr. (Frank R. Lawrence, Frank H. Platt, and Gordon T. Hughes, of counsel), for defendants.

HAZEL, District Judge. This is a motion upon the report of the special master appointed by the court pursuant to equity rules 26 and 27, who found and decided that 36 exceptions out of a total of 86, taken to complainants' amended bill on behalf of respondents, were impertinent, and mere repetitions of allegations appearing elsewhere in the amended bill of complaint. The master accordingly expunged the same in 36 instances, overruling the remaining exceptions. The original bill of complaint on demurrer was held by Judge Coxe to be tautological, uncertain, contradictory, and verbose. Upon the ground that the bill contained inconsistent allegations, and failed to show the extent of complainants' interest, he sustained the demurrer, with leave to complainants to amend. *Polk v. Mutual Reserve Fund Life Association et al.* (C. C.) 119 Fed. 492. The court in reaching its conclusion pointed out that it was essential to the maintenance of this cause that facts be explicitly and unequivocally set out showing the insolvency of the corporation defendant, and the interests of the complainants in the funds sought to be distributed pro rata among its members or policy holders. The special master states in his report that the amended bill is still objectionable on the ground of its prolixity and verbosity, and that, under the rules governing exceptions for impertinence and scandal, he was unable to expunge more than a comparatively small portion of the prolix and redundant matter. The argument upon the report of the master presents two propositions which require attention: First, whether mere prolixity and verbosity of the pleading warrant striking the same from the files; and, second, whether specific acts of wrongdoing by certain officers of the association are scandalous and

impertinent, where it appears that such acts tended to impair and diminish the resources of the corporation. Consideration of these salient features of the questions presented requires a brief statement of complainants' contention.

It is charged in the bill that the defendant association was originally incorporated January 13, 1881, under the provisions of chapter 267, p. 264, Laws N. Y. 1875, entitled "An act for the incorporation of societies and clubs for certain lawful purposes," and hence could not legally abandon the scope of its original object and purpose by reincorporating under the provisions of the general insurance law of the state of New York (section 52, c. 690, p. 1955, Laws 1892), and the acts supplementary thereto; that such act of reincorporation was void on the ground that a fundamental change of the corporate powers was thus established without notice to the members and without their consent. The bill further charges that at the time of the reincorporation of the association as above stated it was insolvent, its insolvency being primarily produced by acts of gross mismanagement and fraud on the part of certain officers of the association. Such acts of mismanagement and intentional wrongdoing are specifically, but with unnecessary circumlocution, averred in the bill. It is correctly pointed out in defendants' brief that the prolixity and verbosity of the bill so apparent to Judge Coxe and the special master are conspicuously aggravated in the amended bill. For illustration, the insolvency of the defendant association is averred about 20 times; the unconstitutionality of the act of 1901, under which the association was reincorporated, is set out at least 9 times; the alleged fraudulent administration of the affairs of the corporation by its officers and directors is repeated about 14 times; general allegations as to the inability of the corporation to attain the purposes of its organization are often reiterated. Other repetitions of essential averments are variously restated and discursively enlarged. The amended bill in its entirety is not within equity rule 26, which prescribes the rule of practice governing accurate pleading in Circuit Courts as courts of equity. The special master correctly expunged the various allegations enumerated in his report.

But it is further insisted by the respondents that certain allegations imputing grave wrongful acts of mismanagement to officers and directors of the association, and not expunged by the special master, are clearly scandalous and impertinent. These allegations are covered by exceptions numbered 57 to 71, inclusive, and it is claimed that they involve the narration of such irrelevant fraud and intentional wrongdoing. After careful consideration of the allegations relating to these exceptions, I have reached the conclusion that they are impertinent averments, and accordingly should also be expunged. The exceptions numbered 57 to 71, inclusive, relate to allegations which, at great length, charge the making of an unlawful contract between the respondent association and its former president, Harper, by which Harper was to receive a percentage per annum upon insurance obtained or written by the respondent in addition to his salary during the time of his presidency. Harper died in 1895,

and was succeeded by one Burnham, who is alleged in the bill to have unlawfully used its funds by payment of grossly excessive sums of money to its employes. Other averments of mismanagement on the part of Burnham are averred to have taken place in the years 1896 to 1898. It is thought that such allegations are not essential to prove the insolvency of the association or the fraud alleged to have been committed in reincorporating under the provisions of the laws of the state of New York hereinbefore referred to. Though ultra vires acts are charged to have been committed as above stated, the individuals alleged to have committed them are not before the court and cannot be heard in their defense. No relief is sought against them. Whether the association was insolvent and whether the act of reincorporation was unconstitutional are the principal questions in controversy. These averments constitute the gravamen of the bill. In this view the allegations of wrongful acts imputed to the officers of the corporation are clearly redundant, irrelevant, and unnecessary. Their omission does not deprive complainants of their remedy. The bill must be framed to bring before the court the material allegations and charges upon which complainants' right to relief rests. All irrelevant matters must, therefore, be regarded as impertinent. The relief which the complainants seek, in my judgment, does not require proof of the specific acts of the president of the association regarding the affairs mentioned in the bill. The corporation undoubtedly has a remedy against its officers for the mismanagement imputed to them, and primarily the right to redress the wrongs complained of exists in the corporation itself. Upon the first point, namely, whether the entire bill may be stricken from the record for prolixity and verbosity, the case of *Kelley v. Boettcher et al.*, 85 Fed. 55, 29 C. C. A. 14, would seem to be express authority. It is there held that a court of equity has inherent power to so dispose of rambling and tautological pleadings. But this general objection can have no weight here, when the matters included in exceptions 57 to 71 are expunged, together with such exceptions, which the special master has allowed.

The report of the special master allowing the exceptions as numbered at the end of his report is affirmed. A further order may be entered allowing exceptions 57 to 71, inclusive, because of impertinence, and striking the same from the bill. The complainants may, at their option, file an amended bill within 30 days from the entry of the order expunging impertinent allegations. Costs and disbursements are awarded against the complainants. So ordered.

In re JANES et al.

(District Court, W. D. New York. March 7, 1904.)

No. 1,318.

1. BANKRUPTCY—PARTNERSHIP—DISTRIBUTION BETWEEN FIRM AND INDIVIDUAL CREDITORS.

In a partnership bankruptcy, where it appears that there is no solvent living partner, and there are no assets in the partnership estate, the creditors of such estate are entitled to share ratably with the creditors of the individual partners in the estates of such partners.

In Bankruptcy. On question certified by referee.

O. H. Riordan, for Bank of Leroy.

Frank M. Loomis, for trustee.

HAZEL, District Judge. The question certified for review by Referee Hotchkiss is as follows:

"Whether, in a partnership bankruptcy, where it appears that there is no solvent living partner, and no assets in the partnership estate, the creditors of such partnership estate shall share with the creditors of the individual partners in the estates of such individual partners?"

The opposing creditors contend that the provisions of section 5 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 547, 548 [U. S. Comp. St. 1901, p. 3424]), must be strictly construed, and that individual creditors have a preference over firm creditors in the distribution of individual assets, and, conversely, that in the distribution of firm assets the copartnership creditors have a preference over individual creditors; that neither expressly nor by implication does the present bankrupt act recognize an exception to the general rule as practically set forth by section 5 of the act, and accordingly the creditors of the bankrupt partnership are not entitled to take *pari passu* with the individual creditors of Ezra S. Janes, one of the partners. The referee has decided that there were no firm assets, and that both partners were living and insolvent. This conclusion upon the facts will be adopted here. Such conclusion justifies the exception to the rule as set forth in Story on Partnership, § 388, that, "when there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share *pari passu* in the estate of the bankrupt partner." This exception to the general rule finds support in subdivision "g" of section 5, which provides for marshaling the assets of the partnership estate and individual estates so as to prevent preferences and secure an equitable distribution among the partnership and individual creditors. I am unable to perceive, on principle, why the creditors of the individual partner should receive what, in effect, would be a legalized preference over the copartnership creditors, when both classes must be paid from a single fund. Moreover, if no bankruptcy proceedings had been instituted, the remedy of the

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 563.

creditors of the firm for the collection of their debt would, in the first instance, have enabled resort to the joint property of the partnership, and then, such property being insufficient to pay the debt, to the separate estate of the individual partners. A construction of the statute so as to preclude the exception to the general rule would practically nullify the fundamental principles of the bankrupt act, which aim to effectuate an equitable division of assets pro rata among all the creditors. In *re* Conrader (D. C.) 118 Fed. 676, affirmed as *Conrader v. Cohen*, 121 Fed. 801, 58 C. C. A. 249; In *re* Green, 116 Fed. 118; In *re* Mills (D. C.) 95 Fed. 269.

It is true, the authorities are not entirely in accord with the conclusions here found. In *re* Wilcox (D. C.) 94 Fed. 84, where all the authorities on the point in this country and in England are exhaustively reviewed, is a notable exception. The decided weight of authority, however, favors upholding the exception to the general rule. Such rule should be applied in the case at bar.

The question submitted for review is answered in the affirmative. So ordered.

In re RUSSOMANNO.

(Circuit Court, S. D. New York. January 30, 1904.)

1. ALIENS—DEPORTATION—PROCEEDINGS—LIMITATION.

Where a proceeding for the deportation of an alien, as authorized by Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], was not begun by the seizure of the alien within one year next after his last entry into the United States, as required by section 11 (26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]), the proceeding was barred.

Charles G. F. Wahle, for the writ.
Robt. A. Paddock, opposed.

LACOMBE, Circuit Judge. The authority to deport this alien is to be found in the act of 1891 (Act March 3, 1891, c. 551, § 11, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]), not in the act of 1903. Inasmuch as he was not seized, even, for purposes of deportation, until more than a year had elapsed after his last entry into the United States, the time within which he could be taken into custody under the act of 1891 had fully expired.

The prisoner is discharged.

GILBERT v. BURLINGTON, C. R. & N. RY. CO. et al.
(Circuit Court of Appeals, Eighth Circuit. March 24, 1904.)

No. 1,980.

1. CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE—QUESTION FOR THE COURT.

While the questions of contributory negligence and proximate cause are, like other questions of fact, ordinarily for the jury, they are for the court where there is no substantial conflict in the evidence, and the conclusions from it are such that all reasonable men must agree upon them.

2. SAME—TEST.

The test of contributory negligence is whether or not the want of care directly contributes to the injury, not whether or not it is a more proximate cause of it than the negligence of the defendant. If it directly contributes to the injury, it is fatal to the plaintiff's recovery, although the negligence of the defendant may be the more proximate cause of it.

3. INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—CHOOSING THE MORE DANGEROUS OF TWO METHODS.

Where there is a comparatively safe and a more dangerous way of discharging a duty known to a servant, it is negligence for him to select the more dangerous method, and, if his selection directly contributes to his injury, it is fatal to his recovery therefor.

4. SAME—VOLUNTARY FAILURE TO USE UNCOUPLING DEVICE—EVIDENCE OF.

The act of March 2, 1893, c. 196, 27 Stat. 531 (3 U. S. Comp. St. 1901, p. 3174), which makes it the duty of common carriers to equip their cars engaged in interstate traffic with couplers which can be uncoupled "without the necessity of men going between the ends of the cars," imposes upon the employes the correlative duty of using these couplers when furnished, and of refraining from unnecessarily going between the ends of cars to uncouple them. A failure of a servant to discharge this duty, which directly contributes to his injury, is fatal to an action for damages on account of it.

5. SAME.

One who voluntarily and unnecessarily exposes himself to an imminent known danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the unknown negligence of the defendant, which concurred to produce the injury, made the danger greater than he supposed it to be.

6. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

A railroad company accustomed to keep its guard rails blocked permitted the block to disappear from one of them. A brakeman, in ignorance that the block had disappeared, after trying to couple two moving cars by means of a lever on his side of the train, failed to use or to try to use the lever on the other side of the train, which had been furnished for the same purpose, entered between the ends of the cars, uncoupled them without the use of the lever, caught his foot between the guard rail and the main rail, and was injured. *Held*, conceding, but not deciding, that the company was negligent in permitting the guard rail to become unblocked, the plaintiff failed to exercise ordinary care; his failure directly contributed to his injury, and was fatal to his action for damages on account of it.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

For opinion below, see 123 Fed. 832.

This is an action brought by Charles Gilbert, the plaintiff in error, against the Burlington, Cedar Rapids & Northern Railway Company and the Chi-

cago, Rock Island & Pacific Railway Company to recover damages for a personal injury which he sustained, as he alleged, by reason of the negligence of the Burlington Company. The complaint stated a cause of action against that company, and contained an averment to the effect that the Rock Island Company had assumed the debts and liabilities of the former corporation. The answer denied the material allegations of the complaint, and alleged that the plaintiff's injury was caused by his own negligence. There was a trial to a jury, and at the close of the plaintiff's evidence the court instructed the jury to return a verdict for the defendants. This ruling and the judgment upon it are assailed by the writ of error. The facts established at the close of the testimony were these: The Burlington Company owned and operated a railroad upon which it had blocked the guard rails and frogs, but a few days before the plaintiff was injured one of these blocks had disappeared from a guard rail in the yard at Iowa Falls, in the state of Iowa, where the plaintiff was at work for the company as head brakeman of a crew of men who were engaged in switching the cars and making up trains. Gilbert's two assistants in this crew had noticed that the blocking to the guard rail was gone, but Gilbert testified that he was not aware of that fact. A few moments after 6 o'clock in the afternoon of May 7, 1902, the plaintiff was engaged with his crew in uncoupling and kicking off upon another track the most southerly of a string of cars, which they were handling by means of an engine attached to the north end of it. The south car of this train was a Street stable car, and the next car north of it was a Northwestern car. Each of these cars was equipped with automatic couplers, the character and operation of which are described in this way in the testimony: "The cars are coupled together by what are known as 'automatic couplers,' which consist of drawbars with knuckles, so called, upon the ends of them, which open and shut, and when shut and clasped together are held in place by means of a pin, and which may be uncoupled by the raising of the pin which cannot be pulled clear out, however, but raised a certain distance and held, and which, when the coupling apparatus is in order, may be raised and held by the manipulation of a lever upon the outside of the car, which is attached to a pin by means of a rod and chain. When the pin is raised and held in place, then by the movement of either car from the other the cars become uncoupled." The lever to pull the pin on the north end of the Street stable car was on the east side of the car. The lever to pull the pin on the south end of the Northwestern car was on the west side of the car. There was no defect in the couplers nor in the apparatus for pulling the pins. It was impossible to pull the pins when the string of cars was drawn tight so that there was no slack between them, or, as the witnesses expressed it, "when the slack was tight." Gilbert was on the east side of the train, giving signals and orders to his men. He signaled the engineer to kick off the Street stable car, and undertook to uncouple it. The train stopped. He seized the handle of the lever on his side of the train, and endeavored to pull the pin with it, but the slack was tight, and he could not do so. The train started south. He walked by the side of it, and endeavored several times to pull the pin by means of the lever and failed. He then stepped in and walked along between the cars, which were moving at the rate of about two or three miles an hour, and tried in vain to raise the pin on the Street stable car with his hands. Thereupon he turned away, but still remained facing the Street stable car more than the Northwestern car, seized the chain, and tried to raise the pin in the latter car, but could not do so. He then turned back to the Street stable car, shook the chain on its pin, pulled the pin up, the cars uncoupled, he caught his foot in the unblocked guard rail, and lost his leg. It was the custom of the brakemen, when they were unable to pull the pin with the lever on their side of the train, to step in between the cars and raise the pin with their hands without attempting to use the lever upon the other side of the train. The pins were at about the height of Gilbert's breast as he walked along between the cars. He testified that he did not try to operate the lever on the opposite side of the train; that one could get a leverage by its use, but that he did not know whether a man could use his strength to more advantage on the lever than he could directly on the pin or on the chain attached to it. He also testified at the trial that he did not find out what the trouble was with the levers and

pins, but a written account of the accident, which he signed about a month after his injury, contains this statement: "The second time I attempted to pull up this lever it worked all right, and I cut the car off. The slack mustn't have been out of the cars the first time I tried it. Sometimes they work hard when this is the case. Far as I know, the couplers were in good condition. They only worked hard, is all."

Humphrey Barton (John E. Samuelson, on the brief), for plaintiff in error.

McNeil V. Seymour (Edward C. Stringer and Carroll Wright, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case presents these two questions: Was there any substantial evidence that the Burlington Company was guilty of a failure to exercise ordinary care to keep its railroad in a reasonably safe condition? Was the evidence that the plaintiff was guilty of negligence which directly contributed to his injury so conclusive that all reasonable men in the exercise of an impartial judgment must draw that conclusion?

The only fact disclosed by the evidence which is claimed by counsel for the plaintiff in error to indicate negligence on the part of the railroad company is that it adopted the practice of keeping its frogs and guard rails blocked, and then permitted one of them to become unblocked without notice to the plaintiff. But it is a mooted question among the owners and operators of railroads whether the blocked or the unblocked frog and guard rail present the nearer approach to safety. Many are of the opinion that the blocked rail is less dangerous than the unblocked rail, and adopt the practice of blocking their guard rails. Many are of the opposite opinion, and leave their rails unblocked. Railway companies have and must exercise much judgment and discretion in determining the methods of construction and operation of railroads which they adopt, and there is a wide field here, where their decision of doubtful questions in the affirmative or in the negative cannot be held to disclose any want of ordinary care. In the matter under consideration they are charged with negligence if they block their guard rails, because employes are liable to stub their toes and fall over the blocks (*Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661), and they are charged with negligence if they fail to block them because servants are liable to put their feet between the rails and get them caught there to their injury (*Kilpatrick v. Choctaw, O. & G. R. Co.*, 121 Fed. 11, 57 C. C. A. 255). In this state of the case the Supreme Court (*Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391) and this court (*Kilpatrick v. Choctaw, O. & G. R. Co.*, 121 Fed. 11, 13, 57 C. C. A. 255, 257) have reached the conclusion that "railroad companies are at liberty to determine for themselves, in the light of their experience, which form of frog is preferable, so long as both forms are in common use, and that it is not competent for a jury to hold a railroad company guilty of negligence because it adopts

one form of frog in preference to another." The contention of counsel for the plaintiff here is, however, that the Burlington Company was guilty of negligence because it blocked its frogs and guard rails and then permitted the block to disappear from the rail, which inflicted the injury, without notice of its disappearance to the plaintiff. But actionable negligence is a breach of the duty to exercise ordinary care. Where there is no duty there can be no breach, no negligence, and no recovery. The Burlington Company owed the plaintiff no duty to block its frogs or guard rails, or to keep them blocked, because its duty of exercising ordinary care was completely discharged by leaving them all without blocks. If it blocked them, and kept them blocked, and this action made the railroad less dangerous, this action was nevertheless not the exercise of ordinary, but of extraordinary, care, and the failure to continue to exercise it does not seem to have been negligence, because negligence is confined to the failure to exercise ordinary care. As it was not a failure in the exercise of ordinary care, and was not actionable negligence for the company to leave all its guard rails and frogs unblocked, it is difficult to see how its failure to keep them all blocked, or its allowance of one or more of them to become or to remain unblocked, can constitute a failure to exercise that degree of care. Such a theory seems to be a contradiction of the axiom that the whole is greater than any of its parts and includes them all. The court below, however, was of the opinion that the plaintiff was guilty of contributory negligence which was fatal to his recovery even if the defendant was negligent in the care of its guard rail, and we turn to the consideration of that question.

There is no substantial conflict in the evidence, and the question here is whether or not it so conclusively discloses the fact that the plaintiff was guilty of negligence which contributed to his injury that all reasonable men in the exercise of their impartial judgment must draw that conclusion. The question of the existence of contributory negligence, like every other question of fact, is ordinarily conditioned by conflicting testimony and by doubtful deductions from the evidence, and hence is generally a question for the jury. But if, at the close of the trial, the evidence so clearly discloses the fact that the plaintiff was guilty of negligence which directly contributed to his injury that a finding to the contrary could not be sustained, it is the duty of the trial court to instruct the jury to return a verdict for the defendant. *Clark v. Zarniko*, 106 Fed. 607, 608, 45 C. C. A. 494, 496; *Railway Co. v. Davis*, 53 Fed. 61, 3 C. C. A. 429; *Gowen v. Harley*, 56 Fed. 973, 980, 6 C. C. A. 190, 197; *Railway Co. v. Moseley*, 57 Fed. 921, 922, 923, 6 C. C. A. 641, 643; *Reynolds v. Railroad Co.*, 69 Fed. 808, 810, 16 C. C. A. 435, 437, 438, 29 L. R. A. 695; *Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*, 60 Fed. 351, 354, 9 C. C. A. 1, 4; *Motey v. Granite Co.*, 74 Fed. 155, 157, 20 C. C. A. 366, 368; *Commissioners v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

Much is found in the brief and much was said upon the argument concerning the question whether or not the negligence of the plaintiff was the proximate cause of his injury, and concerning the duty of the court below to submit that issue to the jury. But the court's duty in that regard was governed by the same rule. *Railway Co. v. Davis*, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Missouri Pac. R. Co. v. Moseley*, 57 Fed. 921, 926, 6 C. C. A. 641, 647; *Motey v. Granite Co.*, 20 C. C. A. 366, 369, 74 Fed. 155, 157.

Again, the question in cases of alleged contributory negligence is not whether the negligence of the plaintiff or that of the defendant is the more proximate cause of the injury, but it is whether or not the negligence of the plaintiff directly contributed to it. One whose negligence directly contributed to his injury cannot recover damages of another whose negligence concurred to cause it, although the carelessness of the latter was the more proximate cause of it. *Pyle v. Clark*, 25 C. C. A. 190, 192, 79 Fed. 744, 746, 747; *Motey v. Granite Co.*, 20 C. C. A. 366, 369, 74 Fed. 156, 159; *Chicago & N. W. Ry. Co. v. Davis*, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Railway Co. v. Moseley*, 6 C. C. A. 641, 643, 646, 57 Fed. 921-923, 925; *Reynolds v. Railway Co.*, 16 C. C. A. 435, 69 Fed. 808, 811; *Schofield v. Railway Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Hayden v. Railway Co.*, 124 Mo. 566, 573, 28 S. W. 74; *Wilcox v. Railway Co.*, 39 N. Y. 358, 100 Am. Dec. 440.

Let us apply these rules to the facts of this case. It is so dangerous for the employes of railroad companies to go between the ends of cars to couple or to uncouple them that Congress passed an act on March 2, 1893, which made it the duty of common carriers to equip all their cars engaged in moving interstate traffic with couplers which can be uncoupled "without the necessity of men going between the ends of the cars" (27 Stat. 531, c. 196, 3 U. S. Comp. St. p. 3174), and the Legislatures of many of the states have enacted laws of a similar nature to regulate carriers within their respective borders. In this way the duty was imposed upon common carriers by the law to so equip their cars that they could be uncoupled without requiring their servants to go between the ends of the cars. The devolution of this duty upon the carriers necessarily imposed upon their servants the correlative duty of using the equipment thus furnished to them, and of refraining from going between the ends of the cars to couple or uncouple them unless compelled to do so by necessity. Under this legislation the breach of either of these duties became a failure to exercise ordinary care, and constituted actionable negligence. The two cars which the plaintiff sought to uncouple were supplied with mechanical devices for separating them without requiring the employes of the railroad company to go between the ends of the cars. These devices were not defective in construction or repair. There were two of them, either one of which would ordinarily enable the servant to uncouple the two cars. One of them had its lever on the east side of the train, where the plaintiff was at work, and could be operated from that station. The other had its lever upon the west side of the train, and could be utilized only from that side. The

plaintiff first endeavored to uncouple the cars by the use of the device on the east side of the train while the string of cars was stationary. When the train was drawn tight, so that there was no slack between the cars, or, as the witnesses expressed it, "when the slack was tight," the cars could not be uncoupled either with or without the use of the levers. When the plaintiff first attempted to separate the cars the slack was tight, and consequently he could not pull the pin by the use of the lever. The engine then pushed the cars to the south, and as they moved along the plaintiff attempted several times to pull the pin by means of the lever upon which he still kept his hand, and failed. He then stepped in between the ends of the cars while they were moving at the rate of between two and three miles an hour, and tried to uncouple them by seizing the chain above the pin with his hands and raising them. The act of placing himself between the ends of the cars to uncouple them without first endeavoring to do so by the use of the lever on the opposite side was an act of negligence, because the use of that lever was a less dangerous method of separating the cars. Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method. *Morris v. Duluth S. S. & A. Ry. Co.*, 108 Fed. 747, 749, 47 C. C. A. 661, 664; *Gowen v. Harley*, 56 Fed. 973, 983, 6 C. C. A. 190, 200; *Coal Co. v. Reid*, 85 Fed. 914, 29 C. C. A. 475; *McCain v. Railroad Co.*, 76 Fed. 125, 126, 22 C. C. A. 99, 101; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Gleason v. Railway Co.*, 73 Fed. 647, 19 C. C. A. 636; *Cunningham v. Railway Co. (C. C.)* 17 Fed. 882; *English v. Railway Co. (C. C.)* 24 Fed. 906. Not only this, but if the plaintiff had adopted the less dangerous method, if he had proceeded to the other side of the train and had uncoupled the cars by the use of the west lever, he would not have walked in the space between the rails where his foot was caught, and he would not have been injured. Even if he had first vainly tried to operate that lever, he would not have walked over the space where he was hurt, and he would have escaped injury. So that there seems to be no escape for a reasonable man, who considers impartially these facts, from the conclusion that the plaintiff was guilty of negligence in refusing to use the lever on the west side of the train and in entering and walking between the moving cars for the purpose of uncoupling them, nor from the conclusion that this negligence directly contributed to his injury.

Counsel for the plaintiff, however, ably and persuasively urge several reasons why, in their opinion, the negligence of the plaintiff was not fatal to his recovery here. They call attention to the testimony of several witnesses to the effect that it was the custom or habit of the servants of the company to ignore the lever on the opposite side of the train, and to step in between the cars when they were moving, and uncouple them with their hands, when the lever on their side of the train would not produce this effect, and they insist that it was not negligence for the plaintiff to follow the ordinary course pursued by his associate operators in cases of this character. But "if a man exposes himself to a risk unnecessarily he is guilty of negligence,

although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is not changed whether done by one or many." *Dawson v. Chicago, R. I. & P. R. Co.*, 114 Fed. 870, 882, 52 C. C. A. 286, 288. The danger of entering and walking between the moving cars was so imminent and obvious that no custom to do so unnecessarily could deprive the act of its inherently negligent character.

Counsel next say that, even if the plaintiff failed to exercise reasonable care to protect himself against the ordinary dangers of walking along the track between the cars and uncoupling them, he did not fail in the exercise of ordinary care to protect himself against the particular danger from the unblocked guard rail, because he was ignorant of its condition, and could not have been negligent about it. In support of this contention they cite, among other cases, *Smithwick v. Hall & Upson Co. (Conn.)* 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104, and *Choctaw, O. & G. Ry. Co. v. Holloway*, 114 Fed. 458, 464, 52 C. C. A. 260, 266. In the former case the plaintiff was instructed to work, handling ice, upon a certain portion of a platform which was guarded, and forbidden to labor upon another portion of the platform which was not guarded, lest he should slip off, fall to the ground below, and be injured. He disregarded his instructions, worked upon the forbidden portion of the platform, and was injured by bricks, which through the negligence of the master, fell upon him from an adjoining wall. In the latter case the plaintiff, a fireman, was guilty of negligence in riding upon an engine and tender with the tender foremost, without a light upon it, in the night. The negligence of the defendant was its failure to equip the engine with a brake, so that when the brake upon the tender was applied the engine crowded against it and injured the plaintiff, who was between the engine and the tender. The marked difference between these cases and the action under consideration is that in the former the negligence of the plaintiffs did not produce or increase the danger from the negligence of the defendants, while in the latter the plaintiff's negligence exposed him to the danger, and inflicted upon him the injury which he would not otherwise have suffered. In the former the workman upon the slippery platform was in as much danger from the falling bricks upon the part of the platform where he was instructed to work as he was upon the forbidden part, and the fireman upon the engine was in as much danger from the absence of a brake, with a good light upon the advancing end of the backing tender, or in the daytime, as he was when the tender was without a light in the night. In the case under consideration the act of the plaintiff in entering and walking between the moving cars exposed him to the danger from the unblocked guard, to which he would not otherwise have been subjected. In the former cases the plaintiffs' negligence was too remote to contribute to the injuries they suffered, while in the latter it was primal, proximate, and causal. While it is true in cases of little danger, when the negligence of the plaintiff is remote, and does not clearly contribute to his injury—as in the case of *Choctaw, O. & G. Ry. Co. v. Holloway*—that a servant may not be guilty of contributory negligence in exposing himself to a risk of which he is

ignorant, and of which an ordinarily prudent person would not have been aware, although he fails to exercise ordinary care to protect himself against known dangers, that rule is not of universal application. It is not applicable to cases in which the danger is known and great, and the negligence of the servant is clearly and directly contributory to the injury. An employé rides upon the pilot of an engine when there are cars on which he could ride with safety. He is injured through the negligence of the master, of the effects of which he was ignorant, when he would have suffered no harm if either he or the master had not been guilty of want of ordinary care. He cannot recover, because his negligence contributes to the injury, which the unknown negligence of the master concurred to cause. A pedestrian is about to cross a railroad. It is his duty to stop and look and listen before he crosses. It is the duty of the railroad company to ring a bell or sound a whistle to warn him of approaching trains. A train comes without whistle or bell, and gives no warning of its approach. The footman walks onto the railroad without stopping or looking along the track to the right or the left, and he is injured. He cannot recover, although he had no knowledge that the train carried no bell or whistle, and that no signal would be given, because his negligence contributed to the injury. A brakeman carelessly jumps onto the brake-beam of a moving car and seizes a handhold not placed upon it to sustain a strain of that character, when there are other handholds for the purpose of enabling men to climb upon the cars, which he ought to have used. He is ignorant that through the negligence of the master one of the screws which keeps the handhold he seizes in place does not secure it. He pulls out the screw, falls, and is injured. He cannot recover, because his negligence directly contributes to his injury. Indeed, where the plaintiff knows he is exposing himself to great danger, and his negligence directly contributes to his injury, it is not his want of care with reference to the particular negligence or defect that concurs to injure him, but his general breach of duty toward his master, his failure to exercise due care in view of the knowledge which he has, that is fatal to his recovery. When he knowingly departs from the line of duty, and unnecessarily causes his own injury by putting himself in a place which he knows to be dangerous, it is no excuse for his breach of duty that the place was more dangerous than he supposed it to be, or that he did not know the exact degree of the danger he carelessly incurred. One who voluntarily and unnecessarily exposes himself to a known and great danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the negligence of the defendant which concurred to produce the injury, and of which he was ignorant, made the danger greater than he supposed it to be. *Railroad Co. v. Jones*, 95 U. S. 439, 440, 442, 443, 24 L. Ed. 506; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Dawson v. Chicago, R. I. & P. Ry. Co.*, 114 Fed. 870, 52 C. C. A. 286; *Erie R. Co. v. Kane*, 118 Fed. 223, 235, 55 C. C. A. 129, 141; *Kresanowski v. Railroad Co. (C. C.)* 18 Fed. 229.

The case at bar falls within this rule. The place into which the plaintiff ventured was dangerous—so perilous that Congress had en-

acted a statute to relieve the plaintiff from the duty of exposing himself to its danger. The peril of the place arose in large part from unavoidable obstructions upon the roadbed as a path for a pedestrian, caused by the rails and ties, and from the necessity of constantly changing the bed, its ties and rails, in order to keep them in proper repair. The danger from the negligence of the defendant in permitting the guard rail to become and remain unblocked was of the same nature as, and was in reality a part of, the danger to which the plaintiff exposed himself when he stepped between the cars, and his ignorance of the particular danger from the unblocked guard rail, while he knew the general and imminent danger of the place, constituted no legal excuse for his want of ordinary care, and cannot be permitted to relieve him from its fatal effect. This view of this question is sustained by a moment's consideration of the fact that the contention of the plaintiff's counsel is suicidal. If, as they argue, the plaintiff is guilty of no actionable or contributory negligence in entering and walking between the cars because he did not know or anticipate the negligence of the defendant in leaving the guard rail unblocked, then by the same mark the defendant was guilty of no actionable negligence in leaving the guard rail unblocked, because it did not know or anticipate that the plaintiff would be guilty of the negligence of entering and walking between the moving cars to uncouple them, and, if he had not done so, he would not have been injured. The plaintiff then failed to discharge his duty to exercise ordinary care when he entered and walked between the moving cars to uncouple them, and this negligence directly contributed to his injury. But counsel for the plaintiff insist that his want of care was excusable, because it was necessary for him to pursue this course, and because his injury was inflicted after he had uncoupled the cars, and while he was attempting to retire from his dangerous position. But the cause of his presence between the cars, of his retiring from that place, and of the injury which he sustained while engaged in the latter act, was his negligence in placing himself between the cars. If he had not put himself between them, he would not have withdrawn himself from that dangerous station, and he would not have been injured.

It will be conceded for the purposes of this case, but it is not decided, that, where the levers furnished to uncouple cars cannot be made to accomplish that end, it is sometimes necessary for brakemen to go between the ends of moving cars to uncouple them, and that when that necessity exists it is not negligence for them to pursue this course. This concession brings us to the question whether or not there is any substantial evidence in the record before us that such a necessity existed in this case. The evidence was uncontradicted and conclusive that the plaintiff was guilty of contributory negligence when he entered between the cars, because it was then his duty to use the lever on the other side of the train before he stepped between them, and he had not tried to operate that lever. Hence the burden was upon the plaintiff to establish the necessity for entering between the cars—a necessity which constituted his excuse for adopting that course. For this purpose the plaintiff testified that he

stepped in between the moving cars, and, after vainly endeavoring to pull the pin attached to the east lever, which he had attempted to operate, he took hold of the chain attached to the west lever with both hands, tried to pull it up, and failed, and that, if he had been on the other side of the train, he could not have uncoupled the cars by the use of the west lever because the coupler would not work. He also testified that there was no structural defect in the apparatus for uncoupling; that he did not discover what the trouble with it was; that the slack was tight when he tried the east lever, so that the pin could not then be drawn; that when he tried to draw the pin attached to the west lever he took hold of the chain about $4\frac{1}{2}$ feet above the ground, or at about the height of his breast, at a point where a man could use but a small portion of his strength in lifting; and, in his written account of the accident, made about a month after it occurred, he stated, when referring to the east lever: "The second time I attempted to pull up this lever it worked all right, and I cut the car off. The slack mustn't have been out of the car the first time I tried it." It was the duty of the court below to take this question of the necessity of the plaintiff's walking between the cars from the jury unless there was substantial evidence of that necessity which would sustain a verdict that it existed. The plaintiff did not know that the west lever would not work when he committed his first breach of duty by entering between the cars, for he had not then tried to raise the pin attached to it by lifting up the chain or in any other way. The only means of knowledge which he ever acquired upon which to found his testimony that the west lever would not operate was his vain attempt to draw the pin attached to it by lifting on the chain with his hands at the height of his breast. When all the testimony upon this question of necessity is reduced to its last analysis, it rests on the single fact that the plaintiff could not pull the pin attached to the west lever by lifting on the chain attached to it with his hands at the height of his breast at the particular moment when he made the attempt, although the lever and its connections were free from defects, although he did not try to operate them, and although he did not ascertain or know what the trouble with them was. That single fact is too remote and inconsequential to warrant a finding that the west lever would not pull the pin. Many other facts, of which the record presents no substantial evidence, are indispensable to such a deduction, especially the facts that the long arm of the west lever was of the same length or shorter than its short arm, so that power applied to the long arm would have the same effect as, or less effect than, power applied directly to the chain; that one walking between cars could apply as much power by lifting with his hands at the height of his breast as he could when walking freely by the side of the train by applying his strength to the handle of a lever; and that the slack was not tight, and the time was opportune when the plaintiff lifted on the chain. The evidence was insufficient to warrant a finding of these facts, or of the fact that it was necessary for the plaintiff to go between the ends of the cars to uncouple them.

Our conclusion is that the plaintiff failed to exercise ordinary care when he walked between the moving cars for the purpose of uncoupling them without first endeavoring to do so by means of the west lever, which had been furnished to him by the company for that purpose; that this negligence directly contributed to his injury; that these facts appear so clearly from the evidence that all reasonable men in the exercise of a fair judgment must come to these conclusions; and that the judgment below must be affirmed. It is so ordered.

THAYER, Circuit Judge. I concur in the order affirming the judgment below. I am not prepared to say that the plaintiff was guilty of negligence because he did not try to lift the coupling pin by the lever on the opposite or west side of the train before stepping in between the tracks. In view of the situation, it is most likely that he could not conveniently go around to the west side of the train to reach the lever on that side, and that it would have occasioned considerable delay had he done so. For these reasons I am not willing to hold that it was his duty to have gone around to the west side of the train. I do agree to the proposition, however, that, where there are two means of doing a given act, by one of which the act may be done with comparative safety, while the other means of doing the act are dangerous, it is the servant's duty to choose the safer way, unless he is forced to choose the other by stress of circumstances. In the present case there was no defect, so far as appears, in the appliance for raising the coupling pin by the use of the lever on the east side of the car. The reason why the pin could not be moved by that lever when the plaintiff made the attempt was doubtless due to the fact that there was at the time no slack. If the plaintiff had waited for a favorable opportunity he could doubtless have lifted the pin by the use of that lever. He did not do so, but voluntarily placed himself in a position of great danger by stepping in between the rails. I think that the act of Congress, which was passed for the protection of brakemen, amounts to a legislative declaration that a brakeman ought not to step in between the rails to uncouple a car in a moving train; and when it appears that a brakeman has placed himself in such a situation unnecessarily, not being compelled to do so by stress of circumstances, and receives an injury, he is guilty of such negligence as prevents a recovery. The testimony in the case at bar, as I view it, shows that the plaintiff stepped in between the rails when the train was moving, without adequate excuse for so doing, and that this act on his part beyond controversy immediately contributed to his injury, and the court below properly instructed the jury that he could not recover.

LAUTERER v. MANHATTAN RY. CO.

(Circuit Court of Appeals, Second Circuit. February 1, 1904.)

No. 76.

1. WRONGFUL DEATH—ACTION FOR DAMAGES—RELEVANCY OF EVIDENCE.

Where plaintiff's intestate attempted to board a car on an elevated road at a station after the gate had been closed and the car was moving, and after being carried beyond the station platform fell and was killed, the absence of a railing or guard across the end of the platform cannot be considered a proximate cause of the accident, and evidence as to the construction of the platform was properly excluded, in an action to recover for the death.

2. RAILROADS—CONSTRUCTION OF STATIONS—NEGLIGENCE.

A railroad company is bound to exercise only such degree of care in the construction of its stations and platforms as is sufficient to protect passengers using ordinary care from injury.

3. SAME—INJURY OF PASSENGER—LIABILITY FOR FAILURE TO GUARD AGAINST PASSENGER'S NEGLIGENCE.

One who voluntarily and unnecessarily exposes himself to a known danger, by attempting to climb on board a moving car, assumes all risks of injury therefrom; and the railroad company is not chargeable with negligence, causing his injury, which results from his falling from the car because of the manner in which its station or platform is constructed.

4. SAME—STATE REGULATION—CONSTRUCTION OF STATUTE.

The New York statute (Laws 1890, p. 1126, c. 565, § 138), which provides that no train on an elevated railroad shall be permitted to start from a station until every passenger upon the platform desiring to enter the cars shall have done so, unless due notice has been given that the cars are filled, must be given a reasonable construction, and cannot be held to require gates of cars to be opened after they have been closed and a signal to start given, or after they have actually started, because people may thereafter come onto the platform and desire to take the train, which in many cases of daily occurrence would wholly prevent the operation of trains.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the United States Circuit Court for the Southern District of New York, entered in favor of defendant on a verdict of a jury.

F. E. M. Bullawa, for plaintiff in error.

Henry W. Taft, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Plaintiff, as administrator, brought this action to recover damages suffered by reason of the death of his son, who was fatally injured by being crushed between the station of defendant's railway at 169th street and Third avenue and a southbound train of cars. Beyond the southerly end of the main platform at this station is a ledge 16¾ inches wide, sloping from the side of the station house toward the track. It was not separated from the end of the platform by any rail or guard. Above this ledge the distance between the body of the station house and the body of a car on the southbound track is about 21 inches. The accident happened on the

morning of December 22, 1899, at about 20 minutes past 7, when a southbound train had stopped at the station with the rear gate of its forward car about on a line with the end of the station building, facing the platform, from which point said ledge extends.

In view of the extraordinary claims asserted in support of the assignments of error, it becomes necessary to summarize the testimony as to the circumstances attending the accident.

Miss Wurtz testified that on the morning in question, as she opened the door of the station, her attention was attracted to decedent by seeing him hurrying out, and she stepped aside to let him pass; that he brushed past her, and "when he started to run to catch the car the forward gate of the second car was already closed." She further testified as follows:

"There was not any one on the platform besides myself. * * * The last gate of the first car was open, the first gate of the second car was closed. The car was not in motion. The young man placed his foot on the last platform of the first car. He placed his foot on the car. The car was not in motion."

Joseph G. Frost testified that he was acting as conductor on the morning in question, but that he was no longer in the employ of the Manhattan Railway Company; that he duly stopped at said station, took on all the passengers there, closed both gates, gave the signal, and started the train; that, just as the train started, deceased came rushing out, slammed the door and stood there; that a porter held up his hand, and said, "Too late"; that deceased stood there about a minute to get back his breath, and looked at him; that he (Frost) also said, "Too late," and then, all of a sudden, deceased made a dash around the porter, got hold of the stanchion of the car, and got about one-half of his foot on the step over the edge of the platform of the car; that, as soon as he (Frost) saw this, he quickly opened the gate and tried to pull him in, but, before he could do so, deceased turned around and lost his hold, and went down between the car and the station house. He further testified that the gate was closed and the train in motion before deceased attempted to get on, and that he (Frost) did not try to open the gate until after he saw that deceased had got his foot on the platform and that his life was in danger.

William Becker, an employé of Adams Express Company, testified that deceased came behind him, rushing up the stairs, ran by him, pushed him aside, got a ticket, dropped it in the box, ran right ahead past the first door, and swung open the second door; that he (Becker) stood still; that both gates were closed; that, when the cars had gone about two feet, deceased made a leap for the back end of the first car, and the car went a couple of feet, and he slipped and went down between the two cars; that he saw the conductor grab for the deceased to try to pull him on the platform; and that he thought the conductor opened one of the doors.

There was no other testimony as to the manner in which the accident happened, except that of one witness to the effect that she stepped aside to let deceased buy a ticket, because he seemed to be in a hurry.

We think it doubtful whether it would have been error for the court to take the case from the jury on the ground that the practically undisputed evidence conclusively showed that the accident was the direct result of the negligence of the deceased. *Elliot v. Chicago, Milwaukee & St. Paul Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and cases cited.

The testimony of Miss Wurtz, as to the last gate of the first car being open is somewhat indefinite as to time, especially in view of the fact that her attention was diverted part of the time by reason of her turning to let the young man pass and to call to a friend who was with her. But the court gave plaintiff the benefit of the doubt, and submitted the case to the jury, charging them on this branch of the case as follows:

"If the gate of either platform was open at the time the young man attempted to board the car, it was to a certain extent an invitation to him to enter, and, if the car started before the gate was closed, the defendant was guilty of negligence."

Despite this instruction, counsel for plaintiff has assigned as error the refusal of the court to charge that "the defendant was bound to exercise all the care and skill which human prudence and foresight could suggest." So far as concerns plaintiff's claim that the car was negligently started, the court assumed this perfectly well-settled obligation of law as binding upon the defendant, and in effect charged that, no matter how much care and skill might have been exercised by defendant, if it started the car before the gate was closed, it was negligent.

Error is further assigned to the refusal of the court to receive any evidence concerning the construction of the platform. The theory of counsel for plaintiff on this point seems to be that the court should have admitted evidence as to the absence of a guard or railing shutting off the space beyond the platform, and should have charged the jury that the absence of such railing was negligence. This position is manifestly untenable. It is not the province of a court or jury to reconstruct the defendant's stations upon such theoretical suggestions. If such railing had been provided, and a person had been killed or injured by striking against it, we think it might have been quite as plausibly argued by counsel that the presence of said railing was the cause of the accident, and that, if the space had been left open, such person might have escaped serious injury, by being permitted to fall on the platform ledge, instead of being thrown against the obstruction.

But the vital objection to the evidence offered is that it appears beyond question that the construction of the platform was not the proximate cause of the injury. In support of his contention that the absence of said railing was the proximate cause of the accident, counsel for plaintiff has cited various cases decided in the courts of this state, and especially relies on *Ellis v. New York, Lake Erie & Western Railroad Co.*, 95 N. Y. 546, and *Lilly v. New York Central & Hudson River Railroad Co.*, 107 N. Y. 566, 14 N. E. 503. But in the *Ellis* Case it was held that the immediate effect of the negligent failure of the railroad company to provide buffers on its car "was to put the

car in such condition that, in case of collision at the rear, its body must be impelled against the preceding car with a force to which it could offer no resistance, and therefore its absence was the 'causa causans,' * * * the proximate cause of injury." In *Lilly v. New York Central & Hudson River Railroad Co.*, supra, a divided court, "after considerable reflection" and "with some hesitation," in a "border" case, held that, where plaintiff was knocked off a car through the negligence of servants, the question whether "the failure to have the brakes in good condition does bear such a relation to the happening of the accident as to make it a question of fact for the jury to determine, upon all the evidence in the case, whether the injury would have occurred if the brakes had been in good order and properly set." In each of these cases the defendant sought to escape liability for negligent failure to provide proper appliances or a safe place, by invoking the protection of the fellow servant rule, and the court refused to allow exemption on that ground.

But we are not here concerned with the decisions of the courts of this state on the question of proximate cause, but with the rule in the federal courts. As was said by the New York Court of Appeals in discussing this doctrine in *Condict v. Grand Trunk Railway Co.*, 54 N. Y. 500:

"The rule adopted in Massachusetts and Pennsylvania was also applied in *Railroad Company v. Reeves*, 10 Wall. 176 [19 L. Ed. 909]. Those decisions are in direct conflict with the law as settled in this state, and cannot control the decision of this case."

If counsel for plaintiff had wished to avail himself of a rule such as he claims is established in the New York courts, he was at liberty to bring this action there, instead of resorting to the federal courts.

Counsel for plaintiff pressed upon our attention in the argument of this exception the case of *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. There the court says:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

And, subject to said qualification as to reasonable care and prudence, the court approved the following charge:

"Turning, now, to the conduct of Smith, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negligently the company ran this train, or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence, his administrator is not entitled to a verdict in this suit."

In the case at bar it cannot be claimed that any negligence of defendant was the primary cause of the injury, because the jury have found as a fact that deceased attempted to board a moving train after the gate had been closed. He is thus brought within the uni-

versal rule that a person who seeks to recover for a personal injury sustained by another's negligence must not himself be guilty of negligence that substantially contributed to the result. "Where the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened, he cannot recover." *Railroad Company v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

But, even if it be assumed that the result of plaintiff's negligence might have been different, if the defendant had provided a railing, yet the failure to provide such railing does not show the failure to exercise reasonable care and prudence. The defendant is not required to provide against accidents resulting either from the reckless disregard by passengers of its reasonable rules, or through their negligent heedlessness of their personal safety. It is only bound to exercise such a degree of care and prudence as is sufficient to protect the ordinary passenger using ordinary care on his part. Here deceased, having voluntarily and unnecessarily exposed himself to a known danger, must be held to have assumed all risks of injury which a careful and prudent person would apprehend as likely to flow therefrom. *Motey v. Pickle Marble & Granite Co.*, 74 Fed. 155, 20 C. C. A. 366; *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Chicago, St. Paul, M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582.

When the negligence of the injured plaintiff is the efficient cause of the accident, defendant is not liable in negligence for any act or omission, where no injurious consequence could reasonably have been contemplated as a result of such omission or act. *Scheffer v. Railroad Co.*, supra; *Railroad Co. v. Reeves*, supra; *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531; *Lilly v. New York Central & Hudson River Railroad Co.*, 107 N. Y. 575, 14 N. E. 503. Furthermore, a defendant is not liable, even where it is negligent, provided such negligence is not the proximate cause, but merely a remote cause or condition of the accident. *Railroad Company v. Reeves*, supra. "But where, upon all the evidence, the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence. *McDonald v. Snelling*, 14 Allen, 290, 299 [92 Am. Dec. 768]. In *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122, Blackburn, J., said: 'I do not think that the question of remoteness ought ever to be left to a jury. That would be in effect to say that there shall be no such rule as to damages being too remote.' It is common practice to withdraw cases from the jury, on the ground that the damages are too remote." *Stone v. Boston & Albany Railroad*, 171 Mass. 543, 51 N. E. 4, 41 L. R. A. 794, and cases cited.

Where the question of proximate cause is in doubt, it should be submitted, under appropriate instructions, to the jury; but, where it is not a matter of doubt, it is a question of law for the court. *Elliott*

v. Chicago, Milwaukee & St. Paul Ry. Co., supra; Southern Pacific Company v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485. In the case at bar there was no question of fact for the jury because, in view of the law already stated, the accident was merely a condition of the proximate cause, and is not one which might reasonably have been foreseen. As Mr. Pollock on Torts says, in discussing proximate cause:

"It follows that if, in a particular case, the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

See Scheffer v. Railroad Company, supra; Milwaukee & St. Paul Ry. Co., v. Kellogg, supra.

In the latter case the Supreme Court says as follows:

"In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

It follows that, if the court had submitted to the jury the question as to whether defendant was negligent in failing to provide a railing at the end of the platform and they had found thereon in favor of plaintiff, it would have been the duty of the court to set it aside.

Error is further assigned to the refusal of the court to charge as follows:

"If deceased had deposited his ticket and was on the platform before the train had started, it was the duty of the conductor to have held the train until plaintiff's intestate had opportunity to board the train."

This assignment of error is founded upon the provision of section 138 of the railroad law of the state of New York (chapter 565, p. 1126, Laws 1890), and section 419 of the New York Penal Code.

Section 138 provides as follows:

"All trains upon elevated railroads shall come to a full stop before any passenger shall be permitted to leave such trains; and no train on such railroad shall be permitted to start * * * until every passenger upon the platform or station at which such train has stopped, and desiring to board or enter such cars, shall have actually boarded or entered the same, but no person shall be permitted to enter or board any train after due notice from an authorized employee of such corporation that such train is full and that no more passengers can be then received."

Section 419 imposes a penalty upon—

"Any conductor, brakeman or other agent or employee of an elevated railroad, who:

"(1) Starts any train or car of such railroad, or gives any signal or order to any engineer or other person to start such train or car, * * * before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train has actually boarded or entered the same, unless due notice is given by an authorized employee of such railroad that the train is full, and that no more passengers can then be received."

And section 139 of said railroad law provides as follows:

"Every car used for passengers upon elevated railroads shall have gates at the outer edges of its platforms, * * * and every such gate shall be kept closed while the car is in motion; and when the car has stopped and a

gate has been opened, the car shall not start until such gate is again firmly closed."

Counsel for plaintiff asserts in his brief that:

"The deceased was entitled to act upon the belief that the defendant's conductor would open the gate of the car and give him an opportunity to board before permitting the car to start, since he was upon the platform manifesting a desire to enter before the car had actually started."

The court was not bound to charge said request. There was testimony tending to show that, after the gate was closed, deceased rushed out on the platform, and that, when the porter and conductor said, "Too late," he stood still until after the train had started. If the jury believed this evidence, deceased did not "manifest a desire to enter the train" until after it had started.

Furthermore, this court must take judicial notice, from daily experience, of the practical operation of the trains of the elevated railway. If the foregoing provisions are to be interpreted to mean that no train can start until every passenger on the platform, desiring to enter such cars, shall have entered the same, the elevated railway could not run. We all know that in the rush hours of the day there is a continual line of prospective passengers on the platform, signifying, with various degrees of energetic insistence, their desire to enter such cars. If such passengers are "entitled to act on the belief that the conductor will open the gate" after it has been closed, and the conductor should thus act, the railroad would be involved in a dilemma between stopping the car until such gate could be again firmly closed, or inviting intending passengers to assume a dangerous position at the moment when the car was starting. We do not understand that any such impracticable construction has ever been put upon the railway law of this state, and we certainly should not feel disposed thus to interpret it or apply it to the facts found herein.

There is no merit in any of the assignments of error. The judgment is affirmed.

ERIE R. CO. v. LITTELL

(Circuit Court of Appeals, Second Circuit. January 27, 1904.)

No. 71.

1. TRIAL—EXCEPTIONS TO CHARGE—FEDERAL PRACTICE.

It is the well-settled rule of the federal courts that all exceptions to a charge must be specific and be taken before the jury retires. A general exception to several propositions, either given or refused, will be overruled, if any one was correctly given or refused.

2. SAME.

Counsel, who before the retirement of the jury requested the court to indicate which of the several specific requests to charge had been given, and which refused, which the court then refused to do, is entitled to be heard on exceptions taken to the refusal of each separate request, identified by its number, having made them as specific as the situation permitted.

3. CARRIERS—ASSUMPTION OF RECEIVERS' CONTRACTS BY PURCHASER OF RAILROAD—TICKETS SOLD BY RECEIVERS.

A conveyance of a railroad on foreclosure sale, subject to all outstanding contracts made and obligations incurred by the receivers, which were

assumed by the purchaser, bound such purchaser or his grantees to accept tickets which had been sold by the receivers for the carriage of passengers over the road, and which were outstanding and unused at the time of the sale. Wallace, Circuit Judge, dissenting.

4. SAME—ERROR IN SALE OF TICKET—EJECTION OF PASSENGER.

When a passenger has purchased a ticket from a railroad company, purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of the ticket, and no prior knowledge or notice of rules of the company, which would make such ticket invalid, brought home to the purchaser, he is rightfully a passenger on the train, and the company is liable in an action to recover damages for his ejection.

5. SAME—WRONGFUL EJECTION OF PASSENGER—RIGHT TO MAKE RESISTANCE.

A passenger, who is rightfully on a railroad train, has a right to refuse to be ejected from it, and to make sufficient resistance to denote that he is being removed by compulsion and against his will.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error by defendant in the court below to review the rulings, refusals to charge, and certain portions of the charge of the United States Circuit Court for the Southern District of New York on the trial of an action at law brought by Isabella M. Littell, a resident of the state of New Jersey, against the defendant, to recover damages for having been put off its train while a passenger thereon between New York City and Hohokus, N. J.

F. B. Jennings, for plaintiff in error.

Franklin Pierce, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. On the morning of November 18, 1899, the plaintiff purchased a ticket from Hohokus to Paterson and return. After having stopped at Paterson, she left there for New York in the afternoon of the same day, having purchased a ticket from Paterson to New York and return. That night she left New York by the 10:30 train for Hohokus. When the conductor demanded her ticket, she handed him a ticket, numbered 118, and which read as follows: "New York, Lake Erie & Western R. R. Co. This ticket at reduced fare is only valid for one continuous passage from New York to Hohokus. W. C. Robinson, General Passenger Agent. Excursion." Upon its back it was stamped: "New York, Lake Erie & Western Railroad Company." The date of the issuance of the ticket had been stamped upon its back, but it was so dim that it could not be made out.

The testimony of the plaintiff as to what occurred thereafter is substantially as follows: The conductor refused to accept the ticket, saying it was no good, had been bought in 1893, and that said railroad had gone out of existence. Plaintiff replied that this was the same Erie Railroad on which she had traveled for 35 years, that she had bought this ticket for that road, and suggested that he should

¶ 5. See Carriers, vol. 9, Cent. Dig. § 1452.

refer the question to the superintendent, and, if she was wrong, she would pay another fare and exonerate him. She also gave him her name and address, and showed him her commutation ticket, and he went away. Later he came back and told her she would have to pay her fare or get off, and, after stopping at the next station for some time, he came to her and told her he had ordered two policemen to come in and arrest her. She then protested against being thus put off the train, and offered the return portion of the other ticket she had purchased that day; but he said, "I won't have it," and struck her hand down. Later, and while the train was still in motion, she offered to pay her fare, but he refused to accept it. At Passaic the two policemen boarded the train, the conductor put his arm around her body, the policemen took hold of her arms, the conductor threw her forward on the front seat on her knees, striking her chest against the top of the seat, and they pushed her through the car, out onto the platform. She only resisted removal to the extent of holding onto the arms of the seats, which she was obliged to do in order to save herself from falling on the floor of the car. She tried to hold onto the rail, but her hand was struck and wrenched free, and she was dragged to the ground. The policemen took her to the police station, where the sergeant examined all her tickets, and told her they (the police) could not hold her, and that she could catch the 1:20 a. m. train for Hohokus, which she did, arriving there after 2 o'clock in the morning.

The evidence introduced by defendant contradicted the plaintiff's testimony as to the tender of the other ticket and of the fare, and as to the amount of force used in ejecting her from the car; but all of her material statements were corroborated by other testimony. The jury rendered a verdict in favor of the plaintiff for the sum of \$2,000 damages.

Counsel for plaintiff contends that certain assignments of error, because of the court's refusal to charge as requested by defendant, are insufficient, because the exceptions taken thereto were general and indefinite. The well-settled rule in the federal courts is that all exceptions to the charge must be definite, and must be publicly taken before the jury retires, so as to challenge the judge's attention to each proposition of law as it is presented, and enable him to exercise his right to modify any misstatement or error in said charge. *Park Bros. & Co. v. Bushnell*, 60 Fed. 583, 585, 9 C. C. A. 138; *Hodge v. Chicago & A. Ry. Co.*, 121 Fed. 48, 52, 57 C. C. A. 388. And, where only a general exception is taken to several propositions submitted to a jury or refused upon requests, the exception will be overruled, provided any of the propositions be correct. *Newport News & Mississippi Valley Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887; *Hodge v. Chicago & A. Ry. Co.*, *supra*. But the record shows that in the case at bar counsel for defendant was confronted by conditions which precluded the possibility of taking such distinct and several exceptions in accordance with the prevailing practice. Before the jury retired he called the attention of the court to his specific requests, asked the court whether it had indicated which were charged and which were refused, and suggested that he

(the counsel) ought to indicate before the jury retired the portions of the charge to which he wished to except. The judge stated in reply that he did not think he would then go through the requests to any extent, that they were refused except so far as covered in the charge, and that he (the judge) would like to have the jury go out and attend to their duties. Thereupon counsel for defendant was permitted to take his exceptions after the jury retired.

That the judge had not indicated in writing on said requests which of them he had refused to charge is evident from his subsequent statement that he could not tell which they were. But counsel for defendant thereupon distinctly excepted to the refusal to charge each separate request, identifying it by its number, so far as the same had been refused and had not been covered by said charge, and the judge allowed said exceptions, saying, "Unless I have absolutely left out something by accident." It does not appear that anything was accidentally or erroneously omitted from the charge. But, in any event, counsel for defendant is entitled to be heard on his exceptions to said refusals to charge. He had seasonably called the attention of the court to the usual method of procedure; the judge had refused to avail himself of the opportunity thus offered to supply the omission of any material statement in his charge, and had thus obliged counsel to postpone the definite statement of his exceptions until it was too late to correct any errors; and counsel for defendant at the first possible moment had stated his several exceptions as distinctly as the situation permitted. We are satisfied that said exceptions, under the circumstances, were sufficient.

Counsel for defendant requested the court to charge the jury that said ticket did not entitle plaintiff to passage, if it was issued by the New York, Lake Erie & Western Railroad Company, or was issued prior to December 1, 1895. The court refused said request, and charged the jury as follows:

"If that ticket was issued by the New York, Lake Erie & Western road, I think that the Erie Railroad Company was bound to honor it, unless you shall find, upon the testimony before you, that it was issued by the original company more than six years prior to the time that an attempt was made to use it."

To this charge, and to the refusal to charge as above, the defendant duly excepted. The court also charged, as requested by defendant, as follows:

"If the jury find that the ticket in question was sold prior to November 18, 1893, the same was outlawed, and the defendant was justified in refusing to accept the same without incurring any liability therefor, and the jury must find that the ticket did not entitle plaintiff to passage."

The questions are thereby raised as to the relations existing between the New York, Lake Erie & Western Railroad Company and the defendant, and the obligations assumed by the latter. Counsel for defendant contends that as the ticket was issued by the New York, Lake Erie & Western Railroad, and as this railroad had been sold under foreclosure of its mortgage, and was subsequently purchased by this defendant, it (the defendant) was not responsible for the contracts of said mortgagor, such as are evidenced by this ticket, but that such contracts were

subordinate to the mortgage, and were cut off by its foreclosure. Counsel for defendant further contends that, as it did not acquire title to or take possession of said railroad until December 1, 1895, it was not bound to accept any ticket sold prior to that date.

It appears, from the record of the proceedings whereby the defendant acquired title to the property and franchises of said New York, Lake Erie & Western Railroad, that from July 25, 1893, until November 11, 1895, said New York, Lake Erie & Western Railroad was in the hands of receivers appointed by this court; that on said date, by virtue of a decree of this court, said property was transferred by the special master of the court to certain individuals, and was by them transferred to this defendant. The indenture under which said transfer was made to defendant provided that said property and franchises were conveyed to the defendant—

"Subject, also, to all contracts heretofore made, or liabilities heretofore incurred, by John G. McCullough and Eben B. Thomas, receivers appointed in the consolidated cause aforesaid, and to all their acts in connection with the said premises, franchises, and property, so far as the said contracts or liabilities are still outstanding and unsatisfied, which said contracts, liabilities, and acts, as well as all and every the covenants and liabilities made or incurred by the said parties of the first part hereto, in or by reason of said deed executed by the said special master as aforesaid, the said party of the second part hereby assumes, and from and against the same does hereby covenant to and with the said parties of the first part to indemnify and save them, and their heirs, executors, and administrators, harmless."

The jury, under the instructions of the court cited above, have found as a fact that said ticket was issued subsequent to November 18, 1893, and therefore subsequent to the date when the receivers took possession of the road. The obligation to accept and honor this ticket, if issued between November 18, 1893, and November 11, 1895, was one of the outstanding and unsatisfied contract obligations of the receivers expressly assumed by the defendant as one of the conditions on which it acquired title. If it was issued after said date, it was a valid and subsisting contract between plaintiff and defendant. The foregoing exceptions must therefore be overruled.

The refusal of the court to charge that the ticket was not good over the road of the defendant is assigned as error on the further ground that there was no sufficient evidence to go to the jury of its sale subsequent to May, 1893. It is true that Tonkin, who was the station agent at Hohokus in 1893, testified that, while he could not state when the ticket was sold, he was sure it was sold prior to May 1, 1893, and that the plaintiff's statement that she bought said ticket on March 9 or 10, 1898, was only corroborated by her other testimony. But the book, which it was said would have contained a record of the sale of said ticket, No. 118, had been destroyed, and it was admitted that there were two different series or sets of tickets similarly numbered, and that after the defendant took possession of said road it continued for a considerable period to sell the said tickets of the New York, Lake Erie & Western road. Defendant's witnesses testified that such tickets were always stamped with the stamp of the Erie Railroad. The ticket in question was not thus stamped. The plaintiff testified that she bought said ticket about March 9 or 10, 1898, using the other part to go to New York. She supported this statement by her testimony that,

prior to March, 1898, she had lived at Waldwick; that in March, 1898, she went to the house which she had rented in Hohokus to have some work done, and on that occasion purchased said ticket; and she stated that her failure to use the return portion on previous trips was due to her having laid away the ticket case in which she had placed it. In these circumstances, we think the jury were justified in finding, upon all the evidence, that said ticket was purchased on a date subsequent to November 18, 1893, and therefore subsequent to the date at which the receivers took possession of said road.

Error is further assigned to the refusal of the court to charge that, if plaintiff presented an invalid ticket, the conductor was justified in ejecting her from the train; that if the plaintiff had money to pay her fare, or another valid ticket, and she failed to pay such fare or surrender said ticket, she could only recover for its value; and that if originally she refused to pay her fare, such refusal was not cured by her subsequent offer to pay. These contentions are disposed of by the finding of the jury, upon sufficient evidence, that said ticket was valid. Besides, as already stated, she testified that she attempted to comply with these suggested requirements while the train was in motion.

Error is further assigned to the charge of the court that it was immaterial that the conductor had been instructed by defendant to refuse tickets issued by the New York, Lake Erie & Western Railroad. Counsel for defendant contends that, even if the station agent improperly sold plaintiff a wrong ticket, she would have her redress therefor in a proper action, but that such ticket would not entitle her to ride without paying her fare. The finding of the jury that the ticket was valid dispenses with the necessity of discussing this contention at length. The rule is well settled that when a passenger has purchased a ticket purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of his ticket, and no prior notice or knowledge of rules of the railroad company, inconsistent with the statements on said ticket, brought home to the purchaser, he is rightfully a passenger on the train, and the railroad company is liable in this form of action for his expulsion. *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 69, 12 Sup. Ct. 356, 36 L. Ed. 71; *Murdock v. Boston & Albany Railroad Co.*, 137 Mass. 293, 50 Am. Rep. 307.

Other assignments of error question the correctness of the refusal of the court to charge that plaintiff was not entitled to recover any damages sustained from her refusal to leave the car quietly, or by reason of her resistance to the conductor in his attempt to eject her. The plaintiff testified that she did not make "a great deal of resistance, except holding onto the arms of the cars. I had to hold on, or I should have been on the floor." Other witnesses testified that she held onto the arms of the seats to prevent being thrown down, and was pressing backward, while the three men threw her forward, and shoved and dragged her through the car. There was some testimony by defendant's witnesses that she went very quietly, and some testimony that she resisted forcibly while in the car, and it was proved that when she reached the platform she held onto the iron rail; she saying she "was compelled to do so." The court charged:

"That if she was lawfully upon that train of the defendant at the time when the ejection took place, she had a right to exercise the amount of resistance which was testified to by all the parties connected with it."

In *Erie Railroad Co. v. Winter's Adm'r*, supra, a passenger was wrongfully ejected from a train with such force that he suffered considerable physical injury. Counsel for plaintiff admitted that no more force was used in expelling plaintiff than was necessary to overcome his resistance. The Supreme Court affirmed a judgment for plaintiff for \$10,000, and upon the question here presented said as follows:

"If he was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that under such circumstances he was put off the train was of itself a good cause of action against the company, irrespective of any physical injury he may have received at that time, or which was caused thereby. *English v. Delaware & Hudson Canal Co.*, 86 N. Y. 454 [23 Am. Rep. 69]; *Brown v. Memphis & Charleston R. R. Co.* [O. C.] 7 Fed. 51; *Philadelphia, Wilmington & Baltimore Railroad v. Rice*, 64 Md. 63 [21 Atl. 97]."

This discussion disposes of all the assignments of error which were pressed on the argument of this case. We think that the charge of the court correctly and fully covered all the questions of law presented, that it was quite as favorable to the defendant as it had a right to request, and that there was no error prejudicial to the rights of defendant.

The judgment is affirmed with costs.

WALLACE, Circuit Judge (dissenting). If the ticket was sold while the receivers were operating the railroad, in my opinion the plaintiff was not entitled to recover. The defendant at that time had not come into existence, but was subsequently incorporated, and acquired the railroad by deed from vendors who had bought it at a foreclosure sale. In the deed the defendant covenanted to indemnify the vendors, and also the receivers, against contracts and liabilities outstanding. I cannot agree with the majority of the court that by force of that covenant the defendant became obligated to carry the plaintiff as a passenger who had purchased a ticket from the receivers. That covenant was exclusively for the benefit and protection of the vendors and the receivers, and not inuring to the benefit of the plaintiff. She could not derive any right of action founded upon it. *Austin v. Seligman* (C. C.) 18 Fed. 522; *Welden National Bank v. Smith*, 86 Fed. 398, 30 C. C. A. 133, 137.

WARNER et al. v. COCHRANE.

(Circuit Court of Appeals, Second Circuit. March 11, 1904.)

No. 112.

1. LEASES—COVENANT AGAINST ASSIGNMENT—BREACH—WAIVER.

Where a lessor, with knowledge that her lessees had assigned the lease in violation of a covenant against such assignment, conducted various correspondence with the assignee, and treated it as her tenant, and made no objection until after the lessees had changed their position to their prejudice, and deprived themselves of the ability to perform an option of renewal contained in the lease, the lessor was estopped to deny that she had consented to such assignment.

2. SAME—DEMAND FOR RENEWAL.

Where an assignment of a lease containing a covenant of renewal was valid as against the lessor, a demand for such renewal was properly made by the assignee to whom such covenant to renew passed by the assignment.

3. SAME—CONCURRENT CONDITIONS.

A lease of asphalt land provided that if, on or before July 1, 1900, the lessees should not have paid royalty on 34,000 tons of asphalt at the rate fixed, they should pay to the lessor on such day royalty equal to the difference between the royalty paid and that payable on that number of tons, and if at that time the lessees should have performed all the conditions contained in the lease, the lessor covenanted to renew the lease at the lessees' option. *Held*, that the conditions for renewal and payment were concurrent, and the lessor, having refused to renew, was not entitled to recover the differential payment provided for.

4. SAME—REMEDIES—ELECTION.

Where a lease of asphalt land provided for a renewal concurrently on the payment by the lessees of a sum equal to the difference between the royalty paid and that which would be payable on a specified number of tons of asphalt, and the lessor wrongfully refused to make such renewals, the lessees or their assignees were at liberty either to tender such differential rent and insist on specific performance of the covenant to renew, or refuse payment, and treat the contract as at an end.

In Error to the Circuit Court of the United States for the Southern District of New York.

A. J. Rose, for plaintiffs in error.

Albert Stickney, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The defendant in error, plaintiff in the court below, is the executor of the Countess of Dundonald, who was a subject and resident of Great Britain, and who brought this action to recover rents or royalties under the stipulations of a lease to defendants of certain asphalt properties in the Island of Trinidad. The defendants, at the time of the transaction complained of, were citizens of and residents in the state of New York. The agreement which is the basis of the action is in writing, and all the material dealings between the parties appear from the correspondence. The lease conferred upon the lessees the exclusive right for the term of four years and five months from February 1, 1896, "to dig, work, search

¶ 1. See *Landlord and Tenant*, vol. 32, Cent. Dig. § 230.

for, and win all pitch and asphalt of good merchantable quality suitable for paving purposes, upon the certain lands of said lessor," subject to a certain rental and royalties and other provisions, including a provision for renewal. The following quotations from the lease show the covenants of the parties material to the questions herein :

"If, on or before the first day of July, 1900, the lessees shall not since the commencement of the lease have won out of the said lands and paid royalty upon the total quantity of thirty four thousand tons of pitch or asphalt at the rate aforesaid, they shall subject to the provisions hereinafter contained on the said first day of July, 1900, pay to the lessor royalty at the rate aforesaid upon such number of tons as shall be the difference between the number of tons upon which royalty shall have been paid and the said number of 34,000 tons. * * *

"The lessees shall not assign or underlet the premises hereby demised or any part thereof without the consent in writing of the lessor. * * *

"The lessor also covenants with the lessees that if at the expiration of the said term the lessee shall have paid the rents hereby reserved and observed and performed the conditions herein contained and on their parts to be observed and performed and shall be desirous of renewing said terms, and shall give to the lessor, her heirs or assigns six months notice in writing, personally or by leaving the same at her, their or any of their usual or last known place of abode in England, then the lessor will grant and the lessee shall take a renewed lease in respect of the said land and premises for a said term of ten years. * * *

"If any dispute or difference shall arise between the lessor or lessees concerning any matter or thing whatever herein contained or the operation or construction thereof or any other matter or thing in any way connected with these presents or the rights, duties and liabilities of either party under or in connection with these presents then in every such case the dispute or difference shall be determined in a manner to be agreed upon between the parties and in case of their disagreement then by action or suit in Her Majesty's High Court of Justice in England and not elsewhere and this clause may be pleaded against any action or suit or commenced by either party out of England."

In March, 1896, the defendants, with certain other persons, formed a corporation known as the Columbia Construction Company, and in April, 1896, a contract was entered into between said company and these defendants whereby the latter agreed to furnish to the Columbia Company an amount of asphalt equal to the amount to which they were entitled under said lease. The Columbia Company "covenants and agrees to take such asphalt and win and dig all the pitch or asphalt herein referred to and transport the same from the said Island of Trinidad, * * *" and "to pay for the rights, privileges, and asphalt hereby secured the further sum or sums of money, required to be paid under said contract with Louisa Harriet Dundonald directly or to the parties of the first part, at the option of said second party." It does not appear that this contract was ever brought to the notice of the Countess Dundonald. In May, 1899, a portion of the defendants executed an assignment of said lease to said Columbia Company.

The record correspondence between the parties is evidently incomplete. In the correspondence between August 21, 1896, and February 21, 1898, the plaintiff, addressing her letters to the defendant Warner, referred to "your company" and "your engineer of Columbia Construction Company"; and Warner, in his replies, referred to "the company" and "our company," and signed all of said letters individually, with one exception. The first payment, on January 1, 1897, was prom-

ised by Warner, signing himself "C. M. Warner, Pres." The payment was made by Columbia Construction Company, "the same being due you on lease * * * between yourself and C. M. Warner et al." One later payment appears to have been made by Warner personally. Payments subsequent thereto were made by the Columbia Company to Lady Dundonald, and accepted by her. In her later letters Lady Dundonald repeatedly used such expressions as "my lease to the Columbia Construction Company," "rent due by Columbia Construction Company," "I have to call on you [the Columbia Construction Company] to carry out your covenants"; and on February 11, 1889, she authorized the company at her expense "to protect or enforce my titles and rights of possession so as to assure your uninterrupted and peaceable working * * * of the lands * * * leased by me to you." All claims and royalties were paid prior to June 30, 1900, except for the difference between amount of asphalt dug and 34,000 tons as specified in said agreement, and for this sum, amounting to \$14,061.79 and costs, the court directed a verdict in favor of plaintiff.

The questions raised by the assignments of error are the following:

- (1) That Lady Dundonald consented to the assignment to the Columbia Company.
- (2) That she broke the covenant to renew the lease.
- (3) That the agreement that any dispute or difference under the lease should be determined by "Her Majesty's High Court of Justice in England" is a bar to this action.

A critical examination of the correspondence establishes the consent of Lady Dundonald to the assignment of the lease. In fact, her course is inconsistent with any other conclusion. In addition to the repeated recognition of the Columbia Company as her lessees, and her continued receipt of rents from it, the following statements made by her establish her waiver of her right to object to said assignment:

(1) In her letter of May 24, 1900, attempting to take advantage of said assignment, she refers to her letter of February 11, 1899, in which, as she says, she wrote to the Columbia Company, her lessees, and authorized them to take legal proceedings on her behalf to insure their uninterrupted occupation at her cost, and says, "This letter [of February 11th] was clearly revocable by me, and it has now been revoked." Having thus admitted that she had recognized the Columbia Company as her lessees, and as entitled to enforce her rights as above, she fails to revoke the recognition in said letter until May 2d, or nearly six months after the Columbia Company had given her notice of its desire to exercise its option for renewal of the lease.

(2) On January 15, 1899, Lady Dundonald, having received notice of a change in the personnel of the stockholders of the Columbia Company, replies thereto by referring to the provision against an assignment in the lease, and saying that, before she could give her consent to any substantial change in the composition of the company, she should require to be informed of the names of those who now control it, and requested references as to their commercial standing and ability to carry out their agreements. Thus having asserted her right to object to the assignment, she merely requests the Columbia Company to obviate said objection by giving her satisfactory references as to the solvency of the new management, and impliedly says: "I

have no objection to the Columbia Company as my lessees by virtue of said assignment, but before I consent to said change in the management I wish certain information." This information was furnished. Lady Dundonald thereafter renewed her dealings with the Columbia Company, and failed to further suggest or assert any right to insist upon said provision against assignment until after the Columbia Company had notified her of their option to renew the lease.

(3) Prior to her final letter, which was written in the latter part of June, but subsequent to the notice of exercise of option to renew by the Columbia Company, Lady Dundonald, having reached the conclusion that the rent to be paid by the lessees was much less than it should have been, states that she regards herself as free to make such new arrangement as she deems proper, and contents herself with mere notices of intention to exercise her right not to renew, and a refusal to admit the right of the Columbia Company to make a claim for a renewal in its favor. But in said final letter she definitely repudiates said agreement, and states that she shall take legal steps to recover possession of the property.

Where a lease contains a provision that the lessee shall not sublet or assign without the written consent of the lessor, if the leased property be turned over to another without the original consent of the lessor, and the lessor acquiesces therein, and fails to seasonably object thereto, the breach of the agreement will be considered as waived by him. *The Elevator Cases* (C. C.) 17 Fed. 200, 3 McCrary, 463. In these circumstances, the declarations of Lady Dundonald not only conclusively establish her consent to said assignment, but, in view of the fact that she postponed making any objection thereto until after the time when the defendants, if they had been notified of that option, might have made the tender instead of the Columbia Company, we think the plaintiff is now estopped to take advantage of the wrong of his testatrix, and to deny the truth of her representations, by reason whereof the lessees, assuming her consent to the assignment, were induced to assume a position prejudicial to their interests. The assignment being valid as against the lessor, the demand for renewal was properly made by the assignee, to whom the covenant to renew passed by the assignment. *Parsons on Contracts* (8th Ed.) vol. 1, p. 243; 18 *American & English Encyc. of Law* (2d Ed.) 786. It follows that the refusal to renew, after seasonable notice, was wrongful.

The second assignment of error is based upon the claim that Lady Dundonald, by such refusal, disentitled herself to sue upon the written contract for recovery of the stipulated amount of differential rent. Defendants had bound themselves to pay said difference on July 1, 1900, subject to the provisions of said lease, including said agreement for renewal. Lady Dundonald had bound herself to grant said renewal on July 1, 1900, provided defendants should have paid the rent and observed the conditions of said lease. It seems clear, in view of her express covenant agreeing to renew upon payment and notice, that she could not have required payment of said difference after such notice, except upon a grant of said renewal. The effect of due notice to renew was to make the covenant to pay the stipulated rent and the covenant to renew mutual covenants, and the right of the plaintiff's

testatrix to recover the stipulated sum without performing or offering to perform her covenant to renew would, technically speaking, depend upon the order in which the covenants were to be performed. *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822. It is unnecessary to determine whether or not these covenants, after such notice, can be treated as independent, because we are satisfied, as already stated, that, if the lessor had any right to require payment before renewal, she has waived the order of performance of the covenants by her own anticipatory breach. "Where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages, and, if the latter elects to treat the contract as terminated, his right of action accrues at once." *Marks v. Van Eeghen*, 85 Fed. 853, 30 C. C. A. 208; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *In re Stern*, 116 Fed. 604, 54 C. C. A. 60.

Even if it be assumed, as claimed by plaintiff, that the contract rights and obligations of the lessor and the original lessees were unchanged by the assignment of the lease to the Columbia Construction Company, yet, after said notice given, we cannot construe the contract as requiring the defendants, on the 1st day of July, 1900, to pay the lessor said difference, not due until that day, in the face of her prior unconditional notification, then in force, that she would refuse to grant the renewal. It may fairly be assumed, in view of the disproportionately large amount to be paid on July 1, 1900, as compared with previous years, that said agreed differential payment was in large measure the consideration for said agreed renewal. The lessor's refusal being wrongful, the lessees were at liberty, on July 1, 1900, either to tender said differential rent and insist on specific performance of the covenant for renewal, or to refuse payment and treat the contract as at an end so far as it remained executory. They have taken the latter course. The lessor, having wrongfully refused to renew, her executor is in no position to demand the performance of the agreement. If the plaintiff has any cause of action against these lessees, it must be supported on a quantum valebat. It cannot be maintained on the theory that he is entitled to a strict performance of the agreement.

In view of these conclusions, it is unnecessary to discuss the third assignment of error.

The judgment is reversed.

KOEWING v. WILDER.

(Circuit Court of Appeals, Second Circuit. March 3, 1904.)

No. 122.

1. SALES—CONTRACTS—REDUCTION TO WRITING—STATUTE OF FRAUDS—PART PAYMENT.

Plaintiff and defendant made two oral contracts, one for the sale of all the stock of the S. Company to defendant for \$500,000, which was subsequently reduced to writing, and the other for the sale of 100 shares of the stock of the B. Company by defendant to plaintiff for \$10,000, which was not reduced to writing. *Held*, that in the absence of evidence that at the time the contract for the S. stock was reduced to writing and delivered the parties restated the prior oral agreement for the sale of the B. stock, and intended to validate the same as a part of the contract, the delivery and the performance of the contract for the sale of the S. stock did not constitute a payment of a part of the purchase money for the sale of the B. stock at the time, so as to take that contract out of the statute of frauds.

In Error to the Circuit Court of the United States for the Southern District of New York.

See 126 Fed. 472.

This cause comes here upon writ of error to review a judgment of the United States Circuit Court, Southern District of New York. The judgment was entered upon a verdict in favor of the defendant below (who is defendant in error), which verdict was directed by the court at the close of plaintiff's case. The action was brought to recover damages for the failure of defendant to transfer to plaintiff 100 shares of the stock of the Butterick Publishing Company at the price of \$100 per share. The answer set up the statute of frauds, and averred that neither the contract declared upon, nor any note or memorandum of it, was ever made in writing, nor did the plaintiff at the time pay any part of the purchase money. The facts sufficiently appear in the opinion.

A. C. Sheussane, for plaintiff in error.

Herbert Noble, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Inasmuch as the cause was disposed of at the close of plaintiff's proofs, his narrative of the transactions is to be taken as correct. He was the only witness, except as to value of the stock. This is his story: He owned and controlled the entire capital stock of the Standard Fashion Company. The defendant was vice president of the Butterick Company, and had expressed a wish to purchase the entire stock of the Standard Company. A meeting took place between the parties early in January, 1900, at which defendant stated that a man named Hudson, who was secretary of the Butterick, was about to be dismissed, in which event 200 shares of its stock then held by Hudson would be called in by defendant, under an agreement which he had with Hudson; that, if plaintiff would make an offer of the Standard stock low enough to enable defendant and his backers to purchase it, he would let plaintiff have 100 shares of the Hudson stock. Nothing was said at the time about prices. The next day they met again, and in response to a question defendant stated that he meant that plaintiff should have the Butterick stock at par. At that interview plaintiff

named no price for the Standard stock. Negotiations continued for a few days, until the minds of both parties met, January 10th, on the proposition that plaintiff would sell the entire stock of the Standard Company for \$500,000, and an agreement to be employed by the Butterick Company for a stated period at \$5,000 a year. Defendant at the time repeated his offer of the 100 shares of the Butterick stock. Both sides agreed to these terms, and it was arranged that a written contract should be prepared, defendant stating that he did not wish the matter of the 100 shares of Butterick to be incorporated therein, because he desired not to have that part of the agreement known to others, who might object. A written contract, dated January 15th, was prepared, which covered the sale of the Standard stock, but was silent as to any sale of Butterick stock. It was signed on January 22d. The plaintiff's testimony is:

"Eventually the contract was concluded on or about January 22d, and the first payment was made of \$25,000. He handed me the first money with the remark, and it being again and again gone over by us, that the 100 shares of stock would be delivered to me for \$10,000 as soon as he received them from Hudson, * * * and Mr. Wilder said again he would deliver me 100 shares for \$10,000 as soon as he should get them."

Manifestly there was no contract, note, or memorandum signed, and the only question is whether within the terms of the statute the plaintiff, at the time the contract was made, paid any part of the purchase money.

The testimony indicates that there were two contracts between the parties—one for the sale of the Standard stock by plaintiff to defendant for \$500,000, which was reduced to writing; the other for the sale of 100 shares of Butterick stock by defendant to plaintiff for \$10,000. There was not a single contract to sell the Standard stock for \$490,000 and 100 shares of Butterick stock. Whatever may have been discussed between the parties as to the terms of sale of the Standard stock must be considered as all merged in the written contract. Nevertheless it was open to the parties to make a contract for the Butterick stock, in which the execution of the contract for the other stock was named as a part of the consideration. And we agree with the proposition of the plaintiff that the words in the statute, "pay any part of the purchase money," are broad enough to cover any part of the consideration, whether it is money or not. The only question presented here is whether the delivery of the executed Standard contract was made "at the time" the contract was made, within the meaning of the statute of frauds of the state of New York. That statute was discussed by this court in *Raymond v. Colton*, 104 Fed. 219, 43 C. C. A. 501, and *Colton v. Raymond*, 114 Fed. 863, 52 C. C. A. 382. It was there held that certain resignations were in part the consideration for a certain promise to purchase, and their delivery "a part payment of the purchase money." The contract in that case was made on August 3d, and the resignations were delivered on August 15th. There was considerable testimony as to what was said at the time they were delivered. This court held (on the first appeal) that "as there was no restatement or reaffirmation of the terms of the prior oral agreement between the parties at the time of the delivery of the resignations, except by implication, and as

they were not delivered for the express purpose of complying with the statute and validating the contract, it must be held that there was no part payment at the time of the contract, within the meaning of the statute as construed by the highest courts of the state." On the second appeal it was held that "a payment made subsequent to the time of the original contract is to be deemed made at the time of the contract, if there was such a reaffirmation of the prior contract as to constitute a new contract; * * * that reaffirmation is one which is made by express terms, and not one which arises from the making and the reception of the payment upon the tacit or implied understanding that the contract formally made was in force." And the court, in illustration of what is required, cited from *Jackson v. Tupper*, 101 N. Y. 519, 5 N. E. 66:

"There was no restatement of the terms of the prior oral agreement when the payment was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain."

It also cited from *Bissell v. Balcom*, 39 N. Y. 275:

"Here is a distinct intelligent reference by both parties to the negotiation of the previous day—a recognition by both of its want of binding force or validity, because no part of the stipulated price was paid; a declared intent to make the bargain valid and binding, assented to; a request for the payment of money for that purpose, and a payment in compliance with that request."

The opinion of this court in *Colton v. Raymond* concludes:

"Upon principle and logically there can be no payment made at the time of the contract unless it is made as part of the negotiations or at the time when the negotiation is concluded; otherwise the statutory provision would be nugatory. If there is a new contract in which the parties agree to reinstate a previous one for the purpose of validating it according to the statute, so that it is to take effect as a new agreement in substitution of the void one, and a payment is made at the time, the statute is satisfied. If they get together, and by words or implication say to one another, 'We recognize that the bargain we have previously made is not enforceable, but we are willing to stand by its terms upon the immediate payment of the purchase money, or part of it,' there is a new contract supported by a new consideration."

From these citations it is apparent that, in order to take an oral contract out of the statute of frauds by a subsequent payment, there must be an intelligent understanding by the parties of the existing situation, an intent to make their void contract valid, and a restatement at the time of payment in express language of all the terms of the old contract. Counsel for plaintiff in his brief concedes that at the time a part of the consideration is paid "the terms of the old void contract [should be] repeated, restated, renewed, reaffirmed, re-enacted, revived, readopted, and recognized as the terms of the contract which they were then making." The evidence falls short of this. The minds of the parties met on January 10th. At that time all the terms of both contracts were agreed to. There is nothing to indicate that at the subsequent interview, when the contract to sell Standard stock was signed and delivered, any new provisions were incorporated in either contract. There is nothing to show that the delivery of the signed Standard contract on that day was intended or understood by either party to be a payment to bind a bargain otherwise void, or anything else than a carrying out of the terms of the oral contract of January

10th. There is nothing to show that they both recognized that said oral contract was without binding force or validity, or that they restated its terms in order to substitute a new and valid contract in its place. The cause cannot be distinguished from the Colton and Raymond Case, where the resignations were delivered upon the tacit or implied understanding that the prior agreement was in force, and under the rule laid down in that case delivery of the signed Standard contract, without the slightest suggestion in the testimony that either side supposed it was necessary in order to bind a prior bargain, cannot be held to be a "payment at the time," which will take the case out of the statute:

The judgment is affirmed.

SMITH v. DAY et al.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1904.)

No. 959.

1. NEGLIGENCE—WHEN QUESTION FOR JURY—EVIDENCE CONSIDERED.

Defendants were contractors engaged in the construction of locks for the government at the Cascades in the Columbia river, and in the course of the work were doing blasting. A steamer used a landing on the reserved premises on its daily trips, and remained there for some time. While so lying with some passengers on board, and others passing to and from the boat, defendants fired a blast at a distance of 150 to 200 feet from the landing, and a piece of rock struck and injured plaintiff, who was in the boat. Plaintiff testified that he heard blasting some time before, but thought it was at a greater distance. *Held*, that while defendants had a right to continue the prosecution of their work, and passengers on the boat or premises assumed all risks necessarily incident thereto if conducted with skill and reasonable care, whether or not defendants exercised such skill and care, there being evidence tending to show that they gave no notice to the boat passengers that a blast was about to be fired, and whether plaintiff was guilty of contributory negligence, were questions of fact to be determined by the jury under all the evidence.

Gilbert, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Oregon.

This was an action to recover damages sustained by the plaintiff while a passenger on a steamboat belonging to a public transportation company engaged in navigating the Columbia river. The defendants were contractors engaged in the construction of locks for the government at the cascades in said river. The plaintiff, with other passengers, entered the boat of the navigation company while it was lying at a wharf on the premises reserved by the government for its work upon the locks, but which was its regular landing place on its daily trips. The plaintiff seated himself in the cabin of the boat, and fell asleep, and while in that condition was struck on the head by a rock thrown from some blasts which were exploded by the defendants within 200 feet of the boat, and which broke through the roof of the cabin. For the injuries received from this blow the plaintiff seeks compensation.

The first trial of the case in the court below resulted in a judgment for the defendants. The case was then brought to this court upon writ of error (100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108), and the judgment was reversed, and the cause remanded for a new trial, upon the error of the court in refusing to instruct the jury, after admitting testimony as to an agreement between

the defendants and the navigation company that the latter used the wharf at its own peril, that, if such an agreement existed, it would not bind the plaintiff. This was the sole ground for reversal, but the court commented upon other points in the case as follows: "We agree with the learned judge of the court below where he said, in ruling upon the plaintiff's motion for a new trial (86 Fed. 62) that: 'The plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufferance or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work in which they were engaged: These passengers assumed all risks necessarily incident to such work prosecuted with skill and reasonable care—such care as is usually employed under like circumstances. They had a right to expect, and are presumed to have relied upon, this degree of care.' We also agree, contrary to the contention of the plaintiff in error, that the facts and circumstances of the case were such as to make it proper for the court below to submit to the jury the question of contributory negligence on the part of the plaintiff; and, in the main, we think the instructions given by the court below to the jury were quite as favorable to the plaintiff as they should have been, and in one respect perhaps too much so, namely, in submitting to the jury the question as to whether the defendants were in duty bound to cover their blasts, or to await the departure of the boat before firing them." 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108. In accordance with this decision, a second trial of the case was had in the court below, but no verdict was reached, as the jury could not agree. A third trial was then had, wherein the jury returned a verdict in favor of the plaintiff for \$2,000. The defendants moved that the verdict be set aside, and a new trial had, because of certain alleged errors in the instructions, and because of the insufficiency of the evidence to sustain the verdict. The court below granted the motion (117 Fed. 956), and upon the fourth trial, at the conclusion of the plaintiff's testimony, a nonsuit was granted. From the order directing a nonsuit an appeal is taken to this court.

G. W. Allen and A. S. Bennett, for plaintiff in error.

Dolph, Mallory, Simon & Gearin and Whitney L. Boise, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error relate solely to the action of the trial court in granting the defendants' motion for a nonsuit. The only question for determination is, therefore, whether or not the evidence introduced by the plaintiff was sufficient to sustain the plaintiff's case.

The negligence alleged in the complaint is the setting off of the blasts by the defendants at the particular time mentioned, when many persons were passing to and from the boat, and the failure of the defendants to give notice or warning to the plaintiff and others that they were about to do such blasting. It is admitted by counsel for plaintiff, in their brief, that the right of the defendants to blast in the prosecution of their work was paramount to the right of the public in using the river; and the Circuit Court of Appeals, upon the former hearing, established the law of the case in this regard, when it agreed with the ruling of the trial court that "the plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufferance or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work in which they were engaged." The testimony shows that it was the practice of the defendants to fire off

blasts at the noon hour, when most of the workmen were at dinner, and again at the close of the day's work. It was also the custom of the boat to arrive near the noon hour, and lie at the wharf for a period of time ranging from 45 minutes to 2 hours and more, during which time passengers were passing to and from the boat. The testimony is practically a unit in the statement that no cover was provided for the blasts, or any preparation made to prevent the rocks from flying in all directions. Under these circumstances the question of notice or warning to the general public that blasts were to be fired becomes of importance. Harry Martin testifies that he was in the employ of the defendants at the time in question, clearing up the beach at the lower end of the locks. He states that the "closest blasting was about 150 or 200 feet from the boat landing"; that he was about 125 feet from the blasting, and hurried to find shelter when the blast occurred; that he heard no word of warning given before the blasts were exploded, and saw no signal. Monroe Vallet testifies that he was on his way to the boat landing to take passage on the boat when the blasts occurred; that he was about 150 yards away, and heard no alarm given before the blasting. U. D. Kelly was on the boat as a passenger at the time, and was standing on the deck when he noticed a smoke beginning to rise from the works at the locks, about 150 feet distant, and, realizing that it indicated the touching off of a blast, immediately sought shelter in the cabin, and was near the plaintiff at the time he was injured. This witness testified that he heard no outcry or warning before the blasts were touched off, and saw no signals given. William Ruffeno, the steward of the boat, testified that he went onto the boat some five minutes before the blasting, and could see the place where the blasting occurred while walking to the boat. He was in the purser's office at the time of the accident, but heard no warning given, and saw no flag or signal as he came to the boat. John Young was a passenger on the boat, and was standing on the deck of the boat when the men employed at the locks went to dinner, and for 20 minutes before the blasting. He testified that three or four men stayed at the work, and one of them said "Look out!" in a moderately loud tone just as he touched off the blasts; that he did not wave his hands or give any other signal; that this man and the others there then got under shelter of carts and machinery, and the blasts occurred. S. Mosher, a passenger on the boat, testified that he was on the deck of the boat, talking with the witness Young, when the workmen left the locks for dinner, and noticed two or three men remaining at the pits; that he saw the blasts set off and the men run to shelter, and when the rocks began to fall he hastened inside the cabin. He did not hear any warning cry or see any signal given. The plaintiff testified that at the time he went on board the boat he knew nothing whatever about any blasting being done in the vicinity; that, after he had been on the boat for a little time, he heard something that he thought was blasting, but it seemed to him quite a distance away; that after a little talk with the steward, and a game of cards with some passengers, he sat down in the cabin on the upper deck, and fell into a doze; that while in that condition he was struck on the head by a rock, and rendered unconscious, with the injuries complained of resulting.

Was this failure to give notice to the persons in the vicinity, that blasts were about to be fired, negligence on the part of the defendants? This court held, when the case was previously before it, that the defendants had a right to prosecute the work in which they were engaged, and that the passengers upon this boat assumed all risks necessarily incident to the prosecution of the work, when such work was prosecuted with skill and reasonable care. Did the exercise of reasonable care require timely notice to be given before firing the blasts? There is no fixed standard by which a court can say that any particular act or omission is or is not reasonable or prudent. It must be considered with relation to the surrounding circumstances in each case. As stated by the Supreme Court in *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 683, 36 L. Ed. 485:

"The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court"—citing cases.

In our opinion, the question whether or not the defendants exercised reasonable care in the operation of blasting at the time and under the circumstances disclosed by the testimony was a proper one for the jury to determine, as well as the question of contributory negligence on the part of the plaintiff. The court below treated the testimony of the plaintiff to the effect that he knew that blasting was going on as conclusive against him on the question of notice. In this the learned judge fell into error, in our opinion. It is conceivable that reasonable men might say that in the prosecution of such work, under the circumstances disclosed by the record, some notice should be given of each separate and distinct blast fired in the immediate vicinity of people liable to be injured thereby.

For the reasons stated, we think the court erred in taking the case from the jury. The judgment is therefore reversed, and the cause remanded for a new trial in accordance with this opinion.

GILBERT, Circuit Judge (dissenting). The evidence, to my mind, clearly shows that the plaintiff in error had knowledge of the fact that blasting was going on before he went upon the boat. If so, he had knowledge of the fact concerning which it is charged in the complaint that the defendants in error failed to give notice. It must be borne in mind that the allegation of negligence concerning the failure to give notice was, not that the defendants in error failed to notify the plaintiff in error of the danger involved in the blasting, but merely failed to give notice of the fact that they were about to do the blasting. The allegation is that the defendants in error "negligently and carelessly omitted to give notice or warning to plaintiff and others that they were about to do said blasting." The plaintiff in error, on the first trial of the cause, testified as follows: "There was about twenty-

five or thirty passengers going up the stream, and I was going down, and the time of the hubbub of the people getting off the boat there was blasting at that time, so I understood. I heard some noise, and went in and sat down there, and the people went up the river." On the last trial of the cause he testified that after he had gone on board the boat, and had been there some 15 minutes, he heard some noise that sounded like blasting at a distance; but he admitted that his memory at that time was not very clear, and admitted also that he gave on the first trial the testimony above quoted. If he heard the noise of blasting, and understood that blasting was going on when he went on board the boat, he had all the knowledge of the fact that blasting was going on that could have been conveyed to him by any form of warning that the defendants in error might have adopted. Indeed, the sound of the blasting itself was the best form of notice that could be given. I think the judgment of the Circuit Court should be affirmed.

JEFFERSON HOTEL CO. v. WARREN.

(Circuit Court of Appeals, Second Circuit. February 29, 1904.)

No. 101.

1. **FEDERAL COURTS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

In the federal courts the burden is on the defendant to prove contributory negligence alleged as a defense by the preponderance of the evidence.

2. **INNKEEPERS—GUESTS—BAGGAGE—DESTRUCTION BY FIRE—FAILURE TO SAVE—EVIDENCE.**

In an action by a guest against an innkeeper to recover for baggage destroyed by fire while in the room which the guest was occupying, evidence held to authorize the submission to the jury of the question whether such guest was guilty of contributory negligence in failing to take measures to save the property before its destruction.

3. **APPEAL—EVIDENCE—FAILURE TO OBJECT.**

Evidence admitted without objection at the trial cannot be objected to on appeal.

4. **INNKEEPERS—DESTRUCTION OF BAGGAGE—INSTRUCTIONS.**

In an action against an innkeeper for baggage of a guest destroyed in his room by fire, an instruction that the guest had a right to rely to a large extent on statements made to him by the clerks and employés in the hotel, so far as the statements related to matters under their control, and that he had a right to rely on their statements as to the extent of the fire, not fully as experts, but within the bounds of reason, if under the circumstances he was justified in paying attention to their statements, etc., but that such statements would not exonerate him from the exercise of his intelligence, was not objectionable, as authorizing the guest to rely exclusively on such statements.

5. **SAME—EVIDENCE—STATEMENT OF CLERK.**

In an action for the destruction of a guest's baggage in a hotel fire, evidence that, on the guest complaining to the clerk that he did not desire a room as high as the fourth floor, the clerk assured him that the hotel was fireproof, was admissible.

6. **SAME.**

Where, in an action for loss of a guest's baggage in a hotel fire, the court had previously charged that plaintiff was not entitled to rely on statements made by people in the hall of the hotel, who were not officially connected therewith, as to the extent of the fire, an instruction that plain-

tiff was not justified in relying on any statements made by people in the hall, as they were only expressions of opinion, and not binding on the defendant unless the statements were made by servants of the defendant or persons in charge of the hotel, was not error.

7. APPEAL—REVIEW—NEW TRIAL—VACATION OF VERDICT—MOTIONS.

The denial of a motion to set aside a verdict and for a new trial in the federal court presents no question which can be reviewed by the Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the Northern District of New York.

On writ of error to the Circuit Court for the Northern District of New York, to review a judgment in favor of the defendant in error (plaintiff below) against the plaintiff in error (defendant below) for \$3,519.67, entered March 12, 1903, upon the verdict of a jury.

Frederick R. Kellogg, for plaintiff in error.

George B. Wellington, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts, briefly stated, are as follows: On March 28, 1901, the plaintiff below and his wife became the guests of the Jefferson Hotel at the City of Richmond, Virginia. They were assigned to room No. 418, upon the fourth floor of the hotel. The plaintiff objected to being located so high up on account of fire where-upon the room clerk, who stood behind the desk in the office, replied, "That is all right; the house is fireproof." The plaintiff replied, "Very well; I will go up." Soon afterwards the luggage of the plaintiff and his wife, consisting of four trunks and some hand bags, was taken to their room. The next night, March 29th, they retired about 10 o'clock. They were awakened by the odor of smoke in the room, which they supposed came from an open window. There was at this time some noise in the corridor outside the room. The plaintiff lay awake for some little time when he heard a man exclaim excitedly, "Bring an axe." At this he arose hurriedly and opened the door. There was a man, several bell boys and some trifling smoke in the hall. The plaintiff supposed that the man was the porter of the hotel. In answer to the plaintiff's question, "What's the matter?" the porter said, "There has been a fire in one of the rooms and it is entirely under control now." Another man who was standing there said, "It is all right." The plaintiff asked, "Are you sure there is no danger?" and he said, "No; there is none; it will not be necessary to remove your things; don't get excited." There was no smoke in the plaintiff's room, but after a while some one knocked at the door and said, "The smoke is getting very thick, you had better get out." The plaintiff opened the door, found that the smoke was increasing and asked the person who had knocked if there were any danger. This person replied, "No, but the smoke is pretty thick and it will be disagreeable." The plaintiff and his wife dressed hurriedly and went to the room of Mrs. Warren's maid, some two hundred feet away, in the same corridor. After leaving Mrs. Warren at this room the plaintiff went back to his own room and locked the door; the trunks had previously been locked. He re-

turned to the maid's room and remained there for eight or ten minutes when all three went downstairs. After remaining downstairs a few minutes and observing that people were coming down, some with their hand luggage, the plaintiff went back to the maid's room and brought her trunks downstairs. At this time the smoke was so dense in the corridor towards the plaintiff's room that he did not make any attempt to go there believing it to be unsafe. That part of the hotel in which the plaintiff's room was located was burned and his luggage was destroyed. The action is to recover the value of the lost luggage.

No question is here argued as to the negligence of the defendant. For the purpose of this review the defendant's negligence is admitted and the testimony bearing thereon has not been incorporated in the record. It is argued, however, that the contributory negligence of the plaintiff is established as matter of law and that the court should have directed a verdict for the defendant upon this ground. We are clearly of the opinion that the trial court was right in submitting this question to the jury and especially so in a tribunal where the burden rests upon the defendant to establish the plaintiff's negligence by a preponderance of evidence. *Inland & Seaboard Co. v. Tolson*, 139 U. S. 551, 557, 11 Sup. Ct. 653, 35 L. Ed. 270; *Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78.

We think the fundamental error in defendant's contention is the implied assumption that the plaintiff and defendant stood upon equal terms as to knowledge of the conditions existing on the night of the fire and that the former knew, or should have known, that danger was imminent from the very first alarm. If we start with the assumption that the plaintiff knew that the fire started in the room directly opposite his own, that it was never under control, that the hotel was not fireproof and that the persons who assured him of safety had no knowledge of the facts, there would be great force in the argument that his fault contributed to the loss he sustained. Such assumption is, however, not in accordance with the testimony. The plaintiff's conduct should be viewed in the light of existing facts. He was called upon to act only as a prudent man would act in such circumstances. He was a stranger in a strange hotel; he was awakened at night by an alarm of fire; he had previously been assured that the hotel was fireproof. On coming out into the corridor he was told by persons, apparently in authority, that there was no danger and that the fire was out or completely under control. He was requested not to get excited and create a disturbance as it might cause a panic among the other guests. When the plaintiff finally became convinced that the danger was serious the smoke was so dense that he did not deem it prudent to attempt to reach his room. Would the court have been justified in holding as matter of law that it was incumbent upon the plaintiff, the moment he was informed that there was a fire somewhere in the house, to begin the removal of the four trunks from the fourth story to the street? It is thought not. The theory that the plaintiff was not justified in giving any credence whatever to the statements of the persons in the hotel corridors until he had instituted an investigation to ascertain the nature of their employment, and whether they possessed expert knowledge on the subject of fires, is too tech-

nical and refined for application to the ordinary affairs of life. The defendant's argument might with great propriety be addressed to the jury and had they found a verdict for the defendant on this issue it would not have been set aside as against the evidence. But the question on the proof is one of fact and not of law and was properly submitted to the jury.

The proposition that the representations made by persons in the hotel corridor that the fire was under control and that there was no danger, were inadmissible, is disposed of by the fact that they were received without objection or exception.

But it is argued that the plaintiff was not permitted "to rely exclusively" upon these statements and having done so his conduct is conclusive evidence of negligence. It is said that this point is presented by exceptions taken to various requests to charge made by the defendant.

The fifteenth request fully discloses the position of the court in this respect. It is as follows:

"That a hotel guest, in an emergency caused by an accidental fire, is not justified in remaining quiet and making no effort to himself save his property by his reliance upon a statement alleged to have been made by some other person or persons, whether servants of the hotel or not, to the effect that no danger existed, as such statements are mere matters of opinion and there is no duty resting upon a hotel keeper or his servants to give opinions on such subjects to their guests; and moreover, as such an opinion, in order to be accurate, would call for special experience and knowledge as to the nature of fires and danger from them which a hotel keeper and his servants do not ordinarily possess and are not ordinarily expected to possess.

"The Court: I cannot so charge. It is my duty to say that the guests in a hotel have the right, in the exercise of intelligence and due care, to rely to some extent and to a large extent, under ordinary circumstances, upon the statements made to them by the clerks and employees in the hotel attending to certain parts of the business, so far as the statements relate to the matters under their control. They are there for that purpose among others. And when it comes to a question of fire, and what the conditions are, the guest has a right to rely upon what they say to some extent, not fully, not as experts, but still what they say to the guests within the bounds of reason and common sense, the guests are protected in paying attention to, if under all the circumstances of the case the jury believed they were justified in paying attention to what was said to them. It does not, however, exonerate the guest from the exercise of his intelligence. But it is for the jury to say whether the plaintiff was negligent, considering all the circumstances, in paying attention to and relying upon the statements of this nature."

It will be observed that this is a very different proposition from the one stated above. The court instructed the jury not that the plaintiff had a right to rely exclusively upon the statements of employes but only to some extent and within the bounds of reason and common sense. We think the instruction is not open to the defendant's criticism.

There was an exception to the admission of the statement of the clerk as to the fireproof character of the hotel, but it does not appear to be relied on in the defendant's briefs. In any view we think the testimony competent within the following authorities: *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1048; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *The Normannia* (D. C.) 62 Fed. 469, 479.

The defendant lays particular stress upon the exception to the court's refusal to charge the twenty-ninth request, which was as follows:

"That the plaintiff was not justified in relying on any statements made by people in the hall, as they were only expressions of opinion and not binding on the defendant. The Court: I so charge, unless the statements were made by servants or defendant or persons in charge of the hotel."

In the assignment of errors the language of the court is quoted thus: "I so charge, unless the statements were made by servants or persons in charge of the hotel."

The difference is apparent. It is not improbable, however, that the word "or" as it appears in the bill of exceptions is a typographical error and should be "of," so that the charge should read:

"I so charge, unless the statements were made by servants of defendant or persons in charge of the hotel."

This is the view most favorable to the defendant and we shall regard the charge as so amended.

It is insisted that this charge was grave error and was tantamount to saying that the plaintiff was justified in relying upon any statements, even though expressions of opinion, made by servants or persons in charge of the hotel, as binding on the defendant. It must be remembered that this was one of, at least, 32 requests which the court was asked to consider after he had already covered almost every conceivable phase of the controversy by his previous remarks. The language in question must be construed in the light of the testimony and of the instructions already given. The jury were distinctly told that the plaintiff was not permitted to rely upon statements made by people in the hall who were not officially connected with the hotel. So far the charge was highly favorable to the defendant. The court then proceeded to qualify the broad statement by saying that the plaintiff was justified in relying upon statements made by defendant's servants or persons in charge of the hotel. So that in order to make the qualifying words applicable the jury were required to find that the statements came from such servants. In other words, the practical result of the instruction was that if the jury believed that the person who gave the first assurances of safety was the hotel porter, the plaintiff was justified in relying upon his statements, but not upon the statements of any other person. As before observed the court had previously cautioned the jury that the plaintiff was not permitted to place implicit reliance upon these statements, but that they might be considered to some extent as bearing upon his conduct.

The denial of the motion to set aside the verdict and for a new trial presents no question which this court can consider. *Central Vermont R. Co. v. Bateman*, 75 Fed. 1021, 20 C. C. A. 679.

The judgment is affirmed, with costs.

NETHERLANDS-AMERICAN STEAM NAV. CO. v. DIAMOND.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 91.

1. SHIPPING—SERVANTS—INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action against the owner of a vessel for injuries to a servant of an elevator company, caused by his falling into the hold, as the result of the insufficiency of light, after the vessel's hatches had been closed, evidence held to authorize the submission of the question of defendant's negligence and plaintiff's contributory negligence to the jury.

2. SAME—ASSIGNMENTS OF ERROR—EXCEPTIONS—NECESSITY.

An assignment of error not supported by an exception cannot be reviewed.

3. SAME—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where plaintiff was directed to go into the hold of a vessel, in order to trim grain, which had been loaded therein, and the vessel's servants, with knowledge that plaintiff had gone into the hold, and needed the light which came from the open hatches, and after being requested not to close the same, did so, without answering such request, and plaintiff was thereafter precipitated into the hold, by stepping on a misplaced bin cover, while groping his way in the dark with his shovel in front of him, requested instructions which ignored such evidence, tending to show that defendant had negligently placed plaintiff in a position of peril, and which assumed that what plaintiff did constituted contributory negligence as a matter of law, were properly refused.

4. SAME—PARTICULAR ACTS.

Where, in an action for injuries to a servant of an elevator company by falling into the hold of a vessel, the court sufficiently stated the rule to be applied by the jury in determining whether or not plaintiff had been guilty of contributory negligence, the court was not bound to give requested instructions directing the jury's attention to plaintiff's particular acts bearing on such question.

5. SAME—MODIFICATIONS.

Where a servant of an elevator company was injured by falling into the hold of a vessel, alleged to have resulted from the negligent shutting off of the light from the hatches by the seamen, a requested instruction that defendant was entitled to close its hatches in the rain, and was not at fault for having no light in the tank or on the orlop deck, and was not bound to furnish electric light for the elevator company's men, was properly modified by adding that such right to shut off the light was to be considered with reference to defendant's relation to plaintiff while using the hatch light as bearing on the question of defendant's negligence.

6. SAME—FELLOW SERVANT.

Where the superintendent of an elevator, who had charge of the loading of a vessel, testified that he had no control over the vessel's men, and denied that he gave any directions or requested the hatches to be closed, and only a single witness testified that the superintendent wanted to cover up the hatches on account of the rain, and that witness ordered it to be done, but did not testify that the superintendent ordered the hatch covered so as to exclude the light, which could have been prevented, it was not error for the court, in an action for injuries to a servant of the elevator company caused by the shutting off of the light by the closing of the hatches, to refuse to charge that, if the jury believed that the seamen

¶ 6. Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Canadian Pac. Ry. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

covered the hatch by direction of the elevator superintendent, plaintiff could not recover on the ground that, if the act in so doing was negligent, it was the negligence of plaintiff's fellow servant.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here on writ of error from a judgment in favor of plaintiff for \$3,000 damages, rendered on a verdict of a jury in an action tried in the United States Circuit Court for the Eastern District of New York.

Henry G. Ward, for plaintiff in error.

James C. Cropsey, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Prior to the accident in question the plaintiff in the court below, a servant of the International Elevator Company, had been engaged on a canal boat shoveling grain, which was to be transferred to defendant's steamship. He was directed to go into the port bin of the ship's hold in order to trim the grain. There were two of these bins, a starboard and a port bin, located under the orlop deck. The upper, between, and orlop decks were reached by a series of ladders located at the starboard forward corner of the hatchway known as No. 3. Ladders also led down from the orlop deck into each of said bins through the openings therein. The size of these openings was about 7 by 9 feet.

When plaintiff approached hatchway No. 3 to descend into the hold it was raining slightly, and defendant's servants had begun to put on the covers of the hatchway, but four sections of said hatch covers, at the forward end where the ladder was located, had not been put on. When the hatches were off there was light enough to enable the men to pass up and down the ladders in the course of their work. On the deck alongside said hatchway were lanterns for the use of the men when necessary.

The light was sufficient for plaintiff's requirements when he started down the ladder, followed by one McGoldrick. He noticed, however, that defendant's servants were putting on the hatches, and he heard McGoldrick ask them whether they wanted to kill the men. When he reached the orlop deck there was barely light enough to enable him to see his way across to the wing on the port side, where, in accordance with a prevailing custom, he was to leave his shirt. As he was pulling it over his head the last of the light had disappeared. He started to find one of the ladders, feeling his way by pushing his shovel in front of him. While so doing he stepped on the bin cover, which was projecting over the edge of the bin opening, the cover tipped down, and he fell into the hold, sustaining serious injuries.

The exceptions challenge the propriety of the refusal of the court to direct a verdict for defendant, on the ground that the evidence failed to show negligence on the part of the defendant, and conclusively established contributory negligence on the part of the plaintiff.

The sole negligence complained of consisted in the act of closing the hatchway while plaintiff was descending the ladder. The evidence was uncontradicted that repeated requests were made to the ship's men not to put on the hatch covers at that time, as the light was needed below. On this point the court charged the jury, *inter alia*, as follows:

"The ship was under no obligations whatever primarily to furnish a light to the elevator's men, and under no primary obligations to furnish a light to this plaintiff, but the plaintiff's own master was bound to furnish him with artificial light. The plaintiff had a right, however, to use the light passing through the hatch while it was shining there. And while the ship had a perfect right to cover up the hatch when the rain came on, it had no right to close up the hatch provided the persons in charge knew, or had reason to know, that the plaintiff was relying upon the light to make his way down into the ship.
* * *

"If the ship wanted to close up the hatch, it was the duty of its servants to use reasonable care to do it in such a way that the plaintiff would not be injured, provided the plaintiff in good faith was relying upon that light to go down.
* * *

"Of course, if, when Diamond came to this place, these men said to him, 'This light is going to be shut off, we are going to close this right up,' and they said this by word or action, so that he had full and fair and reasonable notice of it, and he went down, then he took his own chances. But if he went down using the hatch as other men were entitled to use it when it was not covered, and the men were asked to leave off some of the covers, and if he had a right to believe that they would leave them off until he had a fair chance, a reasonable chance, to get into the lower hold, then, if they didn't use due care, ordinary care, in withholding the hatches until he had a fair chance to get down into the hold, the defendant is guilty of negligence, and it is for you to say whether the plaintiff did or did not have this notice. If he did not have it, it is for you to say whether the defendant did exercise the proper care to give him a fair chance in the amount of light delivered and for a sufficient time to allow him to get down there.
* * *

"You will take into consideration, in determining the question of the defendant's negligence in closing up the hatch, what a man of ordinary prudence would expect the plaintiff would be confronted with as he went down. For instance, it is alleged here that this cover was off the hatch on the orlop deck. It was not negligence to lift that cover off the hatch. It is alleged that the cover projected over the hatch. It was not negligence on the part of the defendant to allow the cover to project over the hatch. But, if it was projecting over the hatch, then you are to consider, as bearing on the question of the defendant's negligence, whether a man of ordinary prudence, stationed there and having this plaintiff in charge, would not have thought, 'If I close up this light the plaintiff must go down so many ladders, he must make such arrangements as he is entitled to go down into the lower hold, and there is the hatch cover resting over the hatch opening, and he may tumble over that, be precipitated over that, and carried down into the lower hold.' That question of the hatch cover is merely an incident here; it is not the main question to be decided, but it is an incident which a man of ordinary prudence would take into consideration in determining the danger of closing up the hatches before the plaintiff could reach his destination."

These excerpts from the charge show the theory on which the court rightly submitted the single question involved as to defendant's negligence to the jury. The argument of defendant's counsel is that plaintiff knew, or had reason to know, that the hatches were to be put on immediately, because the men continued to put them on after plaintiff started to descend; that plaintiff, therefore, assumed the risk; and that what he afterward did, and not the closing of the hatchway, was the proximate cause of the injury. But the uncon-

tradicted evidence of plaintiff and of his companion, McGoldrick, is to the effect that when they asked the men not to cover up the hatches until they got down the men made no reply. The plaintiff had, at least, quite as much right to assume that defendant's servants would leave off hatches sufficient to furnish him light as to suppose that they would put him in a position of peril by shutting off all light, especially when no necessity was shown for their doing so. In these circumstances, the court in its charge having fully discussed the relevant evidence, accurately stated the respective rights and obligations of the parties, and properly left to the jury the question whether the defendant acted with a reasonable regard to said rights and obligations.

Defendant's exception to the refusal of the court to direct a verdict in its favor on the ground of plaintiff's contributory negligence is based on two grounds. Defendant's counsel argues that even if it be assumed that plaintiff, being confronted with a sudden emergency, acted properly in attempting to grope his way to the bin opening, the position was one of his own choosing, because he had elected, after timely warning from the impending hatch cover, not to go back and get a light, or that, if he was not in a position of emergency, he was grossly negligent in not guiding himself back to the ladder by the bulkhead, along which he had just come, or in not waiting for McGoldrick to come down.

The first contention was properly left to the jury, under appropriate instructions, as appears by the portion of the charge quoted above and by other portions not quoted. The other contention overlooks the fact that the jury must have reached the conclusion that plaintiff was placed in a perilous position through the negligence of defendant, or otherwise they would have rendered a verdict in favor of defendant. Defendant's negligence having been thus affirmatively found in this regard, the rule of law must be applied that one who, by his negligence, places another in a position of peril, cannot relieve himself from liability by showing that the other committed an error of judgment.

It is by no means clear that plaintiff was guilty of negligence in proceeding slowly, pushing his shovel in front of him, along the deck toward the bin where he had been ordered to go. There would have been no danger in this course if the cover had not projected over the opening in the bin, a condition which the plaintiff could not be presumed to anticipate.

In any event, questions of proximate cause and reasonable care, especially in cases involving the claim of contributory negligence, are peculiarly for the jury, to be determined under proper instructions from the court, according to the circumstances of the particular case. *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 558, 11 Sup. Ct. 653, 35 L. Ed. 270; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Baltimore & Ohio Railroad Co. v. Griffith*, 159 U. S. 603, 611, 16 Sup. Ct. 105, 40 L. Ed. 274.

The twelfth assignment of error is directed to a portion of the charge quoted above, and furnishes no ground of exception when read in connection with the rest of the charge.

There is no exception to support the thirteenth assignment of error.

Error is further assigned to the refusal of the court to charge, as requested by defendant, as follows:

"First. If the jury believe the plaintiff could have obtained a lantern if he had asked for it, and yet moved about on the orlop deck in the dark, he cannot recover in this case because there was no light or insufficient light there.

"Second. If the plaintiff knew the general disposition of the orlop deck when he fell, he assumed the risk of moving about on it in the dark.

"Third. If the plaintiff did not know the general disposition of the orlop deck when he fell, then it was contributory negligence on his part to move about on it in the dark.

"Seventh. If the plaintiff, with knowledge that the upper hatch was covered and that there was no light, or insufficient light, on the orlop deck, undertook to find and descend into the deep tank, he cannot complain of this condition of things."

These requests ignore the evidence tending to show that defendant had negligently placed plaintiff in a position of peril, and assume that what plaintiff did in the dark necessarily constituted such contributory negligence as would preclude recovery. The plaintiff's testimony as to what occurred is as follows:

"I looked around, and I didn't know what to do, I didn't know how long I would be there. I got my shovel out in front of me, and started over for the ladder, either to go up and get a light or to go down in the hold. I started on, feeling my way the best way I could, and in as safe way as I could, and I went in the hold. * * * I was walking slowly with my shovel in front of me, going on trying to find my way as best I could, until I got struck and fell right into the hold."

Even if the jury had found that defendant was not negligent, it was for them to determine whether a man of ordinary prudence, not knowing or having reason to assume that a cover was sticking out over the opening in the bin, would have acted as plaintiff did, in view of all the circumstances. In any event, as the charge of the court on this point sufficiently stated the rule to be applied, the court was not bound, by directing the attention of the jury to particular acts, to divert their minds from the view of the whole situation in the light of all the surrounding circumstances. *Erie Railroad Company v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Pennsylvania Railroad Co. v. Palmer* (C. C. A.) 127 Fed. 956.

At the close of the general charge the court further charged the defendant's fourth, sixth, and ninth requests, to the effect that defendant had the right to close its hatches in the rain, and was not at fault for having no light in the tank or on the orlop deck, and was not bound to furnish electric light for the elevatormen, but added that said rights to shut off the light were to be considered with reference to its relation to the plaintiff, while using the hatchway light, as bearing upon the question of defendant's negligence, under the rules previously stated in its charge. The defendant excepted to said modification. That said modification was properly made appears

from the foregoing discussion. The exceptions to said modification must therefore be overruled.

Exception was also taken to the refusal of the court to charge defendant's eighth request, which was as follows: "If the jury believe that the defendant's servants covered the hatch by the direction or at the request of the superintendent of the elevator, then the plaintiff cannot complain of its doing so, even if it were negligent, because it would be the negligence of a fellow servant." The superintendent stated that he had no control over the ship's men, and denied that he gave any such direction or request. The single witness who testified as to any such directions stated that the superintendent wanted to cover up the hatch on account of the grain, and that he, the stevedore, ordered it to be done. But he does not state that the superintendent ordered the hatch so covered as to exclude the light—there was another way of covering the hatches with a tarpaulin, which was often employed, and which permitted the light to shine through—and it does not appear that the defendant's servants, in thus shutting out the light while plaintiff was descending, acted under his supervision or directions. The exception is overruled.

The judgment is affirmed.

In re THOMPSON.

In re MURRAY.

(Circuit Court of Appeals, Second Circuit. February 1, 1904.)

No. 60.

1. **BANKRUPTCY—JURISDICTION OF COURT—PROCEEDING AGAINST ASSIGNEE.**

A court of bankruptcy has jurisdiction to require an accounting from an assignee for creditors of a bankrupt, under an assignment which constituted an act of bankruptcy; and where he appears and submits his account, and enters upon a hearing without objection, the court does not lose jurisdiction to require him to turn over the property to the trustee because he asserts title to a part of such property in himself.

2. **SAME—CHattel MORTGAGE—EXTINGUISHMENT OF LIEN.**

Where a chattel mortgagee of a bankrupt, prior to his bankruptcy, but after he had made a general assignment, accepted a part of the mortgaged property in full satisfaction of his debt, his lien on the remainder is extinguished, and he cannot thereafter transfer it to one of the other creditors to the exclusion of others.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

For opinion below, see 122 Fed. 174.

This is a petition by Herman R. Murray, individually and as assignee of William Thompson, the bankrupt above named, for a review of an order made herein by the District Court of the United States for the Southern District of New York, on the 27th day of March, 1903, modifying an order made herein by the referee in bankruptcy, dated February 20, 1903, affirming said order, as modified, and directing the petitioner to pay over to Isaac C. Wilson, trustee, the sum of \$5,756.60, being the value of certain personal property alleged to have been wrongfully appropriated by the petitioner, as assignee in state insolvency proceedings of said William Thompson, bankrupt. The bankrupt,

a livery stable keeper in New York City, made a general assignment for the benefit of creditors to Herman R. Murray on November 27, 1900. On December 4, 1900, a petition in involuntary bankruptcy was filed against him. On December 26, 1900, an adjudication was made, and on February 26, 1901, Isaac C. Wilson was elected trustee. On March 4, 1901, the trustee procured an order from the district judge requiring that Murray forthwith deliver to the trustee all books, papers and documents in his possession relating to the estate, and that he present to the court an account of all moneys and properties received by him belonging to the bankrupt and thereupon deliver and pay over to the trustee such properties and moneys as the court should direct. Upon the return of the order the district judge referred the matter to the referee in charge and thereafter the parties appeared before the referee and Murray presented an account of receipts from book accounts and of disbursements. Proceedings were thereupon continued from time to time and resulted in the order as stated above.

At the date of the assignment there were upon the bankrupt's property certain chattel mortgages as follows:—

First:—A mortgage to Fiss, Doerr and Carroll on which there was due \$400.

Second:—A mortgage to Hincks & Johnson, dated January 21, 1899, covering substantially all the property the bankrupt then had in the business, to secure the sum of \$48,757, there being due thereon at the date of the assignment about the sum of \$29,150.

Third:—A mortgage dated January 21, 1899, to Herman R. Murray to secure the sum of \$4,625 covering 21 horses, 20 sets of harness and a motor car.

Murray was permitted to hold all the property covered by his own mortgage and the Fiss, Doerr and Carroll mortgage which he had purchased, but was not permitted to hold the property covered by the Hincks & Johnson mortgage, which was not taken by that firm.

Murray voluntarily appeared on the accounting and submitted to the jurisdiction of the court. The accounting proceeded to the end without objection. It is stated in the decision of the referee that the question of jurisdiction was raised on the argument, but it does not elsewhere appear in the record that the objection was taken at the hearing before the referee. The authority of the referee to make the order was challenged at the hearing before the district judge, but as the latter adopted the findings of the referee and entered an independent court order the authority of the referee to make the order is no longer in issue. His order was merged in and superseded by the subsequent order of the court.

In the petition to this court for review the objection is asserted for the first time that the District Court, sitting as a court of bankruptcy, was without jurisdiction to enter the order in question.

Other facts appear in the carefully prepared decision of the referee.

William J. Fanning, for petitioner.

Edward H. Wilson, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. It is manifest that the court had jurisdiction to compel the assignee under the void state assignment to render an account. *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. This proposition is not disputed. The petitioner, Murray, recognizing the authority of the court, appeared voluntarily before the referee, presented his account and gave testimony regarding it. Having once acquired jurisdiction of the proceeding the court did not lose it because the investigation took a wider range than the assignee expected or intended. His present contention, carried to its logical conclusion, is that the court acquired jurisdiction of those items which he chose to admit, but not of those which he chose to dispute, and that this jurisdiction was lost the moment he

asserted a claim of title in his individual capacity. If this contention were sustained an assignee for the benefit of creditors could, by the mere assertion of a colorable claim, paralyze the arm of the court of bankruptcy and defeat the intent and purpose of the law. It is asserted by the counsel for the trustee that since the amendments of 1903 the District Court has jurisdiction of any action or proceeding which the trustee may hereafter institute if the petitioner's present contention be upheld, and that a reversal of the order, while subjecting the parties to the expense and delay of retaking the testimony, will be absolutely inconsequential for the reason that the same result must inevitably be reached in the new proceeding. Whether this contention be well founded or not we do not decide, but the possibility that it may be furnishes an additional reason why a decision reached after such careful consideration should not be overthrown. The petitioner was accorded the fullest opportunity to establish his defense, every fact bearing upon the controversy is now before the court and even though the question were involved in greater doubt than it is it would seem to be the duty of the court to resolve it in favor of jurisdiction.

Upon the merits we are of the opinion that the conclusions of the referee, adopted and affirmed by the district judge, are correct. The assignment under the state law was itself an act of bankruptcy and was void. Murray got no title superior to the title of the trustee by virtue of such assignment. His right to hold the fund in controversy is founded solely upon an alleged gift, or transfer to him by the firm of Hincks & Johnson as mortgagees. Murray was a member of this firm, but the firm saw fit, acting through its senior partner, who had authority to bind the copartnership, to accept part of the mortgaged property in full satisfaction of the debt. After the assignment Hincks & Johnson took, under their mortgage, between 50 and 60 carriages and they were sent by the assignee to the factory of the firm at Bridgeport, Conn. The firm waived all claim to the other property, horses, harness, etc., covered by the mortgage. Of this there can be no doubt. Mr. Hincks testified:

"I do not know what became of the property other than the carriages. We had nothing to do with it at all. I told Mr. Murray that I didn't care to bother with horses or property of that kind, and the assignee took it. The firm of Hincks & Johnson made no claim to 119 horses that were covered by this chattel mortgage. We had nothing to do with the horses or other property, except the carriages. I don't know what became of those horses. I suppose they were sold by the assignee. We waive all claim to all of that property. We never claimed to take that property, we never had any property except the carriages at any time. With reference to the horses and all the other property that appears in the mortgage we waive all claim, they haven't come into our possession at all, and we don't assert any claim and we never shall. Don't understand me as waiving any rights of Mr. Murray. I am speaking now for myself and Mr. Johnson. I don't know that I ought to speak for Mr. Murray; but as an entity the firm of Hincks & Johnson, those don't enter into his assets at all. They are waived by that firm."

Subsequently Mr. Hincks was recalled and attempted to explain this positive testimony of an unqualified release, reiterated again and again, by the assertion that he meant to testify that he told Murray "that if he would turn over the carriages to us without expense that

he was welcome to whatever rights we had in the miscellaneous property, horses, carriages, etc. That he might apply that property towards satisfying any deficiency on his mortgage." The District Court was at liberty to reject this explanation as an afterthought and as incompatible with the previous testimony of the witness, but assuming it to be true it does not justify the course of the petitioner in applying the property in payment of his individual mortgage. Hincks & Johnson, the mortgagees, made no claim to the mortgaged property other than the carriages. These they accepted in full satisfaction of their claim. In legal contemplation it was as if they had received a sum of money in full payment of the mortgage. When their mortgage was satisfied the property covered by it ceased to be theirs or under their control. It did not pass to other mortgagees, whose mortgages did not include it, but to the assignee to be divided among the creditors and, in case of bankruptcy, to the trustee. Hincks & Johnson might have had the property sold and the proceeds applied on their debt; they might even have transferred it to Murray, as a member of the firm, to dispose of for their benefit, but this they did not do. After the firm debt was extinguished they attempted to exercise dominion and control over the property and transfer it to one of the bankrupt's creditors to the exclusion of all the rest. Hincks & Johnson unquestionably had the right to make their debt good out of the mortgage property, but when this had been done the firm's interest ceased and the property under the provisions of the bankruptcy act, passed to the trustee for the benefit of all the creditors.

The order is affirmed with costs.

THE PHILLIP MINCH.

(Circuit Court of Appeals, Sixth Circuit. February 17, 1904.)

No. 1,228.

1. COLLISION—STEAMER AND PASSING TOW.

As a steamer with two barges in tow, each on a line about 500 feet long, was passing up the Detroit river in the daytime, about 800 feet from the Canadian side, and when she was about opposite a dock on that side, the steamer Minch, which had been coaling there, swung out and started slowly across the river, her head diagonally upstream. She continued to move slowly until she struck the rear barge about amidships. When she was some 200 feet ahead of the barge, and 50 to 75 feet on her starboard side, the helm of the barge was starboarded 1 or 1½ points; and immediately before the collision, and when it was inevitable, the helm was put hard aport to lessen the blow. *Held*, that the collision was due to the gross fault of the Minch, and that the barge could not be charged with contributory fault because she did not put her helm hard astarboard, since she had the right to expect the steamer to keep off to a safe distance, and for the further reason that there was a vessel with a tow passing down on the other side, and there was danger that the current might take her into them.

2. SAME—CONTRIBUTORY FAULT—BURDEN AND MEASURE OF PROOF.

It is not enough, when the negligence of one vessel is great, to condemn the other to a division of damages, that the question is a close one as to

whether she might not have done something she did not do to avoid the consequences of the other's negligence; but the evidence that the situation required her to do more than she did must be clear and convincing, since all questions of doubt are to be resolved in her favor.

Appeal from the District Court of the United States for the Northern District of Ohio.

This is a case of marine collision. The accident occurred in the Detroit river, near a coal dock, on the Canadian side, at Sandwich, in the afternoon of a fine day in April, 1896. The steamer Thompson was bound up the river, having in tow two iron whaleback barges, known, respectively, as the "134" and the "104," both coal laden. The 134 was the first in the tow. The towlines were of the usual length, of about 500 feet each. When about one-half mile below the coal dock, passing signals of one blast were exchanged with the steamer George T. Hope, bound down, having in tow the schooner Fitzpatrick. When these signals were exchanged, the Hope was about as far above the Sandwich coal dock as the Thompson was below. At this time the steamer Phillip Minch was lying at the Gadfield coal dock, head upstream. The Minch, being bound down, had stopped at the dock to coal. As the Thompson, which was proceeding up, at about 800 feet out from the coal dock with her tow following well in her wake, was passing the dock, the Minch was noticed to be swinging out, her bow pointing somewhat diagonally across the river. The river at this point is about 2,000 feet wide. The movements of the Minch from this moment were closely watched by the passing tow. Both in fact and appearance, she maintained some headway up to the moment of the collision with the 104, which must have occurred within about three minutes from the time the Thompson came abreast of the coal dock. Her heading continued to be nearly across the stream. Her bow had a constant tendency to swing downstream with the current, which was about 2 or 2½ miles per hour. But her headway was enough to hold her against this current, and to slowly make headway out into the stream. So slight was this headway out into the stream, that, when the barge 134 came up abreast of her, the Minch was still abreast of the middle of the coal dock, and about midway of the distance between the 134 and the dock. When the 134 had passed, and the Minch was heading about midway the towline between the two barges, the wheel of the 104 was starboarded a point. But the slow movement of the Minch did not stop, and, when the 104 came abreast, she was not more than 20 feet off her starboard side. A collision was then inevitable, and, for the purpose of lightening the blow, the helm of the 104 was put hard aport, with the intent to swing her stern to port, and thus convert the impact into a glancing blow. The collision which resulted was apparently a light one, and nothing more than a dent in the light iron of her sides was evident. Later it was discovered that her plates below the water line had been sprung so that she took water.

Harvey D. Goulder, for appellants.

Hermion A. Kelley, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The negligence of the Minch may well be regarded as gross and inexcusable. It is said for the Minch that, when she cast her head line off, the Thompson and her tow were nearly a half mile below, and the Hope and her tow an equal distance above, and that her purpose was to move up the river along the Canadian bank, and make her turn behind the Hope and her tow; that, after she had moved up alongside the dock a length, or nearly so, it was discovered that her steering gear would not work; that she was then stopped, and her steering engine found not to be connected with the steam. This

was remedied in a moment, and her movement up the river continued. It was plainly negligent to resume her voyage with her steam steering gear disconnected. This negligence was, however, remote, for her steering gear was properly connected by the time the Thompson came abreast, at which moment she seems to have resumed her movement by swinging her head away from the dock and heading across the stream. Before there was any apparent danger of collision the Minch was fully under control, and her conduct in continuing to run out into the river, with two tows passing, so far as to encroach upon the water which should have been left for them, is most unexplainable. The claim that she did not get her stern more than from 20 to 50 feet from the coal dock, and that the Thompson crowded in upon her without necessity, is not established. There is in this case the usual conflict between the evidence of the witnesses from the several crews as to the position of the Minch at the time of the collision, with reference to the dock. But we have no doubt at all but that the 104 was not less than 600, and probably 800, feet out from the dock at the time of the collision. This being so, the stern of the Minch was not less than 300 feet out from her dock, for her length was only about 275 feet. There was therefore abundant room for the Minch between the dock and passing tow to have waited for the tow to pass; or to back away when she found she was crowding over so far as to arouse even a suspicion of danger. It is said that she did back, and was backing when the collision occurred. But there was no occasion for going so near the path of the tow, and she began her efforts to retrieve her fault too late, for it is certain that she had not lost all of her headway when she struck the 104, for she ran into the barge about amidships, and gave, instead of receiving, the blow. We cannot escape the conclusion that the master of the Minch was either ignorant of the fact that he was encroaching upon the passing tow, or was indifferent to his duties under the circumstances. About her condemnation we have no doubt.

2. But it is said that the 104 did not do all that she could to avoid the collision, and should be condemned as contributing. This is an appeal to rule 28, which makes a vessel responsible for the failure to observe any precaution required by "the special circumstances of the case." To convict the barge of negligence, it is urged that the 104 did not starboard enough when she did starboard, and that, if she had put her helm hard over, instead of a point or point and a half, as she undoubtedly did do, the Minch would have cleared. But did "the special circumstances of the case," as they appeared, require any greater starboarding? When she starboarded, the Minch was about 200 feet above the bow of the barge, and some 50 or 75 feet on her starboard side—a position which, if maintained by the Minch, would have cleared without any starboarding at all. At that moment the Minch was apparently under full control, and she had in no way indicated that she was unmanageable. In fact, she was entirely manageable, and, if she had been then backed strong, would have undoubtedly cleared. About that time engine signals for backing were probably given. But as it turned out, they were ineffective

to stop her headway until too late. These engine signals were evidently given immediately before the collision. As the headway of the Minch continued, the helm of the barge was put hard aport as she came abreast of the barge in an effort to swing her stern away from the Minch and lighten the blow. But this was a movement in extremis. A collision was then inevitable. If the barge is to be condemned at all, it is because she did not put her helm hard astarboard, instead of only about half or two-thirds over. But there were two things to be considered before starboarding so far. There was the descending tow on her port side. The Hope had passed. Her tow, the schooner Fitzpatrick, was nearly abreast on her port side. Her master assisted his wheelsman in starboarding. Referring to the tow on his port side, he says:

"They had not passed us. That is one reason I took the wheel, being a dangerous place—helping the man at the wheel so she would not get the start of him and go over too far, so as to be in danger of the Hope and the Fitzpatrick."

There was also the possibility of a wide sheer to port if the current, against which the barge was contending, should catch her strongly on her starboard bow.

It is true that the master of the barge says that neither of these considerations controlled the question of his actual starboarding, and that he starboarded only a point or a point and a half because he did not think the situation required any greater starboarding in order to give the Minch room for clearing him. But whether he failed to put his helm hard astarboard because of the proximity of the descending tow or not, the fact that that tow was not more than 100 feet off his port side cannot be ignored. If it would have been imprudent to starboard more under the circumstances, then he is not to be condemned for starboarding only so far as he might prudently do, having regard to the dangers incident to such a course. There was no reason why the Minch should not be backed in order to avoid crowding or colliding with the tow. Every consideration of self-preservation, as well as duty to the passing tow, required that she should stop her headway in time to avoid collision. Every movement of the Minch from the time she left the coal dock justified the presumption that she was lying in the river, waiting for the tow to pass. So slight was her headway then that many of the witnesses describe her as having no headway, and as "sagging" or "drifting," and others say she was "lying still." Among the latter are some of the witnesses from her own crew. It is clear, however, that she did have some headway, and was still slowly moving out toward the tow, and had not lost all the headway when she hit the barge.

The master of the 104, Capt. Leonard, impresses us as giving a fair account of the situation immediately preceding the collision in the following questions and answers:

"Q. Could you form any estimate as to about how far the 134 passed from the bow of the Minch? A. Well, I should say between 100 and 150 feet. Q. Up to that time you may state whether the Minch had been moving otherwise than by simply swinging down stream. If so, how? A. Yes, sir; she was forging ahead all the time. Q. Did you notice her wheel—whether it had been in motion at all before that? A. No, sir; not in particular. Q. At this

time you say she had been forging ahead, had she had her stern moved out from the dock? A. Yes, sir. Q. At the time the 134 passed her, how far would you say her stern had moved out from the dock? A. Well, it would be fully as far—150 feet from the dock—as it was from 134. I suppose she was about midway from the dock and 134. Q. And still forging ahead? A. Yes, sir. Q. Diagonally up the river all the time? A. Yes, sir; and swinging a little down all the time. Q. Now, as 134 went by the Minch, and the Minch's bow got abreast of the towline between you and the 134, what did the Minch do? Did she continue to do anything? A. No, sir; not that I noticed, just only lying still, and we forging ahead all the time—I suppose, waiting until we passed by, so as to give her a chance to turn. Q. At the time, after she had got past the stern of the 134, did you anticipate any danger from her? A. No, sir. Q. And why? A. Well, I suppose that at a certain time when he thought it was necessary he would certainly back up his boat to avoid collision. Q. Was there anything, so far as you could see, to prevent his backing up his boat—anything in the river? A. No, sir. Q. And after the 134 had passed the bow of the Minch, and the bow of the Minch was along down abreast of the towline, what, if anything, did you do then? A. I thought he was waiting for us to pass, and I started at my wheel in order to give him all the room that I could. Q. Were you at the wheel at the time of that maneuver? A. Yes, sir. Q. You helped turn the wheel yourself? A. Yes, sir. Q. Did your boat's bow sway to port in obedience to that? A. Yes, sir. Q. How far to port? A. We had the 134 all the way from a point to a point and a half on our starboard bow. Q. At this time do you remember whereabouts the Hope and Fitzpatrick were? A. They hadn't passed by us. That is one reason I took the wheel, being a dangerous place, helping the man at the wheel so she wouldn't get the start of him and go over too far, so as to be in danger of the Hope and Fitzpatrick. Q. Supposing we say that you had put your wheel hard astarboard, did you anticipate that there might have been danger of your going over and getting mixed up? A. Well, I don't think that I could put my wheel hard astarboard, for I would have went into it. I had to give the Minch all the room I thought it was perfectly safe to do. Q. At the time you put your helm hard astarboard, did you then anticipate any danger of collision with the Minch? A. No, sir. Q. And why? A. I supposed when he saw it he would back his boat up, to avoid collision. Q. Where was the Minch when you first anticipated that he wasn't going to back up? A. She was right close onto us—within fifteen or twenty feet of us. Q. When you first realized or anticipated that there was danger of collision, what did you do? A. When I saw there was no way of avoiding collision—when he was pretty near amidships—I put my wheel hard aport, so as to swing her stern to port, to make the blow as light as I could. Q. At the time you put your helm hard aport, how was your boat heading, with reference to the 134 ahead of it? A. When I put my wheel to port she was heading still to port of 134. Q. About how much? A. A point to a point and a half. When I got her off as far as I could, I held her until I saw there was no possible way except for the Minch to come into us, and then I shifted my wheel. She was lying perfectly still until I shifted my wheel. Q. What would be the effect, then, upon your vessel's stern, of throwing your wheel hard aport when she was in that position? A. It would throw her stern to port. Q. Away from the Minch? A. Yes, sir. Q. Where did the Minch's bow strike your boat? A. About amidships. Q. You were at that time, I understand you, on the wheelhouse, after it occurred? A. Yes, sir; I was at the wheel. Q. State, to the best of your judgment, what the distance of the stern of the Minch was from the Gadfield coal dock at the time her bow struck the 104? A. I would say 500 feet. Q. You may state whether up to that time there was anything in the river, or anything apparent on board the Minch, or anywhere in that vicinity, which would indicate to you that there was any reason why the Minch could not back? A. No, sir. Q. I will ask you whether the Minch gave any danger signals, or any signals to indicate that she was disabled or could not back? A. No, sir. Q. And was there anything between her stern and the dock that you know of? A. No, sir."

The situation was one which was brought about by the gross negligence of the Minch. In such circumstances, it is not enough for

her to cast doubt upon the management of the barge. The burden is upon her to establish by clear and convincing evidence that the situation as the barge should have judged it was one which required her to at once put her helm hard over, instead of half over, as she did. *The Ohio*, 91 Fed. 547, 33 C. C. A. 667, 672; *The City of New York*, 147 U. S. 73, 84, 13 Sup. Ct. 211, 37 L. Ed. 84; *The Oregon*, 158 U. S. 187, 197, 15 Sup. Ct. 804, 39 L. Ed. 943; *The Victory*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 155, 42 L. Ed. 519; *The Umbria*, 166 U. S. 404, 409, 17 Sup. Ct. 610, 612, 41 L. Ed. 1053. In the case of *The Victory*, cited above, the court said:

"As between these vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymouthean* must be clear and convincing in order to make a case of apportionment."

In *The Umbria*, cited above, Justice Brown said:

"Indeed, so gross was the fault of the *Umbria* in this connection that he should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85 [13 Sup. Ct. 211, 37 L. Ed. 84], and *The Ludwig Holbert*, 157 U. S. 60, 71 [15 Sup. Ct. 477, 39 L. Ed. 620], that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

The circumstances were not such as to justify an apportionment of damages simply because the master of the barge judged that the *Minch* would take timely measures to avert a collision. The negligence of the master of the *Minch* in not observing his own unreasonable encroachment upon her course, or in not taking timely measures to stop his headway out into the river, is a sufficient explanation of the collision which ensued. *The Servia*, 149 U. S. 144, 153, 13 Sup. Ct. 817, 37 L. Ed. 681; *The Ulster*, 1 Mar. L. C. 234.

Whether the barge might not, with safety, have starboarded more than she did, and whether, if she had put her helm hard to starboard, the collision would have been avoided, may be close questions. Indeed, we may concede that the question is a debatable one, whether, under all the circumstances, she may not be regarded as in fault for not putting her helm hard astarboard, instead of halfway over. But it is not enough in any given case to say that the sequel shows that, if a particular thing had been done by the innocent vessel, the collision would have been avoided. "The question in all such cases is whether, in the exercise of due care and caution in the management of her at the time in any given case, such direction should have been given." *Williamson v. Barrett*, 13 How. 100, 108, 14 L. Ed. 68. Neither is it enough, when the negligence of the one vessel is great, to condemn the other to a division of damages, that the question is a close one as to whether she might not have done something she did not do to avoid the consequences of the other's negligence. The evidence that the situation was one which required her to do more than she did must be clear and convincing, for all questions of doubt should be settled in her favor. We do not think the evidence establishes a case which was so plain as to make it culpable negligence for the barge to presume that the *Minch* would not be guilty of the astonishing fault of deliberately running into the ascending tow, and that she should be condemned for presuming, under the

not sue in her own name without the intervention of a trustee or next friend. Without regard to the merits of this motion, such an objection cannot for the first time be taken upon appeal. *Rankin v. Warner*, 2 Lea, 302. No objection was taken below, and no error has been assigned. The motion is therefore denied.

He has also moved to dismiss her suit because her husband, the bankrupt, who was made party, did not answer, and no decree pro confesso was taken. This is equally untenable. No such objection was made below, and no error has been assigned because the court proceeded to a decree without a pro confesso against the bankrupt. As the bankrupt had scheduled the property sought to be recovered as his own, the legal title vested in his trustee, who did answer and defend. The bankrupt was therefore not an indispensable party to the petitioner's suit. A formal objection of this kind cannot for the first time be made in this court. *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 469.

The first error assigned is that the court erred in allowing Mrs. Estes' claim for rents and profits against the bankrupt, because the claim was not proved within one year after adjudication of bankruptcy, as required by section 57n, Bankr. Law (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]). One insurmountable objection to this assignment is that the date of adjudication nowhere appears in the transcript of the record. The counsel for appellee called attention to this defect in a printed brief bearing the file mark of November 24, 1903. This cause was not heard until February 8, 1904, yet no step was taken to supplement the transcript so as to show the date of adjudication. The presumptions are in favor of the correctness of the action of the court below, and if we are to reverse it must be upon a transcript which will affirmatively show the ground upon which the action complained of was taken. But if we assume that the formal proof of Mrs. Estes' claim for rents and profits, filed January 15, 1903, was not made until more than one year after date of adjudication, it does not appear, and it is not claimed, that her petition setting up her claim in the bankrupt proceeding was not filed within one year after the adjudication. It would be a narrow construction of sections 57 (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) and 57n which would not regard a claim so presented and litigated in the bankrupt proceeding as "proven" within the limitation of the section. A claim "proven" within the year is amendable after the lapse of the year, and the court below probably regarded her petition as a "statement under oath, in writing, signed by a creditor, setting forth the claim," etc., and therefore subject to amendment, to comply with the further formalities of section 57. In this the court did not err. *Hutchison v. Otis*, 190 U. S. 552, 555, 23 Sup. Ct. 778, 47 L. Ed. 1179.

The solicitors for the appellant, in their brief, present an argument against any allowance of the claim for rent, based upon the contention that Mrs. Estes permitted her husband to collect and hold and use these rents for his own purposes, without at any time objecting or calling him to account. The liability of the bankrupt to the petitioner for the rents collected as trustee was adjudged by the decree of Oc-

tober 15, 1902, and the only matter referred to the master was the amount of such rents. The decree of March 28, 1903, confirmed the report settling the amount. The appeal is from the last decree. This was the final decree, and a general appeal would undoubtedly open up all prior decrees of an interlocutory character. There is, in view of the terms in which this appeal was prayed and allowed, room for regarding the appeal as limited to the question of the amount of the rents collected by the bankrupt as trustee for his wife. But, waiving this, the effect of the rule requiring an assignment of error to be filed in the court below before the appeal is allowed operates in itself as a limitation of the appeal. No error was assigned which raises any question of the rightness of the decree below, holding that the petitioner was entitled to recover the tract of land she sued for, or the liability of the bankrupt to account to her as trustee for the rents he had collected on her land. Every error assigned, except the first, that the claim had not been proven within one year after adjudication, goes exclusively to the amount of rents collected. This is a fatal objection to the consideration of any other question.

The errors assigned from 2 to 9, inclusive, complain that the master and the court erred in respect to the amounts of rent shown to have been collected. This raises a question of the weight or sufficiency of evidence. The master and the court below concurred in the finding of facts, and when that is the case this court will not reverse or modify, unless a very plain mistake is definitely pointed out. *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Kiewert v. Juneau*, 78 Fed. 712, 24 C. C. A. 294; *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891.

The question was one peculiarly proper for an accounting, and we see no sufficient reason for disturbing the results reached below. Certainly no plain mistake of either law or fact has been pointed out. The result must therefore be the affirmation of the decree, which is accordingly ordered.

A. G. CORRE HOTEL CO. v. WELLS-FARGO CO.

(Circuit Court of Appeals, Sixth Circuit. March 25, 1904.)

No. 1,253.

1. LEASES—RENEWAL—COVENANTS—ESTOPPEL.

Complainant rented a storeroom, which constituted a part of a hotel, under a lease containing an option for renewal. Thereafter the entire hotel was leased to defendant, under a lease which expressly provided that it was subject to the existing lease on the store; the tenant attorning and paying rent to become due for the same to defendant, its successors and assigns. Complainant's lease was filed for record 4½ months after defendant's lease of the hotel was recorded, and defendant, without making any inquiry as to the covenants in complainant's lease, or examining the record, continued to accept rent from complainant for more than a year after complainant's lease was recorded. *Held*, that the clause in defendant's lease of the hotel, referring to complainant's lease, was a limitation of defendant's grant, and the estoppel created by such clause,

and confirmed by defendant's conduct in accepting rent from complainant after record of its lease, precluded defendant from denying complainant's right to exercise its option to renew.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

E. W. Strong and James J. Muir, for appellant.

C. B. Matthews, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The case grows out of the following facts: On December 2, 1896, the owners of the Gibson House Block, in Cincinnati, made a written lease of the storeroom and basement at No. 415 Walnut street, in said block, to the Wells-Fargo Company, the appellee, from January 1, 1897, to April 1, 1902, at a rental (payable monthly) of \$1,900 per annum, until April 1, 1898, and thereafter at \$2,000 per annum, until the completion of the term. The lease contained the following covenant:

"And it is further covenanted and agreed between the parties aforesaid that the party of the second part shall have the privilege of renewing this lease for an additional term of five years at \$2,000 per annum."

This lease was duly acknowledged by the parties in December, 1896, but not recorded until January 29, 1901. The appellee took possession of the leased premises on January 1, 1897, and has been in possession continuously ever since, paying the rent at first to the owners of the premises, and afterwards to the appellant, the A. G. Corre Hotel Company. In 1900 the appellant entered into negotiations with the owners of the Gibson House Block, through their attorney, Mr. Paxton, for a lease of the block. At this time, in addition to the lease held by the appellee, there was outstanding a lease for another storeroom in the Gibson House Block, on Walnut street, to the Atchison, Topeka & Santa Fé Railroad Company. Mr. Paxton testified that he wanted at first to except from the lease to the hotel company these two existing leases, retaining them for the estate; but the hotel company insisted on having the entire block, so the rental to be paid by it was increased by the amount of rental provided in these two leases. When he came to dictate the final proposition, the question of the existing leases came up. He made a search for them, but failed to find them. He knew that tenants were in possession, paying rent, and assumed they were there under some sort of leases, but did not know the terms. So, as he explained, in order to protect the Gibson heirs and avoid the necessity of a postponement to ascertain the precise terms of these leases, the following clause was inserted into the proposition (which was accepted) and the lease:

"This lease is subject, however, to the existing leases upon two stores front-on Walnut street; the tenants therein attorning and paying the rents to become due for said two stores to the lessee, its successors and assigns."

The lease to the appellant (containing the above clause) was dated July 2, 1900, and provided for a lease for the term of 10 years and 6 months, beginning July 1, 1900, and ending January 1, 1911, at a rental of \$32,000 per annum, payable in monthly installments, with the

privilege to the lessee of an additional term of 10 years, at a rental of \$39,000 per annum. This lease was duly acknowledged, and was recorded on September 11, 1900, 4½ months before the appellee's lease was left for record. The appellant entered into possession of the Gibson House Block on July 1, 1900, and thereafter collected from the appellee the monthly rental on its lease for the storeroom on Walnut street; the latter attorning to the former and paying its rent in accordance with the clause in the former's lease. On January 29, 1901, the appellee's lease was left for record, and thereafter, until April 1, 1902, the appellant continued to recognize the appellee as lessee, collecting the rent regularly as before.

On or about March 1, 1902, the appellee notified the appellant and the owners of the Gibson House Block of its election to renew its lease for the further term of 5 years in accordance with the clause quoted, whereupon the appellant repudiated the appellee's lease, claiming it had no knowledge of its contents, and that, not being recorded at the time its own lease was acknowledged and placed on record, the appellee's lease was fraudulent as to it. Possession of the premises being demanded and refused, the appellant brought an action in ejectment against the appellee, and the latter, having no defense except an equitable claim to a renewal of the lease, recovered a judgment. Thereupon this suit was brought by the appellee to compel the execution of a lease for the further term of 5 years, and to enjoin the appellant from enforcing the judgment in the ejectment suit. The court below rendered a decree as prayed for, from which an appeal has been taken.

The appellant relies upon section 4134 of the Revised Statutes of Ohio of 1892, which provides:

"All other deeds and instruments of writing for the conveyance or incumbrance of any lands * * * shall be recorded, * * * and until so recorded or filed for record, the same shall be deemed fraudulent, so far as it relates to a subsequent bona fide purchaser having at the time of purchase no knowledge of the existence of such former deed or instrument."

Counsel have discussed the question whether, in view of the open, continuous, and notorious possession by the appellee of the storeroom, and of the clause in appellant's lease reciting the existence of the appellee's lease, the appellant was, within the meaning of the statute, a subsequent bona fide purchaser, having at the time of purchase no knowledge of the existence of the appellee's lease. We prefer, however, to place our decision, not upon the knowledge of the appellee's lease, brought home to the appellant through open possession and the recital referred to, but upon the fact that the conveyance or lease to the appellant was by express terms made subject to the existing lease to the appellee. The clause operated as a limitation of the grant. There was no conveyance of the storeroom occupied by the appellee, except subject to its lease. So long as its lease should exist, the appellee was to attorn and pay rent to the appellant, and the extent of the conveyance was the substitution of the appellant for the Gibson heirs as landlord.

Paraphrasing the language of the Supreme Court of Ohio in *Coe v. R. R. Co.*, 10 Ohio St. 372, 406, 75 Am. Dec. 518, it was not in-

tended by the statute relied on to give to any lease, upon the ground of its prior record, an effect forbidden by the very terms of the lease itself. The appellant's lease is expressly made subject to the lease of the appellee, and according to the clear intent of the parties, expressed upon its face, can only operate subject to the terms of the lease to the appellee. The existence of the lease to the appellee, and, therefore, the rights under it, having been expressly recognized in the lease to the appellant, the appellant is estopped from questioning its validity. *Wagner v. R. R. Co.*, 22 Ohio St. 563, 581, 10 Am. Rep. 770. See, also, *Bercaw v. Cockerill*, 20 Ohio St. 166; *Bundy v. Iron Co.*, 38 Ohio St. 300; *Westervelt v. Wyckoff*, 32 N. J. Eq. 188; *George v. Kent*, 7 Allen, 16; *Tuite v. Stevens*, 98 Mass. 305; *Howard v. Chase*, 104 Mass. 249; *Johnson v. Thompson*, 129 Mass. 398.

The estoppel thus created by the clause of the lease was confirmed by the conduct of the lessee, the appellant. Having accepted a lease made in terms subject to that of the appellee, it never inquired of the appellee as to the contents or terms of its lease, but entered into possession and at once began to collect rent under it. The collection of this rent was not the making of a new lease, but an affirmative recognition of the existing one. The presumption was that the appellant had informed itself of the contents and terms of the lease when it proceeded to collect the rent. It could not expect to collect the rent without complying with the contract in all its terms. From July 1, 1900, until April 1, 1902, the appellant continued to collect rent from the appellee; 14 months of this time being after the appellee's lease had been placed on record, and when the appellant was fully advised of the provision giving the appellee the option to renew the lease for five years more.

We think the appellant was bound to inform itself of the terms of the appellee's lease, for it had accepted a lease expressly made subject to the appellee's, and, therefore, subject to its terms, whatever they might be; but, if there be doubt about this, the appellant was informed, when the appellee put its lease on record in January, 1901, of its precise terms, including the renewal clause, and could not go on collecting rent after that time for 14 months, without recognizing the validity of the lease in all its terms, and without estopping itself from refusing, as landlord, to comply with the renewal clause.

The judgment is affirmed.

THE GLADESTRY.

(Circuit Court of Appeals, Second Circuit. February 23, 1904.)

No. 167.

1. FEDERAL COURTS—APPEAL—FINDINGS OF TRIAL JUDGE—CONCLUSIVENESS.

Where an action was tried before the District Judge, who saw all the witnesses, his findings of fact will be followed on appeal.

2. MASTER AND SERVANT—SERVANTS OF SEPARATE MASTERS IN SAME WORK—FELLOW SERVANTS.

A firm of stevedores contracted to discharge and load a vessel, being required to furnish all labor and appliances, except that the ship was to furnish winches and winchmen. Plaintiff, a servant of the stevedores, was injured by the negligence of the winchman in failing to obey an order to reverse the winch. *Held*, that the winchman, not being under the control of the stevedores, was not plaintiff's fellow servant, so as to preclude plaintiff from recovering for his negligence.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, in favor of libellant for damages from personal injuries. 124 Fed. 112. The libellant was engaged as a stevedore, working in the employ of the firm of Wilson & Irvine, in discharging a cargo of logs from hatch No. 4 of the steamship Gladestry. The winch which was used in connection with the work was furnished by the ship and run by one of her crew. It was charged that the winchman was negligent in that, when the gangwayman sang out to him to "come back" (i. e., to reverse the winch), he went ahead with it, whereby the libellant's finger was crushed.

J. Parker Kirlin, for appellant.
Fredk. B. Bailey, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The libellant, the gangwayman, and a fellow workman all testified to the winchman's failure to obey the order given. The latter testifies that he conformed to whatever order he received. The cause was tried before the District Judge, who saw all the witnesses, and his findings of fact will be followed here.

It is contended that the winchman was a fellow servant with the libellant. There was a similar contention in *The S. S. Slingsby*, 120 Fed. 748, 57 C. C. A. 52, where the point was quite fully discussed, and the conclusion reached that upon the facts of that case the winchman did not become pro hac vice the servant of the firm of stevedores. The important piece of evidence in that case, as will be seen from the opinion, was the contract under which the work was being done. By its terms the stevedores agreed to "discharge and load," and the owners of the steamship agreed to "furnish winches and drivers [i. e., winchmen]." The contract in the case at bar is to the same effect;

† 2. Who are fellow servants, see notes to *Railroad Co. v. Smith*, 8 C. C. A. 668; *Railway Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286. Negligence of employé of independent contractor, see note to *Transport Co. v. Coneys*, 28 C. C. A. 392.

See *Master and Servant*, vol. 34, Cent. Dig. § 485.

its language is, "the ship to furnish steam winchmen, falls and slings." There has been an effort to differentiate the case at bar by the testimony of one of the firm of stevedores as to what he understood he had a right to do under this contract, and as to what he had been allowed to do under similar contracts with other parties, but it is unimportant. Under the contract the ship retained the power to select and remove winchmen, and the case cannot be distinguished from that of *The Slingsby*.

The decree is affirmed, with interest and costs.

SING TUCK et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 2, 1904.)

No. 177.

1. CITIZENS—NATIVE CHINESE.

A child born in the United States of Chinese parents, who at the time were Chinese subjects, but who had a permanent domicile and residence in the United States, and were not employed in any diplomatic or official capacity under the Chinese Emperor, became at birth a United States citizen.

2. SAME—EXCLUSION—HABEAS CORPUS.

Where an alleged Chinese alien, apprehended in deportation proceedings, establishes a prima facie case of citizenship, he is entitled to have the legality of his detention judicially determined on habeas corpus, notwithstanding Act Cong. Aug. 18, 1894 (chapter 301, § 1, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]), declares that the determination of the immigration officers shall be final, unless reversed on appeal to the Secretary of the Treasury.

Appeal from the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 126 Fed. 386.

This cause comes here upon appeal from a decision of the Circuit Court, Northern District of New York, dismissing a writ of habeas corpus. The petitioners were Chinese persons seeking to enter the United States. They were stopped by the immigration officers, who, upon examination and inquiry, decided that they were not entitled to enter, and held them for deportation when the writ of habeas corpus was issued. The petition for the writ avers that the petitioners, although Chinese persons, were born in the United States, and are citizens thereof. The returns to the writ showed that such examination had been made, and such decision (unreversed on appeal to the Secretary of Commerce) had been arrived at. The Circuit Court held that "judgment has been passed by those officers competent and duly authorized and having jurisdiction to pronounce it, and this court is without power in this proceeding to annul or reverse it," and dismissed the writs.

R. M. Moore, for appellants.

Geo. B. Curtiss, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.
See *Aliens*, vol. 2, Cent. Dig. § 83.

LACOMBE, Circuit Judge. The statutes relating to Chinese immigration provide a method whereby all Chinese persons seeking to enter the United States shall be examined by executive officers touching their right so to enter. It is also provided in the act of August 18, 1894 (chapter 301, § 1, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]), that "in every case where an alien is excluded from admission into the United States * * * the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." It is settled by the decision in *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890, that a child born in the United States of parents of Chinese descent, who at the time of his birth were subjects of the Emperor of China, but had a permanent domicile and residence in the United States, and were not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States.

In *Gee Fook Sing v. U. S.*, 49 Fed. 146, 1 C. C. A. 211, the Circuit Court of Appeals in the Ninth Circuit held that "the laws excluding immigrants who are Chinese laborers are inapplicable to a person born in this country * * *; that any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who on that ground applies to any United States court for a writ of habeas corpus, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination." In this opinion we fully concur. We need not enter into the discussion of any constitutional questions presented on the briefs (and which do not come before this court for review). We are satisfied that, however broad the language of the exclusion acts may be, it was not within the intent of Congress to submit the right of a native-born citizen of the United States to return to the land of his birth, to the final determination of executive officers. When, therefore, a Chinese citizen of the United States is deprived of his liberty by an executive officer who is about to deport him, we are of the opinion that he is entitled to apply to the federal court for a habeas corpus to inquire into the cause of his detention. To entitle himself to such writ he must, of course, satisfy the court that he can at least make out a *prima facie* case in support of the proposition that he is a citizen. But when he has done that, and the writ has issued, he is not precluded from insisting upon a judicial investigation of the issue on any theory that the decision of the immigration officers is final, or that he has failed to conform to some of the regulations required in the case of Chinese persons who are aliens.

The order of the Circuit Court is reversed, and cause remanded for inquiry into the status of the individual relators. This disposition of the cause is not to be taken as an expression of opinion as to whether in any of the cases a *prima facie* case even was made out by petitioner.

It has been suggested that this decision will affect a large number of pending causes, and will seriously interfere with the execution of the Chinese exclusion laws in the district. If the district attorney wishes to apply to the Supreme Court for a certiorari, the mandate will be held until he shall have had a reasonable opportunity so to do.

DOHERR v. HOUSTON et al'

(Circuit Court of Appeals, Second Circuit. March 9, 1904.)

No. 115.

1. SHIPPING—BILL OF LADING—PACKAGES—INSUFFICIENT PROTECTION—BURDEN OF PROOF.

Where a bill of lading for packages of firecrackers contained the usual printed clause exempting the carrier from liability for breakage, or for loss or damage arising from the nature of the goods or insufficiency of the packages, and also contained a stipulation signed by the shipper to the effect that the steamer was not accountable for chafage or breakage to insufficiently protected property, and that the packages were frail, on proof of breakage of the packages the carrier, relying on such indorsement for exemption, had the burden of proof to establish that the damage was due to insufficient protection.

2. SAME—EVIDENCE.

In an action against a ship for injuries to a cargo of firecrackers, alleged to have been caused by defective stowage, evidence *held* insufficient to establish that the damage was the result of insufficient or defective coverings on the packages.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 123 Fed. 334.

This cause comes here on appeal from a decree of the United States District Court for the Southern District of New York in favor of libellant for \$351.60 damages and costs, by reason of breakage of certain packages of firecrackers shipped by libellant on respondents' steamer *Hilarius* at New York, and delivered at Buenos Ayres.

F. M. Brown, for appellants.

Clarence R. Freeman, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The shipment in question comprised 300 packages of firecrackers, each package containing 8 wooden boxes, each wooden box holding 40 packs of firecrackers. The boxes were made of quarter-inch lumber, nailed together, and each box was covered with oiled paper. The 8 boxes, covered with matting and bound together with rattan, constituted a package weighing about 50 pounds. There were other packages of firecrackers on board, belonging to other shippers. Upon arrival at destination a considerable number of libellant's packages were found to be broken, and their contents damaged. The court below found that the damage was due to negligent stowage.

¶ 1. See Shipping, vol. 44, Cent. Dig. § 481.

The bill of lading contained the usual printed clause exempting the carrier from liability for "breakage," or for "loss or damage arising from the nature of the goods or insufficiency of packages." The bill of lading was indorsed in writing as follows: "Steamer not accountable for chafage or breakage to insufficiently protected property. Packages, firecrackers frail. Doherr, Grimm & Co." The effect of said general printed provisions upon the respective rights and obligations of the parties was considered in a similar case by Judge Brown, in *The Lennox*, 90 Fed. 308. The case at bar, however, differs from *The Lennox* in some of its facts, and in having said special written contract indorsed on the bill of lading, by which the libelant agreed that, as the packages were frail, the steamer should not be accountable for breakage, provided they were insufficiently protected. Upon proof of breakage, the steamer, relying on said proviso for exemption from liability, has the burden of proof to establish that the damage was due to insufficient protection. The question presented, therefore, upon this appeal, is whether the respondents have sustained this burden.

Nordlinger, who sold the firecrackers to libelant, testified that the goods were properly packed for transportation by sea, and that none of the packages were broken on the trip from Hong Kong to New York. The master of the *Hilarius* testified that the packages, on arrival at Buenos Ayres, looked as though they had subsided from their own weight; that "they were not the usual standing of cases to carry goods on board of a ship"; that "we generally have them in stouter cases"; that the cause of damage was "that the cases were frail, and that the ship had encountered boisterous weather, more or less, down through the southeast trades." But on cross-examination, in answer to the question whether he had "ever carried firecrackers before in your experience," he said: "I have carried fireworks, but never mentioned as firecrackers, except that." The cartman who carried part of the packages to the steamer, and assisted in unloading all of them, testified that the packages were not frail, and that they were delivered in good condition. The stevedore who had charge of the loading of the cargo testified that all of the packages were piled in one pile on the dock, and that a few of them broke from their own weight, but that they were fixed up so as to be as good as any other packages, and were all right when stowed. It does not appear whether the packages which broke were, or were not, part of libelant's shipment. The sworn declaration of Pinchetti, who was in charge of the discharge of the *Hilarius* at Buenos Ayres, contained a statement that 45 bundles of the shipment in question "turned out with the covering, which was of matting, broken; and, in my opinion, this breakage had been caused through the inferiority of the covering, compared with that of the other lots." The appraisers appointed by libelant reported that the general aspect of the crushed packages indicated that the damage was caused by negligent stowage. It appears from the whole evidence that the packages were of the same character as those ordinarily used for shipping firecrackers. The testimony of the master of the *Hilarius* shows that he was referring to fireworks, which are packed in strong wooden boxes, and that he knew nothing about how packages of firecrackers are usually packed. But even if his testimony were com-

petent, it only serves to show that he considered the causes of damage to be that the cases were frail (a condition assented to and provided for in the bill of lading), and that the weather was boisterous (a claim which the court below properly found was unsupported by the evidence). In view of this evidence, and of the further evidence on which the court below found negligent stowage, we conclude that the respondents have failed to support the burden assumed by their special contract, of showing that the damage was due to insufficient protection of the packages.

The decree is affirmed, with interest and costs.

CO-OPERATING MERCHANTS' CO. v. HALLOCK et al.
(Circuit Court of Appeals, Sixth Circuit. February 17, 1904.)

No. 1,249.

1. PATENTS—SUIT FOR INFRINGEMENT—DISMISSAL ON APPEAL FROM INTERLOCUTORY ORDER.

Where the record on appeal from an interlocutory order granting a preliminary injunction restraining the infringement of a patent contains sufficient evidence to enable the Circuit Court of Appeals to determine that the patent is invalid or that for other reasons the bill cannot be maintained, such court may order its dismissal. Such power will only be exercised, however, in plain cases.

2. SAME—ANTICIPATION—WEEDING MACHINE.

Evidence of anticipation contained in the record on appeal from an order granting a preliminary injunction against infringement of the Hallock patent, No. 600,782, for a weeding machine, held insufficient to justify the appellate court in dismissing the bill, in view of prior decisions sustaining the validity of the patent, but such as to warrant a reversal of the order appealed from.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Howard P. Denison, for appellant.

Stem, Heidman & Mehlhope, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from an order allowing an injunction pendente lite to restrain infringement of letters patent No. 600,782, issued to Daniel Youngs Hallock and Daniel Earnest Hallock for an improvement in weeding machines. It is now insisted that we shall set aside the injunction and dismiss the bill upon the contention that the prior art, as shown by certain prior patents, discloses an anticipation of the first and second claims of the patent, which are the only claims involved. In addition to a defense of the novelty of the claims of the patent, the appellees contend that, inasmuch as this is only an ap-

¶ 1. Review of interlocutory orders granting or continuing injunctions in Circuit Court of Appeals in infringement suits, see notes to *Gill & Fisher v. Browne*, 3 C. C. A. 572; *Southern Pac. Co. v. Earl*, 27 C. C. A. 189; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 484.

peal from an order allowing an injunction pendente lite, this court may not consider any other question than whether the court below has abused its legal discretion in allowing the injunction, all other defenses being postponed until a final hearing.

In respect of the power of the court to finally determine the validity of the patent upon an appeal from an order allowing a preliminary injunction, this court in *Knoxville v. Africa*, 23 C. C. A. 252, 256, 77 Fed. 501, said:

"In *Bissell Carpet Sweeper Co. v. Goshen Carpet Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 545, this court undertook to construe the seventh section of the act of March 3, 1891 (chapter 517, 26 Stat. 828), allowing appeals to this court from orders or decrees allowing or refusing preliminary or interlocutory injunctions, and to indicate our practice upon appeals from both kinds of injunctions. We there said, touching appeals from both kinds of injunctions, that: 'Where a preliminary injunction is allowed upon a prima facie showing and without the determination of the merits, this court will ordinarily, on an appeal, consider only the question as to whether, on the prima facie case made, there has been an abuse of discretion. Such preliminary injunctions are ordinarily intended to operate only pendente lite, or until a hearing on the merits can be had. They are granted upon a mere summary showing upon affidavits. Their issuance is not a matter of right, and rests in the sound discretion of the judge.' In the same opinion we also said, in regard to the same class of appeals, that: 'Quite another question would arise if, on an appeal from such an order, this court, upon the record, should conclude, not only that no case was exhibited for a preliminary injunction, but also that the bill could not be entertained for any purpose. In such a situation, shall it refuse to determine the case upon the merits, and refuse to direct the lower court to dismiss the bill? Must it confine itself to a mere expression of opinion that the discretion of the court had been erroneously exercised, and permit a fruitless suit to be prosecuted to a final decree, ultimately to end in dismissal? Clearly, the court ought not to idly sit, and merely advise the counsel and lower court, but should, if it has jurisdiction, and it has before it a sufficient record to enable it to do justice, pronounce a judgment upon the merits, and direct the inferior court to do what it originally ought to have done.'"

In *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 495, 20 Sup. Ct. 712, 44 L. Ed. 856, *Knoxville v. Africa* was expressly approved.

Recognizing the distinction between the two classes of appeals allowed under the seventh section of the act of 1891, and that the doctrine of *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, did not necessarily apply to both kinds of injunction orders, Justice Brown, speaking for the court, said:

"Does this doctrine apply to a case where temporary injunction is granted pendente lite upon affidavits and immediately upon the filing of a bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because, under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction to be refused—then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment, or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed. Ordinarily, if the case involve a question of fact, as of anticipation or infringement, we think the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity cases. But if there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and giv-

ing them their proper effect, they establish the invalidity of the patent; or if no question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject, we think the court should not only overrule the order for the injunction, but dismiss the bill."

In *Bissell Carpet Sweeper Co. v. Goshen Carpet Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 545, we overruled *Watch Co. v. Robbins*, 52 Fed. 337, 3 C. C. A. 103, so far as that case denied to this court, upon an appeal from an interlocutory injunction, after a decree determining the validity of the patent, the right to do more than determine whether the injunction had been improvidently granted in the exercise of a legal discretion.

In *Blount v. Société Anonyme*, 53 Fed. 98, 3 C. C. A. 455, 459, and *Duplex Press Co. v. Campbell Printing Press Co.*, 69 Fed. 250, 16 C. C. A. 220, 222, both being appeals from orders allowing injunctions pendente lite, the doctrine of *Watch Co. v. Robbins* was applied.

But so far as those cases deny that this court may consider and decide the merits of the case, when, upon such an appeal, we shall find that the question of the validity of the patent involved is so fully presented by the record that no amendment of the bill and no additional evidence could change or effect the final result, they are necessarily overruled by the subsequent decisions in *Bissell Carpet Sweeper Co. v. Goshen Carpet Sweeper Co.*, 72 Fed. 545, 19 C. C. A. 25; *Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252; *Smith v. Vulcan Ironworks*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; and *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

But it must be conceded that upon such an appeal the case against the patent must be a very plain one before the court would be justified in holding it void for want of novelty upon its face, or in reaching the same result upon a contested question of anticipation arising upon prior patents and their exemplification by ex parte affidavits of patent experts. *Milner v. Yesbera*, 111 Fed. 386, 49 C. C. A. 397; *Higgins Mfg. Co. v. Scherer*, 100 Fed. 459, 40 C. C. A. 491.

In the case at bar the injunction was allowed upon the bill, an unsworn answer, affidavits upon the subject of infringement explaining the patent in suit and certain prior patents claimed to anticipate. In addition there were affidavits showing the large sale of the patent in suit, and tending to show that no prior weeder had ever been a success. That the patent is void upon its face cannot be seriously contended. If, therefore, we are to direct the dismissal of the bill it must be upon the evidence tending to show anticipation.

Among the alleged anticipating patents is one to Carlisle for a horse rake, which is supposed to show the patented tooth. There are also three patents for spring harrow teeth, the closest one being one issued to A. V. Ryder. But it appeared below that the complainant's patent had been sustained upon its merits after a final hearing by Judge Coxe in the case of *Hallock v. Davison* (C. C.) 107 Fed. 482, and that every one of the patents now relied on had been in that case. It now appears that since Judge Coxe's decision the same patent has been upheld upon an application for a preliminary injunction by judge Ray in *Hallock v. Babcock Mfg. Co.* (C. C.) 124 Fed. 226.

We confess to the fact that we entertain grave doubt as to whether upon a fuller understanding of the history of the art the harrow tooth of the Ryder patent will not be found to be an anticipation. But we are not satisfied that, if opportunity be afforded the complainants to produce their full proof in the usual course of practice, they may not be able to show that the tooth of the patent does involve patentable differences. In this state of mind it is better that any decision upon the merits shall be postponed until a final and full hearing can be had.

In view, however, of the grave doubt entertained as to the novelty of the patent, we have concluded to remand, with direction that the injunction be dissolved upon the execution of a bond by the defendants below, with satisfactory security, in such sum as shall be determined by the court below, conditioned to account for and pay all damages resulting from the manufacture or sale of the alleged infringing device after the dissolution and prior to a final decree sustaining the patent and finding infringement. But, if the appellant declines to give such bond, the injunction will be dissolved unless the complainant shall execute a bond in a sum to be settled by the court below, with good security, conditioned to pay all damages which shall result from the wrongful suing out of the injunction.

The costs of this appeal may abide the final decree.

KIRCHBERGER et al. v. AMERICAN ACETYLENE BURNER CO. et al.

(Circuit Court of Appeals, Second Circuit. March 22, 1904.)

No. 174.

1. PATENTS—ANTICIPATION—SUFFICIENCY OF PROOF.

In the specification of a patent in suit, for a gas burner, the patentee stated that it was preferably made of lava, but such material was not made an element of the claims. It was shown that when so made the burner was practically efficient, and overcame the objections to prior burners. It was also shown that the burner of an alleged anticipatory patent, somewhat similar in construction, but made of brass, was not so efficient, nor practically operative; and complainants admitted that their burner would not be, if made of brass. *Held*, that in order to establish anticipation, by showing that the difference was in the material used, and not in the manner of construction, which was the thing patented, defendant had the burden of proving that the alleged anticipatory device, if made of lava, would be practically operative and efficient—a different principle of operation being claimed by each of the patentees.

2. SAME—VALIDITY OF CLAIMS—AMENDMENT OF SPECIFICATION.

An inventor may so amend his specification as to include therein all the advantages within the scope of his invention, where his amendment is filed before other inventors have entered the field, whose rights might be prejudiced, and the original drawings and specification sufficiently show and suggest the claims finally made.

3. SAME.

Where the original specification for a patent sufficiently disclosed the nature of the invention claimed, and sufficiently suggested the process involved therein, it is permissible to amend so as to include claims covering the process, as well as the mechanical structure.

4. SAME—INFRINGEMENT—TIP FOR ACETYLENE GAS BURNERS.

The Dolan patent, No. 589,342, for a process of burning acetylene gas, which consists in surrounding the jet of gas with an envelope of air in a chamber above the discharge orifice of the burner, for the purpose of preventing its combustion in immediate contact with the burner, and until it passes out of the chamber, as distinguished from the air-mixing process of the prior art, and also for a burner tip adapted to carry out such process, was not anticipated, and is valid. Claims 1, 2, and 3 also held infringed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 124 Fed. 764.

This case comes here on appeal from a decree of the United States Circuit Court for the Northern District of New York adjudicating validity, and infringement by defendants, of complainants' patent, No. 589,342, granted August 31, 1897, to E. J. Dolan, for a tip for acetylene gas burners.

F. F. Church, for appellants.

Louis C. Raegener, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

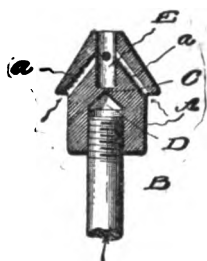
TOWNSEND, Circuit Judge. It appears from the record that the acetylene light industry owes its origin to the discovery by Thomas L. Wilson that calcium carbide, which prior to his discovery had been unknown, so far as concerned any commercial purposes, could be electrically produced in large quantities, and that acetylene gas could be practically, successfully, and economically generated therefrom. This discovery was considered so important that several million dollars were expended in the purchase and sale of rights under the Wilson patents. Owing to the peculiar richness of this gas in carbon, it was soon found that it could not be practically used for any great length of time in any of the burners of the prior art, or in those originally devised especially for burning acetylene gas. Complainants unsuccessfully tried all the kinds of burners which they could get in the market, and those furnished by various manufacturers. Two difficulties were encountered: First, an insufficient consumption of the carbon, so that the gas smoked, and floating particles of carbon were distributed through the atmosphere; and, second, a clogging of the orifices of the burners, after a few hours of use, by carbon deposited during the process of combustion. At this crisis the attention of the complainants was called to the burner of the patent in suit, which obviated the objections previously encountered, and was capable of successful practical operation for more than 1,000 hours. The difficulties attendant upon the use of prior devices, and the theory of his invention, are stated by the patentee in his specification as follows:

"It is well known that great difficulties have been experienced in the making of a suitable burner for acetylene gas. The difficulties have largely been due to the fact that, after a certain time of burning, a deposit has been formed at the point of exit of the gas from the burner, which has gradually choked the outlet and distorted the flame. This difficulty is not cured by merely mingling air with the gas before it is burned. The difficulty seems to be due to the fact that acetylene decomposes at about a red heat, forming benzol, carbon, hydrogen, and other compounds. If at this point of decomposition a re-

ceptive surface is present, the carbon is likely to deposit upon such surface, producing the difficulty above described. It is obvious that, if a substantial separation can be made between the burner-surface and the acetylene as it issues from the burner, this deposit is less likely to occur. This deposit has also been found, in practice, to be less when acetylene mingled with air is burned than when pure acetylene is burned."

The patented burner comprises a tip, preferably made of lava or other material of a like character, provided with a contracted passage or opening connecting the larger supply gas passage and the larger passage terminating at the extreme end of the burner tip. The construction of the tip is shown by the following copy of Fig. 1 of the drawings of the patent:

Fig. 1.



The patentee says:

"In order to prevent the deposit of carbon within the burner or at the burner-top, and thereby insure a perfect combustion and a smokeless flame at the point where the same is formed, I provide a series of inclined air-passages, a, a, which lead into the enlarged passage, E, above the point at which the contracted opening, C, is provided. Ordinarily a single row or series of these air-passages will be found to be sufficient, as is shown in Figs. 1 and 3 of the drawings, though, if for any reason it should be preferred, two or more may be provided, as shown in Figs. 2 and 4 of the drawings."

He further states that he finds it advisable to use this burner in duplex form, or in pairs inclined toward each other, so that the flames from the two tips, uniting at a point above the plane of the tips, form a single flat flame, having great illuminating power. The patentee further explains the operation of his device, as he understands it, as follows:

"The operation of this device seems to be that the gas under pressure escaping in a cylindrical jet through the opening, C, draws in on all sides an envelope of air through the openings, a. This is due to the fact that the chamber, E, is larger than the outlet, C, and to the fact that the air-inlets, a, substantially surround the issuing gas-jet. The result of this arrangement seems to be to so cool the outside of the flame as to prevent any deposit of carbon at the point of egress. It is, of course, essential that the gas have sufficient pressure—say from three to four inches of water—to draw in the necessary amount of air. The result here accomplished would not be accomplished by an ordinary air-mixing burner in which the air was mingled generally with the body of the gas—as, for instance, a burner of the type patented to Thomas Holliday on April 20, 1897, No. 531,117. In that type of burner there is an intermediate chamber provided for the special purpose of mingling the air and gas before they escape from the burner. In my burner an absolutely unobstructed passage is provided for the escape of the original jet of gas formed by the con-

stricted opening, C. By reason of this fact it is substantially necessary to have two jets, if a flame of considerable candle-power is desired."

The claims in suit are as follows:

"(1) The process of burning acetylene gas, which consists in projecting a small cylinder of gas, in surrounding the same with an envelope of air insufficient to cause combustion of all the gas, and in finally supplying the gas with an additional amount of oxygen by allowing the stream of gas to expand above the burner-tip into contact with the air, thereby burning the same, substantially as described.

"(2) The process of burning acetylene gas, which consists in projecting toward each other two cylinders of acetylene gas, in surrounding the same with envelopes of air insufficient to produce combustion of all the gas, and in finally causing the cylinders of gas to impinge upon each other and produce a flat flame, substantially as described.

"(3) The combination in an acetylene-burner of the block, A, having the minute opening, C, the cylindrical opening, E, opening without obstruction to the atmosphere, and the air-passages, a, substantially as described.

"(4) The combination in an acetylene-burner of two air-mixing burners mounted upon a suitable support and inclined toward each other, the said burners being each provided with an air-ejecting apparatus within the burner itself, substantially as described."

The preliminary question of title in complainants was raised by their failure to produce the assignment to them of the sole and exclusive right to the patent, as pleaded in the bill. In view of the finding of the court below that complainants' title as alleged was admitted in the court below, and the statement of counsel that the assignment as pleaded was ready to be produced in court, showing such exclusive license in complainants, we conclude that title has been sufficiently proved.

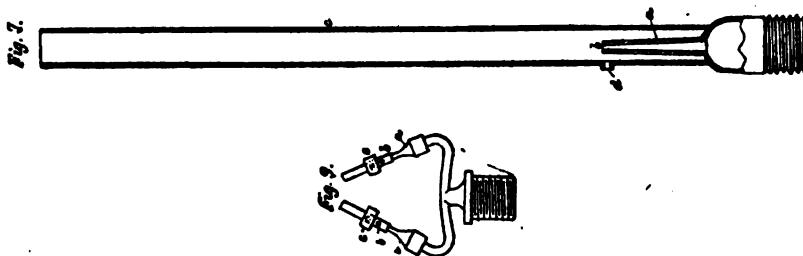
The theory of prior constructors of gas burners adapted to the use of gas rich in carbon, for illuminating purposes, was to secure a complete mixture of the gas and air in suitable proportions within the burner. For this purpose they used various modifications of the well-known Bunsen burner. In the Bunsen burner, a long tube, having openings at the bottom for the admission of air, is placed over the tip from which gas issues, and the jet of gas passing up the tube creates a draft which draws in the air at the openings. The tube thus constitutes a mixing chamber, from the top of which issues the mixture of air and gas. In this manner all the carbon particles are consumed, and a nonluminous flame is produced for heating purposes. Later a modification of the Bunsen burner, sometimes called the "Semi-Bunsen," was made, having openings in the sides of the burners for the admission of a small quantity of air—just sufficient to prevent smoking, but not sufficient to interfere with the production of a luminous flame. This semi-Bunsen burner was adapted for use with very rich forms of gas, which were liable to smoke in ordinary burners. When tried with acetylene, it obviated said first objection of smoking, but after a short time it became clogged with deposits of carbon and was useless. In his patent, No. 555,198, for the process of making said gas, Wilson proposed preferably to mix the gas and air in a holder, but suggests that "it is also possible to supply or add the oxygen or air required at the burner." This reference is to the semi-Bunsen burner, or aero-burner of the Bunsen type, adapted for use for illu-

minating purposes, then well known in the art, early examples of which are shown in Jones & Collins patent, No. 56,949, and Averill patent, No. 141,415, where the intermingling of gas and air is effected in the burner.

The defendants manufacture their burners in accordance with a portion of the provisions of patents No. 617,942, dated January 17, 1899, and No. 634,838, dated October 10, 1899, issued to Henry E. Shaffer, and their contention is that said burners are merely improved forms of the constructions known to the prior art. Their substantial defense in this connection is well stated by the defendants' expert as follows:

"My view is that the processes for burning acetylene mentioned in the first and second claims of the patent in suit lack substantial novelty, in view of the prior art, and that they are not infringed, because in defendants' burners the operation is more to mix the air with the gas jet as it passes through the discharge passage of the burner, than to merely envelop the gas jet by air, without causing a mixture, which seems to be the point on which the operations of the first and second claims stand."

In support of these contentions various patents were introduced by defendants, which specifically describe constructions whereby the air is mixed with gas in the body of the burner. It is unnecessary to discuss these constructions, because it is admitted that the prior French patent to Bullier, No. 246,768, and Figs. 7 and 9 of said patent, show the nearest approximation to the burner of the patent in suit. Copies of these drawings are given below:



The Bullier patent is for a burner for acetylene and other rich gases. The gas inlet orifice in Fig. 9 is opposite the lower air orifice, b. In Fig. 7 the air enters at the orifice d. The patentee states that:

"The small air openings, b, may be of any number—three or four in a row, for example. A sliding ring, c, is frictionally mounted on each branch of the burner, so that one or more rows of the openings, b, can be opened, and consequently the admission of air regulated."

The patentee further says:

"It will be understood that the burner can be composed of any number of branches. Instead of allowing the air to come in laterally, I reserve the right to cause it to come in at the middle of the burner, and the gas from the side; that is to say, to apply a reversal of the arrangement described in the patent."

The whole patent depends upon the theory of a mixture of air and gas. The patentee explains that the nozzle, a, in Fig. 7, contains a very small orifice, b, through which gas escapes into the tip, c, provided with the air orifice, d. The patentee says that the arrangement

shown in the drawing is similar in principle to that of a Bunsen burner; that the mixture is formed in the tip, c; that the air conduits are so arranged that "the current of gas entrains a certain quantity of air, which, mixing with the gas, causes the complete combustion of the gas."

This burner is in many respects strikingly like that of the patent in suit. There are, however, these radical differences in construction: The air-passages in the Bullier burner are located at such a distance below the head as to afford an opportunity for, if not to necessarily cause, a thorough mixing of air and gas, while in the patent in suit the small chamber and orifice are so located at the uppermost end of the burner as to apparently prevent such mixing. The statement of Bullier that he reserves the right to reverse the arrangement shown in Fig. 10, which is practically the same as Fig. 9, further shows that his chief idea was to secure a thorough mixture, whether the gas came in first, and the air later, or vice versa. In his later United States patent, which is subsequent to the patent in suit, Bullier omits the suggestion of the reversal of parts, and he claims "means for commingling the air and gas within the burner M," confines himself to the construction covered by Figs. 9 and 10 of his earlier patent, and illustrates it by drawings of the same long tips, like those of the Bunsen burner, with gas orifices near their bottom, and with air orifices not located in the extreme head of the burner.

It must be conceded, upon all the evidence, that Bullier nowhere shows, describes, or claims any construction designed to surround the jet of gas with an envelope of air, and this is admitted by defendants. They claim, however, that the theory of envelopment stated by Dolan is immaterial upon the question of infringement, provided prior devices, irrespective of the theories of their inventors, were capable of accomplishing the result achieved by him. Relying upon this contention, they produced various brass burners of the prior art, and stated that they had been subjected to a test, and that all of them successfully burned acetylene gas for a brief period of time. These burners included, inter alia, one of the Bullier patent, as shown in Fig. 7. The complainants' expert thereupon took these burners, tested them during a period of 23 hours, and took photographs of them at different periods during said burning operation. The Bullier burner burned for 18 hours, and then became clogged. The other burners tested, with one exception, gave out at an earlier period.

Defendants claim that, if said burners of the prior art had been made of lava or steatite, they would have burned uninterruptedly, without clogging, and that the burner of the Dolan patent was practically inoperative when made of brass. Thereupon the following stipulation was entered into:

"For the purposes of this case, it is hereby stipulated and agreed that burners made wholly of brass, but otherwise in exact accordance with the directions of the Dolan patent, No. 589,342, in suit, would clog up and be inoperative at the end of fifty (50) hours for the burning of acetylene gas."

This condition of affairs raises a close question. There was no evidence in the record that the Bullier patent had ever been commercially used. The tests, considered alone, left the question open whether it

was a mere paper patent, or was capable of successful practical operation. Complainants, by their stipulation, admit that the burner of the patent in suit, if made of brass, would have become clogged within a period of time shorter than that in which one of the prior devices burned successfully. We conclude, however, that, inasmuch as defendants' contention is based on the claim that the Bullier or other devices of the prior art were capable of practical successful operation when made of lava or steatite, the burden was upon the defendants to prove this fact as part of their *prima facie* case. Especially is this so in view of the difference in construction stated above, where Bullier claims to locate his air-passages so as to insure a mixture, while Dolan claims so to locate his passages at the extreme end of the tip as to prevent a mixture. The further question was whether Dolan, in fact, discovered a new and radically different process for enveloping the gas, as distinguished from the Bullier and other mixers of the Bunsen type. Defendants, therefore, should have shown that the differences of construction between Dolan and Bullier were negligible, by showing, in chief, that the Bullier burner would stand a practical endurance test. Instead, they furnished a brass reproduction of Fig. 7 of the Bullier burner, which, under complainants' tests, burned for 18 hours only. There is therefore no proof in the case that that Bullier burner was practical. Defendants did not offer any exhibit of a burner constructed according to Fig. 9 of Bullier. Complainants' expert, however, caused one to be made of brass, like the other exhibits furnished by defendants, and this became clogged and useless in less than 17 hours.

We conclude, therefore, that said Bullier patent does not anticipate the patent in suit because: (1) The defendants have failed to show that it is capable of successful practical operation, or that the objections thereto were such as could be obviated without the exercise of the faculty of invention. *Sage v. Wyncoop*, 104 U. S. 419, 26 L. Ed. 740. (2) Because, being a foreign publication, it does not contain a substantial representation of the patent improvement in such clear and exact terms as to enable a person skilled in the art to construct and practice the invention. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064; *Chase v. Fillebrown (C. C.)* 58 Fed. 374, 378. (3) It appears that it does not operate upon the theory or in the manner covered by the invention in suit.

The proof of infringement is so clear that it does not require extended discussion. We may assume that defendants infringe Dolan's process, provided they employ the instrumentalities covered by his patent. The patent under which defendants claim specifically provided as follows:

"Near the outer end of the passage, 9, are provided very small lateral passages, 12, serving to admit air to the column of mixed air and gas near the point of combustion, effectually surrounding it and preventing contact with the extreme end of the tip, thereby preventing undue heating of the latter, and the formation of a deposit thereon."

These passages are the structural equivalents of those shown in the patent in suit. The sole defenses interposed are that these passages

are so arranged as to produce a mixture; that defendants, in their burners, use one only of said passages; and that one passage would not admit air so as to envelop the gas. The former contention has been already discussed. The latter is patently untenable, and is disproved by the admission of defendants' expert. Referring to the defendants' burners, defendants' expert says as follows:

"The air opening in question is formed in the upper part of the burner; that is, that part which lies between the flat end of the burner and the discharge passage on which the flame is seated, so that the air entering through this upper opening descends from the end of the burner to this discharge opening, and then, I should judge, curls around the upper portion of the circular edge and goes out with the mixed current of air and gas. To that extent, I should judge that this air current would tend to prevent the flame from making direct contact with that part of the circular edge which is located over the inner end of that upper air passage."

The fact that the air passages in the two burners are differently inclined is immaterial, in this connection, and need not be discussed.

A further contention by defendants is that the patent is invalid by reason of an amendment in the Patent Office. The original specification was filed February 18, 1897. An amended specification was filed May 20, 1897. The difference between the original and amended specifications, relied on by defendants, is shown as follows:

"Original Specification.

"In order to supply to gas within the tip, before it reaches the point at which combustion takes place, a sufficient amount of oxygen to insure perfect combustion and to render the flame smokeless, I provide a series of inclined air passages, a, a, which lead into the enlarged passage, E, above the point at which the contracted opening, C, is provided."

"Amended Specification.

"In order to prevent the deposit of carbon within the burner, or at the burner top, and thereby insure a perfect combustion and a smokeless flame at the point where the same is formed, I provide a series of inclined air passages, a, a, which lead into the enlarged passage, E, above the point at which the contracted opening, C, is provided."

In both specifications it was stated that the result sought to be accomplished by the invention was perfect combustion of the gas. In the original specification, Dolan says, "in order to supply to the gas within the tip * * * a sufficient amount of oxygen to insure perfect combustion, * * * I provide," etc.; and he claims the tips or burners, only, and not the process. In the amended specifications he omits the statement as to the amount of oxygen, but in the first claim for the process he explains that the process consists in surrounding the cylinder of gas with an envelope of air insufficient to cause combustion of all the gas, and in finally supplying an additional amount of oxygen sufficient to insure combustion by allowing the gas to expand above the tip into contact with the air. It is contended, therefore, that the original specification failed to describe the process covered by the patent in suit, and that claims 1 and 2 of the patent are invalid. This contention is unsound, for the following reasons: (1) The amendment was filed within three months after the filing of the original specifications, and before, so far as appears, other inventors whose rights had been prejudiced had entered the field. *Railroad v. Sayles*, 97 U. S. 554. 24 L. Ed. 1053. (2) The original drawings and specifications sufficiently show and suggest the claims finally made, or at least are not

inconsistent therewith. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. (3) Subject to the foregoing rules, an inventor may amend his specification so as to include therein all the advantages within the scope of his invention. *Singer Mfg. Co. v. Cramer*, 109 Fed. 652, 658, 48 C. C. A. 588.

It was unnecessary, in the original application, where only the tip was sought to be patented, to set forth the steps in the process by which the desired result was accomplished. But when the applicant sought to cover both process and product, he explains that the process by which he secures perfect combustion consists in first surrounding the gas with an envelope of air insufficient to cause complete combustion, and in subsequently supplying such additional air as is sufficient for that purpose. The original specification and drawings disclose the envelope construction of air-passages surrounding the jet of gas. In these circumstances, we conclude that there is no substantial conflict between the statements in the original and amended specifications; that the original specification sufficiently disclosed the nature of the invention claimed in the patent, and sufficiently suggested the process involved therein; and that, as the invention or discovery of the process involved the invention of the product, and the product was the result of the process, the claims for the process were properly included in the patent in suit. *Powder Company v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Wing v. Anthony*, 106 U. S. 142, 1 Sup. Ct. 93, 27 L. Ed. 110.

If the defendants are correct in their contention that the Bullier burner is practical, successful, and operative when made of lava or steatite, they are at liberty to use the same, or they are at liberty, having closed the aperture at the extreme end of the tip, which admittedly furnishes the air envelope for the gas, to use the apertures whereby the mixing of air with gas is secured.

It is unnecessary to discuss the first, second, or third claims, all of which are valid and are infringed. Nor is it necessary to discuss or construe the fourth claim. The invention of the patent resides, as we have seen, in devices which surround the acetylene gas with an envelope of air, in contradistinction to the old air-mixing process. If it be held that the two burners of claim 4 are but a duplication of the single burner of claim 3, complainant is abundantly protected against infringement by claim 3. If, on the other hand, it be held that, because of the use of the words "air-mixing burners," the claim should be restricted to burners which "mix," instead of "enveloping," defendants do not infringe. What construction should be given to the claim, we think it unnecessary to decide.

The decree is affirmed, with costs.

WELDON v. FRITZLEN et al.

(Circuit Court, D. Kansas, Second Division. April 2, 1904.)

No. 1,009.

1. REMOVAL OF CAUSES—SINGLE CONTROVERSY.

An action in a state court, brought by a mortgagee against his mortgagors and their creditor, claiming a mortgage lien on the property to obtain a decree foreclosing his mortgage, fixing the amount of the mortgage debt due and unpaid, adjusting the liens upon the property, and adjudging their priority, presents but a single controversy.

2. SAME—DIVERSE CITIZENSHIP.

In such suit or action, when the plaintiff and defendant mortgagors are citizens of the state in which the suit is brought, and the creditor of the mortgagors claiming a mortgage lien on the property is a citizen of another state, such mortgage creditor cannot, by a rearrangement of the parties to the controversy, or otherwise, upon the ground of diverse citizenship of the parties, remove the case into the federal court.

3. SAME—PREJUDICE.

Neither can such suit be removed into the federal court by the nonresident mortgage creditor of his codefendant mortgagors on the ground of prejudice and local influence.

(Syllabus by the Court.)

In Equity.

H. J. Bone and Hite & Nichols, for the motion.
Botsford, Deatherage & Young, for Boatmen's Bank.

POLLOCK, District Judge. An action under the Code was brought in the district court of Clark county by W. H. Weldon against D. G. Fritzlen and Edna P. Fritzlen, his wife, to foreclose two mortgages given by the Fritzlens to plaintiff to secure a promissory note in the sum of \$3,750, one a real estate mortgage, the other a chattel mortgage. To this action the Boatmen's Bank, a corporation of Missouri, was made party defendant because of the fact that said bank held two mortgages prior in point of time, the one a real estate and the other a chattel mortgage, on the identical property mortgaged to plaintiff, to secure a large sum of money owing by the Fritzlens to said bank. The petition filed in the state court, omitting a description of the property incumbered, reads as follows:

"The plaintiff, for his cause of action against the defendants, says:

"(1) That on July 2, 1903, the defendants D. G. Fritzlen and Edna P. Fritzlen, for a valuable consideration, executed to this plaintiff their promissory note for the sum of thirty-seven hundred and fifty (\$3,750) dollars, which said note by its terms became due and payable to this plaintiff on July 12, 1903; that a copy of said note is hereto attached, marked 'Exhibit A,' and made a part of this petition; that said note is due and unpaid, and there is due to this plaintiff on account thereof from said defendants D. G. and Edna P. Fritzlen the sum of thirty-seven hundred and fifty (\$3,750) dollars.

¶ 1. Separable controversy as ground for removal of cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.

¶ 2. Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.

"(2) That on July 2, 1903, the defendants D. G. and Edna P. Fritzlen, for the purpose of securing the payment at maturity of the note mentioned in paragraph 1 of this petition, executed to this plaintiff certain mortgages, by terms of which the said defendants D. G. and Edna P. Fritzlen conveyed to this plaintiff, as security for the debt evidenced by said promissory note referred to hereinbefore as 'Exhibit A,' the following described personal and real property, to wit: * * *. That all of said real estate is situated in Clark county, Kansas." That a copy of said mortgages, conveying to this plaintiff said personal property and said real property, is hereto attached, and marked respectively Exhibits 'B' and 'C,' and made a part of this petition.

"(3) That the defendant, the Boatmen's Bank, is a corporation organized and existing under the laws of the state of Missouri, and has its principal office in the city of St. Louis, in said state. That said defendant bank has or claims to have an interest in the personal and real property, hereinbefore described, by virtue of certain pretended mortgages which said bank asserts to be liens upon said personal and real property, but this plaintiff alleges that the Boatmen's Bank, defendant herein, has no right, title, or interest in or to any of said personal or real property; and that whatever interest the said Boatmen's Bank has or claims to have by virtue of said mortgages grows out of certain transactions entered into between said bank and a certain partnership known as Elmore & Cooper, which said transactions, in so far as they relate to said mortgage liens, this plaintiff alleges to be wholly illegal and void. This plaintiff further alleges that the mortgages which the said Boatmen's Bank asserts are void, illegal and of no effect. The plaintiff further alleges that if said Boatmen's Bank has any claim or right, title, or interest in or to any of said personal or real property, the same is junior, inferior, and subordinate to the right, title, interest, and liens of this plaintiff. That, by virtue of said mortgages executed to this plaintiff by the said defendants D. G. and Edna P. Fritzlen, this plaintiff is now the owner and holder of valid and subsisting liens against said personal and real property, hereinbefore described, to the amount of thirty-seven hundred and fifty (\$3,750) dollars. That the said Boatmen's Bank, defendant herein, claiming, as it does, the legal title to said personal property by virtue of said pretended, illegal, and void mortgages, is about to take possession of said personal property and convert same to its own use, to the irreparable injury of the plaintiff, as said bank will convey said personal property out of the jurisdiction of this court.

"Wherefore this plaintiff prays for judgment against the defendants D. G. and Edna P. Fritzlen for the sum of thirty-seven hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum from July 2, 1903 (\$3,750), and that said judgment may be declared to be a lien upon all the said personal and real property hereinbefore described; that upon final decree that said personal and real property, or so much thereof as may be necessary, shall be sold for the purpose of satisfying said judgment; that the mortgage lien of this plaintiff against said personal and real property be decreed to be a first lien thereon; that upon the sale of said property that the proceeds thereof be brought into court and applied as follows: First, to the payment of the costs of this suit; second, to the payment of the costs of said sale; third, to the satisfaction of this plaintiff's claim and judgment against said D. G. and Edna P. Fritzlen.

"The plaintiff further prays for such other and further relief as to this court may seem meet, and the plaintiff will ever pray."

In due season, defendant, the Boatmen's Bank, filed its petition and bond for removal of the cause into this court. The petition for removal, omitting formal parts, reads as follows:

"Your petitioner, the Boatmen's Bank of St. Louis, Missouri, one of the defendants in the above-entitled cause, respectfully shows that the matter and amount in dispute in this suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars; that the property described in plaintiff's petition is worth about \$30,000, and much in excess of \$20,000; and that the prior mortgages held on said property by said Boatmen's Bank were given and are held by said Boatmen's Bank to secure an indebtedness due said bank

from said D. G. Fritzlen and Edna P. Fritzlen in the sum of \$32,920.15, with interest at eight per cent. per annum from November 30, 1901; and that said plaintiff, as will appear by his petition herein, is seeking to establish a first and prior lien on and against said property in the sum of \$3,750.

"Your petitioner further shows that this defendant is a corporation created and existing, as averred in plaintiff's petition, under the laws of the state of Missouri, and has its principal office at the city of St. Louis, in said state, and that therefore, before, at, and ever since, and for a long time prior to, the bringing of this suit, said Boatmen's Bank was and still is a corporation duly created under the laws of and a citizen of the state of Missouri. That said bank is engaged in the banking business in the city of St. Louis, Missouri.

"Your petitioner further avers and shows that said plaintiff, W. H. Weldon, and the defendants D. G. and Edna P. Fritzlen, were at the time of the bringing of this suit, and ever since have been, and for more than two years prior to the bringing of this suit have been, and still are, citizens of the state of Kansas, and residents of the county of Clark, in said state of Kansas.

"Your petitioner further shows and avers that the controversy herein as to whether the alleged mortgage of plaintiff, or the prior mortgage of said Boatmen's Bank, on the properties described in plaintiff's petition, is prior and paramount, is a separable controversy wholly between plaintiff and said Boatmen's Bank, and that said controversy can be determined herein fully as between the plaintiff and said Boatmen's Bank.

"Wherefore, said Boatmen's Bank prays the court to make an order removing this cause to said United States Circuit Court for the District of Kansas, sitting in the Second Division thereof.

"For a still further ground and cause of removal herein, said Boatmen's Bank shows and avers that the controversy herein is between the plaintiff and said Boatmen's Bank, and that by reason of prejudice against said Boatmen's Bank, and the local influence of said plaintiff, Weldon, and of the defendants D. G. and Edna P. Fritzlen, in said Clark county, Kansas, said Boatmen's Bank will not be able to obtain justice in this cause in the district court of Clark county, Kansas, and that said Boatmen's Bank does not have the right under the laws of Kansas to remove said cause to some other county than Clark county on account of said prejudice and local influence; and defendant Boatmen's Bank shows and avers that said plaintiff is a public official of said Clark county, Kansas; that said plaintiff is and has been a member of the Kansas Legislature, and that said plaintiff attends the political conventions of his party, which is the dominant party in said Clark county, and is influential in shaping the policy of said county and in electing the judge, clerk, sheriff, and other officers of said district court, and in the selection of juries, and is a man of wide and extensive influence in said county, and that said defendants D. G. and Edna P. Fritzlen, although united with said Boatmen's Bank as defendants herein, are on the same side of the controversy herein with said plaintiff, Weldon, and that said defendants Fritzlen and Fritzlen are and for many years last past have been prominent citizens of said Clark county, Kansas, and of wide and extensive influence therein, and that said Fritzlens also take a prominent part in the public affairs of said county, and by reason of the controversy herein between them and said Boatmen's Bank, which has extended back for two years last past, have caused and engendered against said Boatmen's Bank in said Clark county a prejudice; that said Fritzlens and plaintiff, Weldon, are stockmen engaged extensively in the cattle business in said Clark county; that the chief industry in said county is, and for many years has been, the cattle and live stock business, and that said Fritzlen and plaintiff, Weldon, by reason of the controversy herein with said Boatmen's Bank, have caused a prejudice to exist among cattlemen generally in said county against said Boatmen's Bank, and that by reason of the local influence of said plaintiff and said Fritzlens in said county, and by reason of the prejudice which they have caused to exist against said Boatmen's Bank in said county, said Boatmen's Bank would not be able to obtain justice in said district court in this cause; and said bank shows and avers that there is much prejudice in said Clark county, Kansas, against foreign corporations and banks.

"Wherefore, said Boatmen's Bank prays the court to make an order removing this cause to said Circuit Court of the United States for the District of Kansas, sitting in the Second Division thereof.

"And, for a still further and additional ground for the removal of this cause, your petitioner shows to the court and avers that, in respect to the controversy herein with respect to the Boatmen's Bank, said plaintiff, Weldon, and said defendants D. G. and Edna P. Fritzlen are on one side and allied together, and are each and all of them hostile to this defendant, the Boatmen's Bank, and that therefore this suit in its entirety is a controversy between citizens of different states, to wit, the plaintiff, Weldon, and defendants Fritzlen and Fritzlen are citizens of the state of Kansas, and this plaintiff, the Boatmen's Bank, is a citizen of the state of Missouri."

A motion to remand to the state court was interposed by plaintiff and defendants Fritzlen, and presented at the September, 1903, term of this court, and the following order entered thereon:

"And now come said parties plaintiff and defendants, and the motions to remand this cause to the district court of Clark county, Kansas, of the plaintiff and of defendants D. G. Fritzlen and Edna P. Fritzlen, coming on to be heard, the court finds from the pleadings and record that this suit is a controversy between plaintiff and defendants D. G. Fritzlen and Edna P. Fritzlen, who are citizens of the state of Kansas, on the one side, and the defendant, Boatmen's Bank, which is a citizen of the state of Missouri, on the other side, of said controversy; that said Boatmen's Bank had the right to remove this cause to this court, and said motions to remand are accordingly annulled and denied."

Thereafter a plea to the jurisdiction of this court was interposed by plaintiff, and the bank's exception thereto overruled, and replication filed by the bank. Upon application of plaintiff, the court being in doubt as to its jurisdiction, the filing of a second motion to remand has been permitted, and exhaustive oral arguments and elaborate briefs of counsel touching all questions concerning the jurisdiction of this court have been presented, including the right of the bank to remove this cause into this court on the ground of prejudice and local influence.

The first contention of counsel for the bank is that the former order of this court denying the motion to remand should stand as the law of the case until reversed on appeal. Such contention, when confined to ordinary rulings, is and should be given much weight, that there may be an end of litigation; but, when the decision or order made relates to the jurisdiction of the court itself, it becomes the duty of the court to pause upon the application of counsel, or, indeed, upon its own motion, and reconsider the question of the right to proceed further in the cause. It is elementary that no court should proceed in any case in which it has no power to investigate and determine between the parties, and, if it does so do, its proceedings are a nullity. Hence, if, upon a reconsideration of the question of jurisdiction of the court over the subject-matter of the suit or action, the court becomes convinced of its want of jurisdiction, it should not hesitate to so declare, notwithstanding any former ruling made to the contrary. Any other course is worse than error. It is a folly, alike expensive and oppressive to the litigants, and fruitless of good to any one. First National Bank of Chicago v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; Mo. Pacific Railway v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536; Fitzgerald v. Missouri Pac. Ry. Co. (C. C.) 45 Fed. 812; Kessinger v. Vannatta (C. C.) 27 Fed. 890.

By reference to the former order of this court made on the motion to remand, it will be seen that order is expressly placed upon the ground that this suit involves a controversy between the plaintiff and the defendants Fritzlen on the one hand and the bank on the other. Hence it was held the controversy is removable into this court on the principle of rearrangement of the parties to the controversy, and this rearrangement of the parties is made from the petition filed and record made in the state court. Is such rearrangement of the parties to the controversy possible in the light of the facts pleaded in the petition of the plaintiff? I am convinced this cannot be done. In *Insurance Company v. Delaware Mut. Ins. Co.* (C. C.) 50 Fed. 243, Judge Hammond says:

"The court cannot search the record for a mere ideal controversy that might have been made by the plaintiff, which is separable and wholly determinable as between citizens or corporations of different states, and arrange the parties as if that controversy had been made, but must find a real controversy actually made by the pleadings, and may then arrange and adjust the parties without regard to their present attitude on the record, if it have the separable quality, and may be wholly determined between citizens or corporations of different states. * * * It is urged that the position of the parties on the record is immaterial, and that the court will arrange them on either side according to the nature and character of the controversy. But this always has reference to the controversies made by the pleadings, and does not authorize the interjection of a suit not made by the pleadings, nor authorize the court to construct pleadings that do not exist for such interjected suit."

In *Black's Dillon on Removal*, § 147, it is said:

"But the removability of the cause is tested by the character of the suit as disclosed by the pleadings of the plaintiff, and it is not in the power of the defendants thus to make that separable which the plaintiff has chosen to make joint."

Recurring to the petition of plaintiff, what is the cause of action therein stated? It is, in substance, that defendants Fritzlen are indebted to plaintiff on a past-due promissory note; that this note is secured by certain mortgages upon the property of the defendant makers of the note, which are prior liens thereon; that the defendant bank therein claims some interest in the property incumbered by plaintiff's mortgages, by virtue of certain mortgages held by the bank, and by the bank asserted to be valid liens upon the property, but, as alleged by plaintiff, such mortgages are void and of no effect. The relief asked is a decree for the amount due plaintiff, and foreclosure of his mortgages and sale of the property, free and discharged of any lien thereon asserted by the bank. In such case, it is conclusively settled by authority, there exists but one controversy or cause of action. In *Thurber v. Miller*, 67 Fed. 371, 14 C. C. A. 432, Judge Caldwell, delivering the opinion of the court, says:

"This is an ordinary suit in equity to foreclose a mortgage on real estate. The bill makes the heirs and executors of the mortgagor and the creditors of the mortgagor having, or claiming to have, liens on the mortgaged premises, defendants; alleges the amount of the mortgage debt; that default has been made in payment thereof; and prays for a decree for the amount of the debt, and for the sale of the mortgaged premises to satisfy the same. The creditors of the mortgagor having liens on the mortgaged premises are made defendants for the purpose of barring their equity of redemption, and as to them the allegation of the bill is as follows: 'Plaintiff further states, on informa-

tion and belief, that the defendants Addison W. Hastie, Fred T. Evans, Lawrence county, and the city of Deadwood have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgage.' A bill for a foreclosure of a mortgage which asks for a decree for the amount of the mortgage debt, and the sale of the mortgaged premises to satisfy the same, and alleges that the lien of the complainant's mortgages is prior and superior to the liens of some of the defendants named in the bill, presents but a single cause of action. The ascertainment of the relative rank of the liens is incidental to the main purpose of the suit. 'The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Railroad Co. v. Ide*, 114 U. S. 52 [5 Sup. Ct. 735, 29 L. Ed. 68]; *Torrence v. Shedd*, 144 U. S. 527 [12 Sup. Ct. 726, 36 L. Ed. 528]."

In *Thompson v. Dixon* (C. C.) 28 Fed. 5, it is said:

"There is but one cause of action in the case, which is the foreclosure of the mortgage, and the proper adjustment of the several liens upon the property. To this action the mortgagor, who is the holder of the equity of redemption, and who is liable for any deficiency, is a necessary party. He is, indeed, the principal party defendant, resides in the same state with the plaintiffs, and cannot be ranged on the same side with the plaintiffs for the purpose of making a case for removal to the federal court."

In a suit to foreclose a mortgage the holder or holders of the legal title to the property are necessary parties, in order that the decree entered, and sale thereunder, may cut off their equity of redemption. Such holder or holders of the legal title, and all persons against whom the plaintiff demands a personal decree for the indebtedness due, are parties necessary to the case, and are adversary parties to the plaintiff, hence necessary parties defendant to the suit; and such adversary parties, of necessity, must remain as they came into the case, defendants, and cannot, for the purpose of conferring jurisdiction on the federal court, or for any other cause, be arranged on the same side of the controversy with plaintiff. Their interest is not united with that of the plaintiff, but is antagonistic to plaintiff. These propositions are self-evident, and need no support from authority.

Again, as the petition filed in the state court by plaintiff makes but one cause of action or controversy between plaintiff and all the defendants, and as the defendants Fritzlen, the makers of the note and mortgagors, are necessary parties defendant, antagonistic to plaintiff, and not united in interest with plaintiff, the suit could not have been by plaintiff, in the first instance, brought in this court, because the defendants Fritzlen are citizens and residents of this state with plaintiff. Hence the cause cannot be removed into this court by the bank, a nonresident of this state and a citizen of Missouri, for only such suits as might originally have been brought in this court can be removed into this court. In *Mexican National Railroad v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672, the Chief Justice, rendering the opinion, says:

"We must hold, therefore, as has indeed already been ruled in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454 [14 Sup. Ct. 654, 38 L. Ed. 511], that the jurisdiction of the Circuit Court, on removal by the defendant under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction, and as such cannot be waived."

It must therefore be held, on the case made by plaintiff in the state court, this cause was improperly removed into this court on the ground of diverse citizenship of the parties thereto.

At the oral argument something was said by counsel for the defendant bank of the want of good faith on the part of plaintiff and defendants Fritzlen in the making of the papers forming the basis of plaintiff's suit, and in the bringing of this suit. The allegations of fact in the petition for removal are, by the motion to remand, taken as true. No issue has been joined thereon by plaintiff below, no fraud or fraudulent joinder of parties defendant to defeat the jurisdiction of this court is there pleaded, hence such contention, if possessing any foundation in fact in such suit as this, is unavailing here.

But one question remains. Is this case in its nature such as may be removed into this court by the defendant bank on the ground of prejudice and local influence? While the application made upon this ground is found in the petition for removal which was addressed to the state court, and was not addressed to this court, yet, it being the desire of counsel for all parties to this controversy that the question of the right in law of the defendant bank to remove this case into this court, upon proper application alleging prejudice and local influence, be now determined, the same will be considered as though the application were in proper form addressed to this court and supported by sufficient proof. As has been seen, the suit involves but one controversy. The defendants Fritzlen are necessary parties defendant, because their interests in the subject-matter of the controversy are adverse to that of plaintiff. The suit could not have been brought in this court, and hence cannot be removed from the state court into this court by the defendant bank on the ground of diverse citizenship of the parties, for the reason the principal and necessary defendants Fritzlen are citizens of this state with plaintiff.

May the bank remove the cause into this court on the ground of prejudice and local influence? This precise question has not been ruled by the Supreme Court or the Court of Appeals for this circuit. It has, however, been twice decided in this circuit. *Anderson v. Bowers* (C. C.) 43 Fed. 321; *Campbell v. Milliken* (C. C.) 119 Fed. 982. While a contrary view has been held in other circuits, yet when the language of the act of 1887-88, Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509], in this regard is compared with that of the act of 1867, Act March 2, 1867, c. 196, 14 Stat. 558, as that act was construed by the Supreme Court in *Myers v. Swann*, 107 U. S. 546, 2 Sup. Ct. 685, 27 L. Ed. 583; *American Bible Society v. Price*, 110 U. S. 61, 3 Sup. Ct. 440, 28 L. Ed. 70; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 6 Sup. Ct. 929, 30 L. Ed. 60; *Hancock v. Holbrook*, 119 U. S. 586, 7 Sup. Ct. 341, 30 L. Ed. 538; *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. Ed. 352—I am convinced of the soundness of the views expressed in *Anderson v. Bowers* and *Campbell v. Milliken*, supra, wherein it is held: One of two defendants, both necessary parties to a suit in which there is no separable controversy, cannot remove the cause into the federal court on the ground of prejudice or local influence under the fourth subdivision of section 2 of the judiciary act of 1887-88, where his codefendant is a

citizen of the same state as the plaintiff. That this is the true construction of the section of the act under consideration, and the irresistible conclusion of the whole matter, becomes more apparent when the language employed by Mr. Justice Gray, delivering the opinion of the court on a question of close analogy with that now under consideration in *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685, and that of Mr. Justice Bradley in *Re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738, is considered; and this view is in harmony with the repeated decisions of the Supreme Court, that the purpose of the act of 1887-88 was to further restrict the jurisdiction of the federal courts.

It follows, the motion to remand the case to the state court from whence it came must be sustained, and the application made to remove this cause into this court on the ground of prejudice and local influence, from the very nature of the case, must be denied. It is so ordered.

UNITED STATES v. COHN et al.

(Circuit Court, S. D. New York. March 9, 1904.)

1. CONSPIRACY—QUALITY OF EVIDENCE—PARTNERSHIP WITH CONSPIRATOR.

Where, in a trial of a member of a firm for conspiracy to defraud the customs revenue, there was proof that his firm was concerned in such conspiracy, *held* that it is not mere partnership in the firm, nor relation to some acts, that the law required to be done in the course of passing goods through the custom house, that is demanded to show guilty connection with the conspiracy; it must inevitably appear that such connection was used, or such relation assumed, for the purposes of subserving the conspiracy.

2. REVENUE—CONSPIRACY TO DEFAUD—NEW TRIAL—VERDICT CONTRARY TO EVIDENCE.

Where a verdict of guilty was rendered in a trial for conspiracy to defraud the United States of duty on imported merchandise against a member of a firm that was implicated in the conspiracy, *held* that the verdict was contrary to the evidence, and a new trial should be granted, where it appeared that the accused had been admitted to the firm within seven months of the time of the fraud; that during that time, and the previous time when he had been an employé of the firm, he had not been connected with the general management of the business, which was of large volume and international scope, requiring a systematic division of duties; that he had been engaged almost exclusively in selling the merchandise and designing patterns; and that there was no evidence that he had had any relation with a single fact in connection with the purchase of the merchandise or its importation, with the exception that he had signed in blank some of the entries of the merchandise, leaving the particulars of the entries to be filled in by the customs brokers, and no evidence that he had had occasion to examine into the business of the company, or that there had been an accounting during his membership in the firm.

3. CRIMINAL LAW—NEW TRIAL—CO-CONSPIRATORS.

Where parties have been indicted for conspiracy, tried together, and found guilty, the grant of a new trial to one of the accused does not require that a new trial should be granted to any co-conspirator.

4. SAME—LIABILITY OF PARTNER FOR CRIME OF COPARTNER.

A partner is not chargeable with criminal acts of his copartners or others, acting in behalf of the firm, unless he has knowledge thereof.

¶ 4. See Partnership, vol. 38, Cent. Dig. § 307.

5. CUSTOMS DUTIES—ENTRY—ILLEGAL DECLARATIONS—SIGNING IN BLANK—NOTARY PUBLIC—FALSE CERTIFICATION.

Under section 5, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 132 [U. S. Comp. St. 1901, p. 1889], providing that on the entry of imported merchandise the importer shall make certain sworn statements in regard to the importation, *held*, that the practice of having such declarations signed in blank by an importer, to be filled in later by a customs broker, and the practice of notaries public in falsely certifying such declarations as having been made and sworn to in their presence, are illegal, and to be condemned in law as in morals.

Henry L. Burnett, U. S. Atty., and W. Wickham Smith, Sp. Asst. U. S. Atty. Gen.

A. J. Dittenhoefer and Frank H. Platt, for Cohn.

De Lancey Nicoll, John D. Lindsay, and Judson G. Wells, for Browne.

THOMAS, District Judge. The indictment charges that "on and before the 30th day of July, 1901," Rosenthal, Cohn, Browne, and others to the jurors unknown, conspired to defraud the United States of duties that should be paid upon goods imported from foreign countries by Abraham S. Rosenthal and Martin L. Cohn, and that such conspiracy was to be effected by Rosenthal and Cohn causing the goods to be shipped from foreign countries, consigned to A. S. Rosenthal & Co., at the port of New York, upon consular invoices containing, and known to them to contain, false statements as to weight; and that they should make their written estimated entries at the custom house at the port of New York upon such invoices, whereupon Browne, the examiner in the appraiser's department, should neglect and refuse to ascertain the true weight and nature of such part of the said goods as should be designated and sent to the public stores for examination, and should knowingly make false returns and reports upon the invoices as to the weight and nature of the goods, to the end that the estimated entries and the duties upon the same should be liquidated by the collector upon such returns and reports, and less than the amounts of duty legally due thereon collected. The indictment charged five overt acts, three of which were entries made by Rosenthal and Cohn, and two of which were the passing of goods by Browne in the manner charged.

After numerous motions, demurrers, and pleas not involving the merits, the action was brought to trial on January 22d, pursuant to an order of the court made at a previous term, and, upon Rosenthal failing to appear, the trial was severed as to him, and the jury impaneled as to the other defendants. Some 4½ days were taken in the selection of a jury, and thereupon the trial continued to February 20th, when the jury rendered a verdict that Cohn and Browne were each guilty, and strongly recommended the former to the mercy of the court. Each defendant moved for a new trial, and after full discussion and consideration of the carefully prepared briefs of the parties it is concluded that a new trial should be granted to Cohn and denied to Browne. The evidence amply justified the finding of the jury that some persons, in behalf of A. S. Rosenthal & Co., for several months after about January 1, 1901, were importing goods and entering them

at this port upon false invoices, for the purpose of defrauding the government. Indeed, the evidence, marshaled with admirable painstaking and skill, and lucidly presented upon the trial by the government, amounted to a demonstration that could have left no properly equipped mind unconvinced that there was a fraudulent scheme formed by some persons. Had there been a single invoice showing a mere discrepancy between the weights as actually ascertained and as invoiced, the government might not accuse the importation as fraudulent; but the multiplicity of fraudulent invoices, showing repeated and startling discrepancies between the stated and actual weight of the goods, must have swept irresistibly the minds of the jurors to the conclusion that fraudulent practices for the purpose of defrauding the government were on foot, and that several persons connected with A. S. Rosenthal & Co. at this and foreign ports were involved. Indeed, specific written evidence was given that some person in New York, co-operating with A. S. Rosenthal & Co.'s agent at Lyons, arranged with Coles & Son, of London, that the latter should pack silks made in China, 200 pieces in a case, and, marking them "Made in Japan," deliver them for shipment to Pickford, forwarder at London, and that A. S. Rosenthal & Co.'s agents at Lyons should attend to the consulation. Such goods should have been invoiced and consulated at London, but it was contrived that the goods should be consulated at Lyons, France, upon invoices showing purchase of Godchaux & Co., of that place, of 50 pieces in case, of a weight largely below the actual weight, and at a price much less than the price actually paid; and so it was done. The goods were consulated at Lyons on or about March 18th, the entry blank was signed by Cohn and the entry thereupon made in New York on March 28th, and one case was examined and passed as correct by Browne on April 2d. Under this arrangement three other shipments of goods purchased of Coles & Son, upon invoices severally dated April 1st and 4th and May 11th, all showing similar frauds, were made, and upon due arrival at this port the goods were entered, Rosenthal in each instance signing and declaring upon the entries; but none of the last three shipments of fraudulent importations from London chanced to be sent to the public stores, nor did Browne examine them. The transactions connected with the purchases from Coles & Son, standing alone, unequivocally declare that some persons, in the interest of A. S. Rosenthal & Co., arranged a criminal scheme to defraud the government, and imported goods under and pursuant thereto, thereby depriving, on four shipments, the government of between \$6,000 and \$7,000. While the evidence of this fraudulent practice on the part of some persons has this irresistible probative force, yet the evidence disclosed the personnel of the guilty actors with varying degrees of persuasiveness. That certain persons, either holding the relation of partner or agent to the firm of A. S. Rosenthal & Co., were such guilty actors, admits of no doubt whatever. As to the defendants Cohn and Browne, a just statement is that the evidence does not warrant a conclusion, within the rule of reasonable doubt, that Cohn was a guilty actor in the fraudulent undertaking, while there is sufficient evidence to justify the finding of the jury that Browne, beyond a reasonable doubt, was involved in the ar-

rament to commit the fraud. It may be that the evidence of Browne's guilt is not so irresistible as is the evidence that the fraudulent scheme existed, yet the evidence against Browne is sufficient to justify the verdict that he, without whom the conspiracy would be hopelessly ineffective, was a member of it. Browne, observing a right that belonged to him, was not a witness in his own behalf, and the state of the evidence was such that the jury was justified in finding that his acts and omissions, further unexplained, were inconsistent with his innocence, and were only compatible with the conclusion that he had betrayed the trust reposed in him as an examiner, for the purpose of aiding the conspiracy. It does not appear that there was error in the impaneling of the jury, in the admission or rejection of evidence, or in the charge of the court, demanding that a new trial should be granted.

It remains to point out with some particularity the reasons for the decision that the evidence concerning Cohn was insufficient to justify the verdict of guilty rendered against him. It is a delicate judicial function to supervise, and, if need be, set aside, the finding of a jury of such marked excellence in intelligence and unabated attention as the jurors in the case possessed and observed. But not even a proper concern for governmental interests, or the public welfare, or for a sturdy enforcement of the law, warrants the maintenance of a verdict that is unsupported by sufficient evidence of guilty connection with the crime charged. It is not a mere connection with the business of the importing firm involved, nor relation to some acts that the law required to be done in the course of passing goods through the custom house, that is demanded. Such connection must exist, and such relation of some person representing the importers in due course of business must arise, even if the importations were legitimate. It must inevitably appear that such connection was used, or such relation assumed, for the purpose of subserving the conspiracy.

What was Cohn's connection with the business of A. S. Rosenthal & Co., and with the transactions upon which the charge is predicated? What was the firm of A. S. Rosenthal & Co.? Who were the partners? What was and what had been Cohn's relations to the firm? What did he specifically do respecting the fraudulent invoices? What opportunity did he have to know of the same? What presumption of knowledge of the nature of such invoices existed, from which the jury could draw inferences unfavorable to him? The firm of A. S. Rosenthal & Co. was established in business in New York at some time before the year 1892, and was engaged in the purchase and sale of Japanese silks, handkerchiefs, lambrequins, table covers, and taffetas. The firm's name was changed in 1898 to that of A. S. Rosenthal & Freed, the latter having been for some years a partner. Cohn, who had previously been engaged in business in the far West as salesman for different houses located there, came to New York in 1892, and after a time was employed by A. S. Rosenthal & Co. to sell goods in the city of New York. After two years he added to his duties of salesman the further care of creating or devising the styles or patterns of goods that should at times be shown in goods manufactured for the firm or purchased by it. For the first year he received a salary

of \$6,000; for the second year he received a salary of \$7,500; for the third year he received $6\frac{1}{4}$ per cent. of the profits, with a guaranty of \$7,500, which in 1898 was increased to 15 per cent. of the profits, with a guaranty of \$15,000. On January 1, 1901, Freed retired, and Cohn became a partner in the firm, putting in some capital, and entitled to receive 25 per cent. of the profits and \$10,000 in salary in addition. In Yokohama the firm had a branch known as A. S. Rosenthal & Co., in charge of one Bramhall and J. H. Rosenthal, a cousin of A. S. Rosenthal, both of whom had an interest in the profits of the business. In Lyons, A. S. Rosenthal & Co. had an agent, Godchaux, while one Beechenor—for some 14 years so employed—attended to the buying of the goods in Europe, and received his compensation by sharing in the profits of the business. The firm both sold and bought goods in Europe, having accounts in Zurich, France, London, and Canada. This survey of the business indicates the range and complexity of its trading, whose volume is illustrated by the fact that in 1901 the business amounted to \$3,750,000, that the foreign value of the merchandise imported was some \$1,650,000, and the duty paid thereon was \$868,000. The extent of the business of the firm has important bearing upon the question of Cohn's cognizance of the details of the firm's transactions, beginning, so far as this action is concerned, at the very inception of his joining it, and extending through some six or seven months thereafter. Into this large business of a long-established house Cohn was introduced as a partner in January, 1901. Such a business necessarily demanded systematic division of duties, and the evidence uncontradictedly shows that Cohn was in the sales department; that he sold goods in the morning about the city of New York, and that in the afternoon he was in the salesroom, selling or attending to sales of goods on the floor, or, when not so engaged, that he designed goods in a small office taken off from such floor. It also appears that Rosenthal, Medd (an employé in the office), Cohn, and at some times Freeman, head salesman, made up the prices of goods to customers. As to this Cohn testified: "Q. What did you have to do with it? A. We would look at an article, and see what we thought it would bring, and put the price on accordingly. * * * Q. Did you know anything about the market for those goods abroad? A. No, sir; nothing to do with the market abroad." It further appears that in March the general office was moved to a floor above the salesroom, that Freed had been in immediate charge of it during his connection with the firm, that thereafter Rosenthal had charge of it, and under him Mr. Hill, an employé, to December, 1901, when he was succeeded by Mr. Medd. Cohn states that he did not have occasion to look over the invoices of goods, save that "once in a while I had occasion to refer to one to see what was coming in—some particular style we had orders for, and when we could promise the trade to deliver them to them." The goods came into the basement of the store, and were opened by the porters, and minor clerks checked them off from the assortment sheets, which showed the kind of goods, the number of pieces of the goods, and the lot number of the goods. These sheets were sent up to the office for comparison with the original invoices. Cohn states that he never checked off an assortment sheet

with the invoices in his life, nor was he present when this was done. It further appears that Rosenthal was in general charge of the business. That fact may be inferred properly, inasmuch as he had for a long period been the principal partner, and the person who contributed more largely to its capital. It cannot be doubted that he was the head of the house, the governing power, and the person in charge of its financial affairs. The evidence shows that Cohn, before August, 1901, never went to the custom house, except for the purpose of leaving his signature when he first became a partner; that he was never at the appraiser's department before July 30th, save on a single occasion, for a harmless errand; that he never visited the banks, save on a single occasion, to leave his signature; that he did not have charge of drawing checks; that he never paid the bills, nor saw them; that he never ordered the goods. All of that part of the business was in a separate department, with which he had no immediate connection. Nor is there the slightest evidence in the case that Cohn had any personal connection whatever with any of the transactions whereby the goods were brought to this country, nor is there any specific evidence that he had any immediate knowledge thereof. But upon the arrival of the goods in this country there is evidence connecting Cohn with particular acts with reference to the entry of certain invoices at the custom house, and with reference to certain transactions in the appraiser's department after such entry. Of all the invoices offered by the government 14 were passed by Browne, and the dates of these invoices range between December 21, 1900, and June 22, 1901, and the entries thereof in the custom house range between January 18, 1901, and July 15, 1901. Ten of these invoices were from Yokohama, and six of these ten entries were made by Cohn and four by Rosenthal. It seems fair to state that the goods falling under these ten invoices had gone into consumption before the conspiracy was discovered. Hence the government, for the purpose of showing the false weights described in these invoices, was obliged to rely upon such samples as had been selected from the total pieces of goods by Browne, to be sent to the analyst for his examination and report, and thereafter returned to the appraiser's department, where they remained after Browne had been suspended. Respecting this manner of ascertaining the weights of goods falling under such invoices, the learned counsel for the government stated in the final argument to the jury:

"We would have an absolutely perfect case against both Cohn and Browne if you strike every bit of that evidence out of the case. And, moreover, I say to you that if there were no other evidence against these men than that particularly, they never would have been prosecuted. That evidence—and I will proceed to discuss its value in a moment—that evidence is offered here as corroborative evidence to establish irresistibly the inference to be drawn from the other facts that have been proven against these people, from the English Coles shipments, from the kaiki invoices that were always underweighted, from the substituted invoices. These are the salient points of the evidence for the prosecution, and the so-called swatch (sample) testimony is introduced to corroborate the other testimony, and to strengthen the inferences to be derived from it."

The remaining invoice passed upon by Browne was dated March 18th, entry was made thereon March 28th, and was passed by Browne

on April 2d. The declaration to the entry was signed by Cohn. This invoice covered goods purchased in London, and, while fair on its face, it was in fact a narration of falsehoods, according to the evidence, whereby the government was defrauded of several thousand dollars. Browne was suspended from duty on July 30th, and the only other entries shown to have been made by Cohn before such suspension were three in number. One was on July 27th, upon an invoice from Yokohama, dated July 3d. An examination of the goods was made in the appraiser's department on October 19th, by J. D. Smith, who found a discrepancy in weight of $10\frac{1}{2}$ pounds upon a total weight of $254\frac{3}{4}$ pounds, the duty on the deficiency being \$43.35. Thereupon the balance of the cases in the shipment which had been delivered to the importers was asked for, but it was answered that the remaining cases had largely gone into consumption, with the exception of certain pieces, which were offered to the government, but were not accepted by it, as they were regarded as insufficient for the purposes of further examination. There were also two entries signed by Cohn, one on July 25th and the other on July 16th. The invoice covered by the entry first named was examined and the goods weighed in the first instance by Examiner Pringle, on July 29th, and returned as correct. A re-examination was had by Examiner Smith in August, on several occasions, and finally in Cohn's presence—a privilege obtained by Cohn after much difficulty, and only after application to the collector himself. A discrepancy in weight of 67 pounds was discovered. Cohn's energetic conduct respecting the investigation of this invoice has been characterized as self-serving, but it is equally consistent with the promptings of a person unconscious of an offense, and unwilling to credit its existence without ascertainments made before his own eyes. The other invoice entered by Cohn on July 16th, and passed by Smith on August 13th, covered goods from Yokohama. Smith reported that there were more pieces of goods than were mentioned in the invoice, and that there was a discrepancy in weight of 549 pounds, which would make a difference in duty of \$423.40.

So much for entries made by Cohn before Browne's suspension on July 30th. The entries made thereafter are unimportant upon the question now under discussion, inasmuch as any entry made after Browne was suspended could not have been in furtherance of the conspiracy. The question now arises whether the mere fact that Cohn made such entries of itself is any evidence of his guilty connection with the fraudulent scheme. Had these entries been made by a partner in charge of the purchasing department, or if it had appeared that such partner had been connected with the importations—for instance, those from London—the fact of such person taking part in the entry would have been strong supplemental evidence of guilty participation in the conspiracy. But such conclusion would have found its necessary support in the earlier evidence of actual or presumed knowledge of the transactions with which the offenses were connected. While the jury must have inferred that Rosenthal, Beechenor, Godchaux, or all of such persons, had such knowledge, yet there is no specific evidence as regards Cohn; nor does it appear that he was in a position where he would be likely to obtain such knowledge. Therefore the fact that

his name appears upon the entries is quite as consistent with his innocence as with his guilt. But when the circumstances under which he signed the entries are taken into consideration, there is no ground for holding that the mere fact of signing the entries showed that he was a participant in the fraud of which they were in fact a part. It was then, and is still, a practice of the firm of A. S. Rosenthal & Co. to have in its possession a number of entry blanks, issued by their custom house brokers, Corbett & Co., and it was the further practice, justly condemned, of A. S. Rosenthal's custom house clerk to take a number of these blanks to some member of the firm to secure his signature to them before they were filled up. Thereupon the clerk retained these blanks until it was desired to make an entry of goods, whereupon he sent the number of blanks needed to Corbett & Co., the custom house brokers, whose clerk filled in the entry on its face and back, and one Brautigan, a notary public, certified that the importer had made the declaration in his presence. The entry, thus filled in and certified, was presented at the custom house for the purpose of making the entry upon the invoice described in it. Counsel for the government urged that the mere fact that this objectionable practice was employed was in itself evidence of Cohn's connection with the conspiracy. While such practice is in disobedience of the statute, and is to be strongly condemned in law as in morals, it would not tend to convict Cohn upon an entirely distinct charge, although it might be used to affect his credibility as a witness. However much it might tend to discredit the evidence of Cohn as to any affirmative statement or negation made by him, the jury would have no right to infer that the opposite of his statement was true, unless there were other evidence upon which the jury might rely. Had the invoice been an honest one, representing an honest transaction, Cohn would have signed the declaration and have made the entry in precisely the same manner. But whether the entry was made upon a blank form, and without proper declaration before a notary public or other proper officer, or whether it was made in obedience to the statute in that regard, the mere fact that Cohn did what he did to enter the goods cannot, of itself, have any significance as showing his guilty participation in the conspiracy, without some evidence that he knew the nature of the invoice to which the entry related. Of this there is not the slightest evidence in the case, unless it may be found in the fact that he became a member of the firm of A. S. Rosenthal & Co. in 1901, and that from that connection alone it may be presumed that he knew the business of the firm, and was cognizant of the transactions represented by the invoices.

In this connection it must be observed that before these entries signed by Cohn were received in evidence, the counsel for the government and for the defendants had made the following stipulation:

"Counsel for the government admit that all such signatures to entries and declarations were placed on said paper in blank, and that said papers, so signed in blank, were sent to M. J. Corbett & Co.; that all the writing in said entries and declarations was placed afterwards thereon by George Brautigan, a clerk in M. J. Corbett & Co.'s office; and that none of said papers were seen by said Cohn, after signing them in blank, until more than a year after the said entries were made in the custom house, and that said Cohn had no knowledge how said papers were filled in by Brautigan."

This stipulation was in accordance with the fact as shown by the evidence, and the government lost no rights by making it, and thereby saved much time upon the trial. The stipulation merely represented the truth, and its value now is that it illustrates that the government recognized the fact as it existed, and made the stipulation accordingly.

The customs administrative act (section 5, Act June 10, 1890, c. 407, 26 Stat. 132 [U. S. Comp. St. 1901, p. 1889]) provides that the declarant shall state that he is "the owner of the merchandise described in the annexed entry and invoice," that the declaration shall describe the ship in which the importation was made, and that the declarant shall state "that the invoice and entry which I now produce contain a just and faithful account of the actual cost of the said goods," etc. This provision seems to make the invoice a part of the declaration, so as to bring it within the terms of the stipulation. Hence it must be accepted as a fact that Cohn did not know how the declaration was filled in, nor what invoice was attached to and made a part thereof. This deprives his act in signing the entry blank of any significance as bearing upon his complicity in the conspiracy. But assume that the blank had been filled, the invoice annexed, and Cohn had signed and duly declared before the proper officer. What would the act signify as showing his guilty connection with the conspiracy? He would be doing the precise thing which he would have a right to do, and which the law required him to do in the case of an honest importation. Hence, as already stated, the act of making the entries in itself counts for nothing. Nobody claims that an inspection of the invoices would discover the fraud without an examination of the goods to which they were related. Hence, unless Cohn had some antecedent knowledge of the fraudulent practices, he is not incriminated by his immediate connection with the entries.

Upon the motion for a new trial the learned counsel for the government is understood to have admitted orally that substantially the only evidence connecting Cohn with the conspiracy was to be found in the fact of his relation to the firm of A. S. Rosenthal & Co., and his duties in the business of such firm. While this seems to very much narrow the evidence against Cohn, yet, after a most careful consideration of the evidence, it is thought that counsel brought the discussion to the very essential and crucial point of the inquiry. The argument against Cohn may be stated as follows: Cohn was at the head of the selling department. He knew and aided in fixing the prices of goods. To do this he must have known the cost of the goods, and therefore he must have known the factors that entered into the cost, one of which was the duty paid upon them; and thereby learned, if he had not obtained notice or information from other sources, that there was a fraudulent scheme for depriving the government of its proper duties. Moreover, as a partner, he could not but have known of the large savings of duty and of disbursements to corrupt the examiners. It is a rule in criminal cases that a partner is not charged by the criminal acts of his copartners, or others acting in behalf of the firm, unless he has knowledge thereof. The law in relation to partnership is that the partner agrees to be bound for all acts done in obedience to the law, to which there are attached certain civil liabilities for

fraudulent acts or representations done or made by a partner or an agent for the purpose of affecting the firm's business. It is not considered that, in the absence of some special statute bearing upon the particular acts of a firm, whereby each partner is made the subject of punishment, one partner can be found guilty of a crime because his partner or agent has done acts that would justify his or their punishment. However, there would be a very strong presumption that, if a person were a member of a firm regularly carrying forward a business in course of which offenses were committed for the purpose of defrauding the revenue of the United States, he would become at some time cognizant thereof. For instance, if money were being paid to Browne for the purpose of obtaining his co-operation in the criminal scheme charged, it would not be presumed that Rosenthal, if he were the guilty actor, would make the arrangement, and himself alone bear the disbursement, but that he would exact contribution from Cohn and his other partners, or those interested in the profits. Even if the books of the company did not show such disbursements, yet no one would infer that they would be lost sight of in the yearly adjustment between the partners. So, also, if several cases of silks were ordered in London, and there was, through a fraud practiced on the revenue, a difference in duty amounting to between \$6,000 and \$7,000, it would be a reasonable presumption that at some time a partner not first concerned in the arrangement looking to this saving would become cognizant thereof. But it must be kept in mind that Cohn was a younger man, who had entered the firm on January 1, 1901, and that he had been a part of the firm less than six months when the conspiracy was rendered ineffective. There is no evidence that during that time he had had occasion to examine into the business of the company, nor from a knowledge of the manner in which business is conducted is there any inference that he did make an examination of the books, or that there was any settlement between the partners. Had there been such settlement, or had a year expired, after which such settlements are usually made, it would be difficult to infer that a partner, who was vigilant in securing his full share of the profits; would take such statement as his partner saw fit to make of the receipts and disbursements, or that he would remain unfamiliar with the manner of conducting the business, by which large sums of money were saved by fraudulent practices. Taking into consideration the large extent of the business, its widespread transactions, the practically supreme power which Rosenthal exercised over it, the necessary division of the business into departments, the absorption of Cohn in a department so totally divorced and unrelated to matters that would give him notice of the transactions in the office or of the fraudulent importations, the fact that he was a new member of the firm, and had been such for only six months, and presumably had not yet had his first accounting with Rosenthal, it is thought that a verdict that he must have been conscious of the existing frauds and the favorable results to the firm was not justifiable.

So far as fixing prices is concerned, the evidence shows that Rosenthal, and the men immediately under him in charge of the office, the head salesman, and Cohn, participated, taking into consideration, among other things, undoubtedly, the prices for which the goods would

sell in the market, concerning which Cohn's opinion would be of the utmost value. While it may be properly assumed that the cost of the goods would enter into the prices fixed, it is not to be inferred that the cost price was diminished by the amount saved through fraudulent importation. It is not to be presumed that the fraudulent scheme was conceived and enacted for the purpose of aiding the consumer; and, if there is to be any presumption, it is that the cost of the goods were made up in the office, and were either marked upon the goods, or communicated to Cohn, or both, without entering into a discussion of the effect upon the cost price on account of the fraudulently diminished duties. While, therefore, all this class of evidence might create suspicion of knowledge on the part of Cohn, of which he availed himself as a member of the firm, or while it might carry some moral conviction, it appears to the court, looking at it as strictly legal evidence, that it is not sufficient to connect Cohn with the conspiracy, so that it can be said beyond a reasonable doubt that he was guilty.

The government also gives evidence of certain acts of Cohn after the 30th day of July, when the conspiracy became practically ineffective. Before that time, on the 16th or 17th of July, he had been to the appraiser's department for the first time, and then only for the purpose of finding whether certain goods which, contrary to the rule, had been delivered to A. S. Rosenthal & Co. for consumption, must be returned to the appraiser's department, or might be released. The defendants' counsel urges that, inasmuch as he refused to allow the goods to be opened or used before the full rules of the custom house had been complied with, it showed a fidelity on his part tending to acquit him of any indirection; while the government contends that there was some error in the shipment unfavorable to the firm, entirely disconnected with the conspiracy, that showed that he had a selfish purpose in having the goods sent back to the appraiser's department. But, whatever his motive, it was plainly not a guilty one, and has no significance in that regard.

After the 30th day of July there were certain goods afloat, shipped from Yokohama, and on August 15th these goods were reconsulated upon substituted invoices, whereon entries were made at this port between October 17th and 29th, by Cohn, in the manner above stated. It is contended that the reconsulation of these goods after the conspiracy was discovered shows an attempt to conceal the misrepresentation of weight in the original invoices, and that this in some way affects Cohn. There is not the slightest evidence that he had any connection with the substitution of these invoices, and, even if he had, it would be quite consistent with integrity that an honest partner, having discovered a fraud, should insist, as far as possible, that the fraudulent invoices be not used, but that invoices, so far as possible correcting the false invoices, be substituted in place thereof, and that the custom house authorities should be informed that additions should be made for weight and value. The same may be said of the Lyons substitutes. These entries were all made and passed through the custom house after October 17th, and it would be more than unreasonable to presume that Cohn, or any other person, was attempting to defraud the government at that late date. The most that can be claimed for these

subsequent actions is that they showed an effort to make right something that had been done wrong, either for the purpose of preventing detection or saving the goods from seizure. The evidence shows that Cohn had no specific connection with a single act, fact, or circumstance relating to the purchase, invoicing, shipping, or importation of the goods into this country; that after their arrival his sole relation to them was that he made entries in the manner above stated of certain of the goods; that his brief connection with the firm of A. S. Rosenthal & Co., and relative duties in connection with its business, do not justify an inference that he had obtained knowledge of the fraud. Hence it must be concluded that there is not sufficient evidence to support the verdict as to him. The court has had opportunity to consider the evidence denied to the jury, and after the most assiduous study of the record has reached the conclusions stated.

Upon the authority of *Regina v. Gompertz*, 6 Pa. Law J. 377, Commonwealth v. McGowan, 2 Pars. Eq. Cas. 341, and *Dutcher v. State*, 16 Neb. 30, 19 N. W. 612, it is urged by counsel for Browne that a new trial for Cohn must result in a new trial for Browne. These cases do not seem in point. Cohn is granted a new trial because no cause of action was proved against him, and the indictment should have been dismissed as to him by the court. Had such dismissal been ordered, nevertheless Browne's case could have been submitted to the jury.

STATE OF IOWA ex rel. GREGORY v. JONES, Warden.

(District Court, S. D. Iowa, W. D. March 19, 1904.)

1. CRIMINAL LAW—JUDGMENTS—REVIEW—HABEAS CORPUS.

A writ of habeas corpus is not available to review mere errors or irregularities of another court.

2. SAME—STATUTES—HABITUAL CRIMINAL ACT—EX POST FACTO LAW.

Laws 27th Gen. Assem. Iowa, p. 58, c. 109, providing that whenever a person has been twice convicted of the larceny of property exceeding \$20 in value, and shall thereafter be convicted of such offense, he shall be imprisoned for a term not less than 15 years, is not in violation of Const. U. S. art. 1, § 10, as an ex post facto law, though it applies to a defendant convicted of larceny after its passage, whose prior convictions, and the punishment assessed thereon, had been fully completed before the passage of the act.

3. SAME—RULES OF EVIDENCE—CHANGE.

Such act was not ex post facto on the ground that it changed the rules of evidence, and permitted the admission of different testimony than that which the law required at the time of the commission of the offense in order to convict accused.

4. SAME—INDICTMENT.

Laws 27th Gen. Assem. Iowa, p. 58, c. 109, provides that whenever a person has been twice convicted of the crime of larceny, and shall thereafter be convicted of such crime, he shall be imprisoned for a period of not less than 15 years. *Held*, that where an indictment for larceny charged that defendant had been previously three times convicted for such offense, and the jury, by a special verdict, so found, such indictment and verdict were sufficient to bring accused within the statute, since, by

¶ 1. See Habeas Corpus, vol. 25, Cent. Dig. § 25.

having been previously twice convicted, he brought himself within the class of habitual criminals, and it was immaterial how many more convictions he had suffered.

Habeas Corpus.

Recently there was filed by the relator a petition asking for the issuance of the writ of habeas corpus, to the end that his imprisonment might be inquired into, and that on a hearing he might be discharged from custody of the warden. From the petition the following facts appear: October 22, 1891, Gregory was convicted on indictment for the crime of larceny by the district court of Greene county, Iowa. April 1, 1895, for a like crime, he was convicted by the district court of Adair county, Iowa. September 7, 1896, he was convicted of a like crime by the district court of Harrison county, Iowa. In all those cases the value of the property stolen was in excess of \$20, and in all the cases he was sentenced to the penitentiary, and he served his respective terms of imprisonment. All of which were prior to the year 1898. In the year 1898 (chapter 109, p. 58, Laws 27th Gen. Assem.) a statute was enacted providing, among other things, that whenever a person has been twice convicted of the crime of larceny of property of a value in excess of \$20, and shall thereafter be convicted of such crime, he shall be imprisoned for a time not less than 15 years. The statute requires that such prior convictions shall be pleaded, and that the jury shall specially find whether he has been so convicted as alleged. In May, 1900, Gregory was indicted in the district court of Pottawattamie county, Iowa, for the larceny of a mule in October, 1899, of the value of \$125. The indictment also recited the three prior convictions. The verdict was that of guilty as charged, and special affirmative findings of the three prior convictions as alleged. And he was sentenced to 20 years' imprisonment, which he is now undergoing, and by reason of which Warden Jones now detains him. Notice having been given to the Attorney General and county attorney, they have filed, for the warden, a demurrer to the petition.

T. H. Milner, for relator.

Charles W. Mullan, Atty. Gen., and W. H. Kilpach, Co. Atty., for Warden Jones.

McPHERSON, District Judge (after stating the facts as above). The validity of the judgment now being enforced against the prisoner, and the statute, as construed by the state court, under which the judgment was pronounced, are assailed for many reasons. Some of these reasons only will be noticed, because, as to all the others, this court has neither the right nor the power to inquire into them.

It has been held over and over again that the writ of habeas corpus cannot be used as an appellate proceeding by which the irregularities or errors, real or supposed, of some other court, can be reviewed. Such matters can only be determined on appeal or by writ of error. And if there be no appeal, the rulings and the judgment of the trial court are a finality. And if the case is carried up, and the judgment affirmed, the conclusions of the appellate court put the matters forever at rest. So that many of the contentions of counsel for the prisoner on the present hearing are given no consideration.

Although not pleaded, yet, as a fact, it can be stated that there was an appeal from the judgment in question to the Iowa Supreme Court. See *State v. Gregory*, 90 N. W. 1131. And the fact that the Iowa Supreme Court disposed of the case in an opinion of seven lines, and that the case was not even argued, in no manner can call for the judgment of a federal court on the questions which might have been argued, or which might have been discussed by the Iowa Supreme

Court. Ever since Iowa has been a state, the maximum punishment for grand larceny has been five years' imprisonment. And prior to 1898 Iowa had no habitual criminal law. And prior to 1898 the three prior judgments had been pronounced against the prisoner, and prior to that year he had fully served the several terms of imprisonment provided for by the three several prior judgments. The contention of the prisoner is that the statute of 1898, as construed and enforced against him, is an *ex post facto* law. The entire strength of the argument is that the last fifteen years of the imprisonment imposed upon him were because of crimes committed prior to the enactment of the statute of 1898. And while it is not material, he seeks to strengthen his claim that not only were his three crimes committed prior to the enactment of that statute, but that he had wholly served the terms of imprisonment imposed for those three crimes before the action of the Legislature of 1898. Prior to the argument of the case at bar, and before reading the decisions of the courts upon the question, it seemed quite plausible that Gregory, under the judgment now assailed, is being imprisoned for five years or less for the stealing of the mule in Pottawattamie county in 1899, and for fifteen years or more for his larcenies prior to 1898. But plausible as this statement is, it is only plausible, and not a correct statement. It is unsound. Const. U. S. art. 1, § 9, provides that Congress shall not enact an *ex post facto* law, and by section 10 of the same article it is provided "no state shall * * * pass any *ex post facto* law." And what is an *ex post facto* law? In *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162, Chief Justice Marshall said: "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." A better, or more accurate definition has not been given. From this definition it is seen that the punishment provided for when the crime was committed is the punishment that must be imposed. If no punishment was then provided for, none can be imposed by subsequent legislation. If punishment was then provided for, subsequent legislation cannot be enacted, increasing the punishment, and such legislation can only refer to subsequent crimes. The punishment can be lessened, but never increased, as against any one, for a crime already committed. No more beneficent provision is found in the Constitution for the protection of the individual, and it must be and will be enforced on behalf of the bad citizen or criminal as well as for the good citizen.

But the learned counsel of the relator concedes that the statute of 1898 is within the Constitution, and therefore valid, but claims that it is only valid when it relates to other convictions committed after the enactment of the statute. But the authorities are against him, whatever might be urged if it were an original question. *Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184, is in a measure in point, although it does not go to the extent as claimed. The federal Constitutional provision was not relied on nor discussed in that case. But the case of *Commonwealth v. Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256, is in point. In that case the offense pleaded as a prior conviction was committed prior to the enactment of the statute under which the convictions appealed from was enacted. And it was held that the statute, as thus construed, was not an *ex post facto* law.

Sturtevant v. Commonwealth, 158 Mass. 598, 33 N. E. 648, is of like holding. And so is *In re Miller* (Mich.) 68 N. W. 990. *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18, is squarely in point. In that case the defendant was indicted for breaking and entering a building with intent therein to commit larceny April 4, 1890. The indictment also pleaded two former convictions of felonies—one of June, 1881, and the other of October, 1886. The statute was of date May, 1885. So that one of the prior offenses, and convictions as well, was of a prior date to the enactment of the statute. The prisoner urged the point that the statute, as applied to him, was an *ex post facto* law. The jury finding him guilty as charged, and finding the allegations of the indictments as to the prior convictions to be true, he was sentenced to the penitentiary for life. The judgment was affirmed by the Ohio Supreme Court.

Moore v. State of Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301, by argument, at least, is in point. The indictment charged a felony as of date May 26, 1893. It also set forth a prior conviction of a felony. The date of the enactment of the statute in question is not given, and therefore it will be assumed that it was prior to the commission of the first offense. The defendant, by reason of the crime charged and the former conviction, was sentenced to prison for life. So far as appears from the opinion, it was not urged that the statute was an *ex post facto* law. At all events, that question was not discussed in the opinion. The point decided was that the statute was not in conflict with the fourteenth amendment. Therefore it cannot be said that the case is an authority on the point now before this court. But the fact is that by argument, at least, much of what is said by the chief justice is persuasive on the question now presented, and is worthy of being considered in the case at bar.

It is always with satisfaction that quotations are made from Cooley's *Constitutional Limitations*—one of the few really great text-books. That work (7th Ed.), at page 383, recites:

"And a law is not objectionable as an *ex post facto* which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that, in providing for such heavier penalties, the prior conviction authorized to be taken into the account may have taken place before the law was passed. In such case it is the second or subsequent offense that is punished, not the first; and the statute would be void if the offense to be actually punished under it had been committed before it had taken effect, even though it was after its passage."

From these authorities it will be seen that a prisoner is convicted and sentenced for the one crime charged, and is not convicted on account of or for the prior crime or crimes. But he is convicted of the crime charged, and as belonging to a class of incorrigibles, for whom punishment does no good—a class into which the accused has voluntarily brought himself, and as against whom society has the right to be protected by placing him for the balance of his life where he cannot prey upon the people. In this case it was fortunate for Gregory that his sentence was for but 20 years, instead of for life, as it

could have been—fortunate because at the end of 20 years, with four convictions behind him, he will have one more chance in life.

A law is also *ex post facto*, and therefore void, if it alters the rules of evidence, and allows less or different testimony than the law required at the time of the commission of the offense in order to convict the accused. It is therefore urged that the statute changes the rules of evidence, and is therefore void. But this point has already been covered.

The prisoner was convicted for stealing the mule in Pottawattamie county in the year 1899, after the enactment of the statute, and in stealing the mule, thereby, by his own act, he brought himself into a class of thieves, as distinguished from those not yet classified by judicial records. As already observed, the statute in question covers cases wherein the accused has been twice before convicted.

The indictment against Gregory recited that he had been three times before convicted, and the trial jury, by special verdicts, found the allegations to be true. And because of such allegations and special verdicts, it is claimed that the judgment is void. This cannot be so. It is a familiar, and perhaps elementary, rule of criminal law and pleading that the greater includes the lesser, the same as in mathematics. If he had been three times before convicted, as, of course, he had been twice before convicted, and the indictment would have been good, and the special verdicts valid, if innumerable convictions had been pleaded and proven. Two prior convictions would bring the accused into the class, and twenty prior convictions would do no more. But all this was a question for the Pottawattamie District Court, subject only to review by the Iowa Supreme Court, and with which this court has no concern.

The court holding, as it does, that the statute of 1898 is valid, and that it is not an *ex post facto* law, even when construed as authorizing the pleading of a conviction of an older date than the statute, to the end of bringing him into a class of criminals, the writ of habeas corpus should be, and is, denied, because section 755 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 593] provides that the writ shall not issue if the petition, on its face, shows that the prisoner is not entitled thereto.

In re MERO.

(District Court, D. Connecticut. March 18, 1904.)

No. 1,219.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—FAILURE TO DISCHARGE LIEN.

A livery stable keeper's lien given by statute is not a lien "obtained through legal proceedings," which is dissolved by an adjudication in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450], nor does the failure of the debtor to discharge such lien at least five days before a sale of the property thereunder, as provided by the statute, constitute an act of bankruptcy under section 3, subd. 3 (30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]).

2. SAME—INVOLUNTARY PETITION—ALLEGING ACT OF BANKRUPTCY.

An allegation in a creditors' petition that defendant committed an act of bankruptcy by removing property with intent to hinder, delay, or defraud his creditors should be made as specific as possible, but greater detail of statement than creditors can probably furnish will not be required. It is not necessary to allege in what manner the defendant indicated his intent, which may be inferred from the facts alleged and proved.

3. SAME—SUFFICIENCY OF PETITION.

A petition in involuntary bankruptcy must set out the business in which the defendant was engaged, or state specifically that he was not engaged in one of the excluded classes by business or occupation.

In Bankruptcy. On creditors' petition for adjudication.

J. Birney Tuttle, for petitioners.

Harry W. Asher, for respondents.

PLATT, District Judge. The important parts of the petition are as follows:

"And your petitioners further represent that said John O. Mero is insolvent, and that within four months next preceding the date of this petition the said John O. Mero committed an act of bankruptcy, in that he did heretofore, to wit,

"(1) On the 18th day of January, 1904, suffer and permit, while insolvent, Robert H. Nesbit and Stephen J. Warner, two of his creditors, to obtain a preference through legal proceedings, to wit, by allowing said creditors to obtain a lien for \$130.00 on two horses, a wagon, coach, harness, and blankets for the keep of said property, by virtue of section 4167 of the General Statutes of Connecticut, and has not, within at least five days before the sale of such property on said lien, vacated or discharged such preference.

"(2) Transfer while insolvent all or part of his said property by permitting and assisting James E. McGann, another creditor, to make an attachment on same for the purpose of permitting said attachment to become absolute under the statute laws of the state, and thereby transferring title to same under said laws, with the intent to prefer said James E. McGann over his other creditors.

"(3) That said John O. Mero has within four months next preceding the filing of this petition transferred and removed large sums of money, his property, to New York City, as your petitioners are informed and believe, with intent to hinder, delay, or defraud his creditors, and that Carrie A. Mero, the wife and agent of said insolvent, stated at a meeting of his creditors held on the ——— day of January, 1904, that said Mero had from July, 1903, up to about December 1, 1903, removed to New York about \$7,000 in money, none of which money can now be found within this state."

To the petition said John O. Mero demurs, because the complaint fails to allege:

"First. (a) When sale of the property mentioned in paragraph 1 of said complaint took place; (b) that notice of the time and place of said sale was given to the defendant by said Nesbit & Warner; (c) that the bankrupt within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against him in favor of said Nesbit & Warner, and the effect of such judgment will be to enable the said Messrs. Nesbit & Warner to obtain a greater percentage of their debt than any other of such creditors of the same class.

"Second. (a) What property the said bankrupt permitted and assisted the said James E. McGann to attach; (b) when said attachment was brought; (c) how much the said James E. McGann claimed; (d) to what court the said writ was returnable and when so returnable; (e) that the said bankrupt has, being insolvent, within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured and suffered judgment to be entered against himself in favor of said McGann, or made trans-

fer of any of his property, and the effect of such judgment or transfer will be to enable the said McGann to obtain a greater percentage of his debt than any other of such creditors of the same class; (f) that the bankrupt suffered or permitted, while insolvent, said James E. McGann to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of the property affected by such preference vacated or discharged such preference.

"Third. (a) Upon what dates said money was removed by said bankrupt to New York City, and to whom transferred or removed; (b) in what manner the said bankrupt indicated his intent to hinder, delay, or defraud his creditors by the transferring and removal of said large sums of money to New York City.

"Fourth. (a) That the defendant is neither a wage-earner nor a farmer."

He also moves to strike out that portion of subdivision 3 beginning with the words, "and that Carrie A. Mero," etc., to the end, because the words are evidential.

The petitioners ask leave to amend subdivision 1 by adding the following:

"On January 14, 1904, the said Nesbit & Warner caused a notice of the sale of said property to be served upon said John O. Mero by a constable of the town of New Haven, a copy of which notice is as follows:

"New Haven, Ct., Jan. 14th, 1904.

"John Mero, City—Dear Sir: You will please take notice that on the 21st day of January, 1904, at 10 o'clock in the forenoon, at number 141 Union street, we will sell at public auction the two horses, wagon, coach, harnesses, blankets, now held by us under a lien for the board, etc., of said horses and wagons, to satisfy a lien upon the same for \$130.

"Dated at New Haven this 14th day of January, 1904.

"Robert H. Nesbit and

"Stephen J. Warner,

"By L. Erwin Jacobs, Their Attorney."

If the amendment were allowed, the objection to subdivision 1, which appears in "c" of the first ground of demurrer, would still stare us in the face. It is clear that Nesbit & Warner claimed a lien under section 4167, Gen. St. Conn. 1902. This is commonly known as "the livery stable keeper's lien," and provides that, "when a special agreement shall have been made between the owners of any * * * horses * * * and any person who shall keep and feed such animals, regarding the price of such keeping, such animals shall be subject to a lien for the price of such keeping," and further provides for the detention of such animals, and for a sale at public auction, under certain regulations, if the debt shall not be paid.

It will be noticed that there is no allegation that a special agreement had been made regarding the price of keeping the animals upon which the lien is claimed, and also that an attempt was being made to sell at public auction "wagon, coach, harnesses, and blankets," as well as the "two horses" which might have been the subject of a special agreement as to keeping and feeding. For these reasons alone the demurrer is sound; but, as I am at the matter, it may be well to cover the entire ground.

In my opinion, if the lien were valid, the most favorable statement of facts which could be devised would not constitute an act of bankruptcy, under the third subdivision of section 3 of the act of July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. Under sec-

tion 67f (30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]), a mechanic's lien, properly filed, is not dissolved by adjudication, since it is not a "lien obtained through legal proceedings." *In re Emslie*, 102 Fed. 292, 42 C. C. A. 350. I am unable to discover the line of reasoning which will place any liens arising from state statutory provisions on a different footing. If any lien becomes so attached that it cannot be disturbed by adjudication, it would seem to follow, as a syllogism, that the failure to remove it cannot constitute an act of bankruptcy, under section 3, subd. 3, of the act of 1898.

The allegations under subdivision 1, as presented, or as they might be presented, are insufficient. Subdivision 2 is not pressed by the petitioners, and is clearly insufficient. As to subdivision 3, the motion to strike out the latter portion is granted. The remainder of the subdivision is demurrable as it stands; but I think that the petitioners can, by amendment, make it an issuable cause of bankruptcy.

It is important that the allegations in this respect shall be as specific as possible, but it would be unfair and contrary to the spirit and purpose of the bankrupt law to require greater detail than it is probable that creditors can furnish. I do not think it necessary to allege "in what manner the said bankrupt indicated his intent." If a man in his circumstances removed \$7,000 in money to New York between July, 1903, and January, 1904, such fact would be one of the evidences of intent which might be introduced. *Collier on Bankruptcy* (4th Ed.) p. 32.

As to the further ground of demurrer, I can find nothing in the petition which enables me to form an opinion as to what Mero's business was. My information comes from other sources. It is certainly necessary, either to set forth the kind of business the respondent was engaged in so that one may be able to see that it is not of the excluded classes, or to state specifically that it was not of the excluded classes. An amendment is necessary to avoid the force of the fourth ground of demurrer.

The petitioners may amend their petition, in accordance with the suggestions above given, within 10 days by paying \$10 costs. If it shall not be so amended, let the petition be dismissed. If it shall be so amended, let the respondent answer within 10 days thereafter.

The petition against Carrie A. Mero, as amended, is, in the main, satisfactory. The volume and page of record of the chattel mortgages should be inserted, and also an allegation that defendant is neither a wage-earner nor a farmer.

In re BRINKER.

(District Court, W. D. New York. February 19, 1904.)

No. 719.

1. BANKRUPTCY—TAXES ON MORTGAGED PROPERTY—RIGHTS OF PURCHASER AT FORECLOSURE SALE.

A purchaser at foreclosure sale, under a decree of a state court, of real estate of a bankrupt, with knowledge that there were tax liens thereon, and that the trustee in bankruptcy was insisting that the property be sold subject to such liens, or that the taxes be paid from the proceeds, acquires no equity which requires the bankruptcy court to direct the payment of the taxes from the personal estate of the bankrupt.

2. SAME—SALE OF PROPERTY FOR TAXES—RIGHTS OF PURCHASER.

A city filed a claim against the estate of a bankrupt for taxes due on real estate of the bankrupt which had been sold in foreclosure proceedings, and on which, under the state statute, the taxes were a lien. While the claim was pending, the city sold the property for the taxes as provided by statute. *Held* that, the purchaser being a volunteer, the doctrine of equitable subrogation had no application to transfer to him any right of the city to preferential payment of the taxes from the personal estate of the bankrupt, instead of looking to the property on which the taxes were a lien.

3. SAME—REQUIRING PAYMENT OF TAXES BY TRUSTEE—RIGHTS OF MORTGAGEE.

Where mortgaged real estate of a bankrupt subject to a paramount lien for taxes is sold in a foreclosure suit for less than the mortgage debt, Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], which provides that a trustee shall pay all taxes, does not require the payment of such taxes from the bankrupt's personal estate, the result of which would be to give a preference to that extent over the general creditors; the municipalities to whom the taxes are due being secured, in any event, by their lien on the property.

In Bankruptcy. On review of decision of referee.

George C. Riley, for trustee.

Frank Rumsey, for county of Erie and Benjamin W. Carskaddon.

Percy W. Lansdowne, for city of Buffalo.

HAZEL, District Judge. The question for decision arises from facts which, so far as material, are as follows: Certain real estate of the bankrupt, situated in the city of Buffalo, incumbered by two mortgage liens, was sold at foreclosure sale to Benjamin W. Carskaddon on the 5th day of February, 1902. Adjudication in bankruptcy was made September 24, 1901. There were tax liens for taxes assessed upon the mortgaged premises. The foreclosure sale was free and clear of all taxes. The trustee of the bankrupt was a party defendant to the foreclosure proceedings, and at the sale demanded that the property be sold subject to the tax liens. This the referee refused to do. Thereupon application was made by the trustee to the New York Supreme Court, in which the foreclosure action was pending, to require such payment out of the proceeds of the sale. The state court denied the application on the ground that the personal estate of the bankrupt was primarily subject to the payment of tax liens. On appeal to the Appellate Division of the Fourth Department, New York, this decision was sustained. It was the duty of the trustee to collect and

reduce to money the assets of the bankrupt. At the time of the mortgage foreclosure, the trustee stood in the position of the bankrupt and the general creditors, demanding a sale of the property subject to incumbrances for taxes, or payment from the proceeds of the sale if such payment could legally be demanded. It undoubtedly was his duty to effect a sale of the bankrupt's realty at the best possible advantage to the bankrupt estate, and, if possible, to enhance the value of the assets. Whatever equities exist in favor of the purchaser at the foreclosure sale arose at that time, and it is difficult to perceive how any disposition can be inequitable towards the purchaser, Carskaddon, who was apprised of the tax liens in controversy, of the prior sales of said property because of nonpayment of taxes, and the claim of the trustee. The question, therefore, of whether the taxes were legally due and owing, in the sense that they should be allowed priority here, was an open one, for subsequent determination by the bankruptcy court. The city, in connection with the purchaser, now demands payment of these from the estate. Reliance by the purchaser for the payment of the tax liens by the trustee under the provisions of section 64a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), is not sufficient to compel a decision that in equity, as well as under this section, the taxes should have priority from the bankrupt estate. The inferences deducible from the evidence are that Carskaddon bought the mortgaged property at the sale, knowing the exact situation as to these taxes. The undisputed evidence shows that there are outstanding at this time upon the tax records of the county of Erie and of the city of Buffalo, as taxes and assessments, the following sums: County tax for 1899, \$194.64; county tax for 1900, \$144.72; county tax for 1901, \$172.64; city tax for 1901, \$616.87; and local assessment, \$378.05. On February 20, 1902, more than two weeks after the foreclosure sale, claims were presented to the referee in bankruptcy by the county and municipal authorities, and an application was made for an order directing the trustee to pay the tax liens above enumerated. It further appears by the record that after the foreclosure sale, and after claims for tax liens were filed under section 64a, as above stated, the real estate was sold by the county to one Wadhams for nonpayment of taxes for the year 1900, and thereafter was also sold by the municipality to one Wiltsie for nonpayment of the city taxes and assessment heretofore set out. Such sales were made in conformity with statutory requirements providing for the collection of taxes. The city and county therefore have no real interest in the controversy. They are secure. The only result of an affirmance of the referee will be an ostensible allowance to the city and county, which will redound, not to their benefit, but to that of an individual at the expense of the general creditors. Apparently the method to effect the object of the statute was strictly followed. The referee, in his decision, allowed a portion of the claims which were disputed, namely, the county taxes for the year 1900, and city taxes for the year 1901, amounting in the aggregate to \$784.68, and disallowed the remainder. According to the referee, the purchasers of the tax sales by operation of law became equitable assignees, and were subrogated to the legal rights and privileges of the

taxing body. This proposition is based upon the premise that there could be no relinquishment of liens for taxes by conditional sales of the property affected, for the reason that the statutes of the state under which the real estate was sold were mandatory, and hence the status quo was fixed and determined when the claims were filed in the bankruptcy court, which, as has been stated, was subsequent to the said foreclosure sale. It is further maintained that the purchasers at the tax-lien sales were merely holders of tax certificates, and accordingly obtained only a defeasible title, the owner reserving the right of redemption within a specified time, and further that, in legal effect, the taxing bodies became trustees for the purchasers. This assertion, it is thought, finds support in the statutes which authorize the county and city to subsequently receive the amount of unpaid taxes, together with costs and expenses, from the delinquent, should he elect to redeem the property sold within the time limited by law.

I do not assent to the conclusions found. A precedent for holding differently where the facts are as here may be found in *In re Veitch* (D. C.) 101 Fed. 251, where Judge Townsend decided that "taxes should not be paid by the trustee, where such a payment would operate to the advantage of a third party against another; the taxes being, in any event, secured." Nor does the principle of the right of equitable subrogation have application here. *Acer v. Hotchkiss*, 97 N. Y. 396. The purchasers of the tax certificates were not obliged to bid in the property at the tax sale in order to protect themselves. They were not mortgagees or judgment creditors, or even creditors, of the bankrupt. They are third parties to the transaction, pure and simple, and accordingly cannot invoke the aid of the doctrine of subrogation. Furthermore, none of the purchasers of the tax certificates are parties to this proceeding. Evidently they do not rely upon the redemption of the property by the trustee in bankruptcy, or the payment of the taxes as a preferred claim. The taxes were paid by them in full, and they hold the property taxed as security. What further interest has the county and city in the real estate in question? No other or different taxes are due and owing them from the estate of the bankrupt. The remedy which the county and city have elected for the collection of the tax has resulted in absolutely wiping out the unpaid liens for taxes, and in securing, if not absolutely paying, their claim. There is no sound reason why the county and city should longer be regarded as creditors entitled to a priority of payment. The bankruptcy court should, whenever possible, so marshal the assets of the estate as to secure equitable distribution to all. In *re Veitch*, supra. The direct result of payment of the purchase by Wadhams and Wiltzie at the time of the sale for unpaid taxes deprived the municipality and county of further interest in the controversy. A different question would arise if, for example, the county and city had been obliged to bid in the real estate at the sale, and had, therefore, a defeasible title to it. In a recent analogous case (*In re Stalker* [D. C.] 123 Fed. 961) decided by this court, the following was said:

"The significance of section 64a, as applied to a municipality, is that a claim for taxes is paramount to all other claims, because of the pecuniary needs and requirements of the municipality, and so as to relieve the general taxpayers

from the payment of an unfair proportion of taxes. Some seemingly unjust features may be presented by the application of the stringent provisions of the bankrupt act referred to, but, as the law is plain and singularly free from ambiguity, it is obvious that Congress intended that the statute should be strictly construed and applied, unless the facts disclose unjust or prejudicial results."

Such being the law, it is clear that third parties, bidders at a tax sale, holding tax certificates for their security, are not entitled to relief out of the assets of the bankrupt. Much less is the purchaser at a foreclosure sale, having full knowledge of the tax liens, entitled to demand relief by the payment of taxes ostensibly to municipalities, but which in reality inures solely to his benefit, and when it may fairly be assumed that he bid in the incumbered property subject to existing liens for unpaid taxes and assessments.

I conclude that no priority of payment should be allowed on account of tax liens, and, for the reasons stated, the conclusion of the referee as to the tax claims allowed is reversed, and sustained as to those taxes which have been disallowed.

In re BYERLY.

(District Court, M. D. Pennsylvania. March 26, 1904.)

No. 141.

1. BANKRUPTCY—TRUSTEE'S REPORT—ATTORNEY'S FEES—DISALLOWANCE—EXCEPTIONS BY ATTORNEY.

Where an assignee for the benefit of creditors under the state law was appointed trustee for his assignor in bankruptcy proceedings, and on his accounting the referee disallowed certain payments made by the trustee for attorney's fees after the assignment and before bankruptcy proceedings were instituted, the attorney to whom such fees had been paid was not entitled to file exceptions to the referee's rulings.

2. SAME.

Where the whole amount of a bankrupt's estate, which passed through the hands of the trustee in both his capacities as the bankrupt's assignee for creditors and as trustee in bankruptcy, exclusive of the bankrupt's exemption, did not exceed \$5,500, and the trustee's payment to his attorney of \$125 for fees and \$21.75 additional for serving notices and mileage, was allowed, it was proper for the referee to disallow further payments for attorney's fees.

In Bankruptcy. On certificate from W. W. Fletcher, referee.

H. H. Matter, for exceptions.

Edwin W. Jackson, for creditors.

ARCHBALD, District Judge. On December 6, 1901, the bankrupt, M. Elmer Byerly, made an assignment for the benefit of creditors under the provisions of the state law to A. H. Smith, who qualified and entered upon his duties. Within four months thereafter, on March 29th following, a petition in bankruptcy was filed against him in this court, at the instance of creditors, based on the assignment. The right to maintain these proceedings was contested by the bankrupt on the ground that the petitioning creditors had recognized and consented to

the assignment, by participating in certain meetings held under it, whereby they were estopped from trying to overturn it. But the proceedings were sustained, and on March 21, 1902, an adjudication against the bankrupt was entered. Subsequently, at the first meeting of creditors, A. H. Smith, the assignee under the state law, was chosen trustee, and after disposing of the property and effects of the bankrupt he filed an account, which was sent to the referee, and he has considered and passed upon it. It is to his disallowance of certain items therein relating to the fees of counsel that exception has now been taken.

The trustee incorporated into his account a schedule of his receipts and disbursements as assignee, and with the balance so struck started his account proper. So far as the expenditures for which he has claimed credit in this way were incurred for the preservation and benefit of the assigned estate in his hands, he is entitled to deduct them, the same as he would be if the estate was to be turned over to another; and this, as recognized in *Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, extends to what may be due for the services of counsel. But, as there pointed out, it is limited to that which was beneficial and necessary, and it is upon this that the parties here divide.

The accountant claims credit as assignee for counsel fees, as follows: Jan. 9, 1902. H. Homer Matter, Esq., retaining fee, \$25. Feb. 25, 1902. H. Homer Matter, Esq., on account, \$50. March 5, 1902. H. Homer Matter, Esq., balance for services, \$140. In addition to this, in his account as trustee we find the following: March 12, 1903. H. Homer Matter, Esq., on account, on order of referee, \$50. August. Notice on eight judgment creditors and mileage, 36, at 16 cents, \$21.76. August 11, 1903. H. Homer Matter, Esq., for balance for professional services, expenses, and stating account, \$80. Taking the two accounts together, this amounts in all to \$366.76. The referee refused to allow the two items of \$140 and \$80, reducing the claim to \$146.76, and to this the attorney nained has excepted.

It is very clear that the exceptions must be dismissed. In the first place, so far as the first of these items is concerned, the accountant is the only one affected, and he does not object. It is upon his rights to this credit that the referee has passed, and not upon his liability or that of the assigned estate for them to Mr. Matter. As pointed out in *Randolph v. Scruggs*, supra, the claim as it is now presented must be worked out through the accountant in his former capacity as assignee, and cannot be put any higher than an allowance to him for necessary counsel fees paid. If sought to be proved as a claim against the bankrupt estate, it might be different; but in that relation it would have no preference. It comes in here solely as a debt incurred in the disposition of the assigned estate, and the assignee is the only one concerned in its rejection.

The other item of \$40 for services to the trustee may stand better. There is no direct provision in the bankrupt act for the payment of the fees of attorneys employed by the trustee; but they come in as part of the administration of the estate, like other necessary expenses (In re Stotts, 1 Am. Bankr. Rep. 641, 93 Fed. 438); and in that char-

acter attorneys claiming them would seem to be entitled to be heard in their behalf. But the referee in the present instance has rejected this item, as he did the other mentioned, on the merits, because he did not think it had been earned, and I see no occasion to disturb that result. The estate was not a large one; the whole amount passing through the hands of the accountant in both his capacities not exceeding \$5,500, exclusive of the bankrupt's exemption. Neither does it seem to have been seriously involved. It presented simply the ordinary case of a small commercial failure, in which the services of counsel were only needed, to a limited extent. It is the policy of the bankrupt act to administer the estates which are brought into court as economically as possible, and no large fees are to be expected. Those directly allowed by the act are purposely kept down to the lowest possible limits, and the courts have no right, in fixing the compensation of counsel, to be differently influenced. The attorney in the present instance has received \$125 in fees, and an addition of \$21.76 for serving notices and mileage, the occasion for which is not altogether manifest. I agree with the referee that this is all, under the circumstances, that he can ask.

The referee did not exceed his authority in rejecting the items referred to without waiting for express exceptions. In presenting his accounts for passing, the trustee was bound to vouch them, and to the extent that he did not do so to the satisfaction of the referee the latter was warranted in revising them as he did.

The exceptions are overruled, and the report of the referee is confirmed.

IN RE NATIONAL MERCANTILE AGENCY.

(District Court, E. D. Pennsylvania. March 30, 1904.)

1. BANKRUPTCY—RECEIVERS—RIGHT TO SUE.

Where a receiver was appointed for a bankrupt before the appointment of a trustee, and was given power to proceed forthwith to collect and take possession of all the assets of the bankrupt, he was not authorized to bring suit to collect such assets in a jurisdiction other than the one in which he was appointed.

In Bankruptcy. In Equity. Exceptions to report of special referee.
Read & Pettit and Joseph A. Arnold, for receiver.
Conard & Middleton, contra.

J. B. McPHERSON, District Judge. The exceptions to the report of the special referee need not be considered, for there is a fatal objection to this proceeding, which I regret to say was not raised at the beginning, namely, that the receiver by whom the petition was filed is not shown to have had any authority to bring the suit. As is well known, a receiver has such power only as the court that appoints him chooses to give, and unless he is authorized to leave the court of original jurisdiction, and sue elsewhere, he is not competent to bring

¶ 1. Suits by and against receivers of federal courts, see note to J. I. Case *Plow Works v. Finks*, 26 C. C. A. 49.

such a suit. The order of the District Court for the Southern District of New York gave the receiver power "to proceed forthwith to collect and take possession of all the assets of said alleged bankrupt," but nothing whatever is said concerning his power to bring suits, either in that district or in the courts of the Eastern District of Pennsylvania. The general subject is considered in *High on Receivers* (3d Ed. 1894) § 201, where it is said:

"In general a receiver, by virtue of his appointment, is clothed with only such rights of action as might have been maintained by the persons over whose estate he has been appointed, and to whose rights, for purposes of litigation, he has succeeded. It is essential, therefore, in order to sustain a suit brought by him in his representative capacity, that he should allege and set forth the equities of the parties whose rights of action he represents, and he must also show that by the appointment of the court, properly made in a matter within its jurisdiction, authority has been conferred upon him in his representative capacity as receiver to prosecute the action, and, failing to show this, he cannot maintain an action."

In *Beach on Receivers* (Alderson's Ed. 1897) the same rule is laid down in these words:

"Sec. 650. Necessity of Receiver to Have Leave of Court to Sue or Defend a Suit. The receiver is the officer, the agent, and hand of the court, and therefore his powers are limited, and are derived from the order of appointment, if a common-law receiver, and from statute, if a statutory receiver. It follows necessarily, and especially in a matter of so great importance to the administration of the trust, that the receiver has no right to institute or prosecute any suit without the consent and authority of the court being first obtained or subsequently given while the action is pending. This is the general rule, and prevails in all courts, both federal and state. The authorities in support of this proposition are numerous and in full accord. [Citing cases.]

"It is also the general rule that a receiver has no authority to defend an action without leave of court.

"The receiver's petition must contain an allegation that leave of court to sue has been obtained, or it will be demurrable.

"The reason of the rule which denies to the receiver the right to institute and prosecute litigation without leave of court has been said to be founded on the absence of title in him; but, even when he becomes invested with the title to the property, the rule still applies, and the true reason of the rule may be said to be that the receiver is wholly under the control of the court, that his powers are limited to those conferred by the court or by statute, and that in so important a matter as litigation over the trust estate the court must be consulted and is entitled to direct its officer."

It is manifest, therefore, that the receiver was without power to institute this proceeding, and for this reason the petition must be dismissed. No injury, however, is likely to be done to the bankrupt estate, for, as I am informed, a trustee has since been appointed, and he has ample power to bring an action in the proper forum to recover whatever assets of the bankrupt may be found in the possession of other persons.

The exceptions are dismissed, and the petition of the receiver is dismissed, at his costs.

In re LEINWEBER.

(District Court, D. Connecticut. March 24, 1904.)

No. 910.

1. BANKRUPTCY—CONCEALMENT OF ASSETS—RECOVERY.

Where, shortly before the filing of a voluntary bankruptcy petition, the bankrupt collected, principally in a single month, over \$3,000 from current sales, and paid more than such sum, as he alleged, to ancient and distant creditors, in the first half of the same month, and, on being given ample opportunity to corroborate his statement as to such payments by producing such creditors, he obtained the evidence of but one, an order directing him to pay to his trustees the amount so alleged to have been paid to the creditors not produced was proper.

In Bankruptcy.

J. B. Ullman and Wm. L. Bevins, for bankrupt.

P. T. O'Brien, F. S. Fay, and W. F. Davis, for creditors.

PLATT, District Judge. On February 5, 1904, Referee Newton issued an order that the bankrupt pay to Thomas P. Dunne, trustee, \$2,630 on or before February 26, 1904. Is that a lawful order, in view of the facts then before him? The order was an evolution from certain facts, of which the following are the most important:

The bankrupt was examined at a meeting of the creditors held August 1, 1902, and, by continuance, on August 20th, September 5th, and October 3d of the same year. During that examination bankrupt testified that, shortly prior to his petition, principally in July, he collected over \$3,000, and paid out the moneys so collected to certain creditors of long standing, of which this list covers the important payments:

July 8.	Fred Wertzel	500.
" 10.	Geo. Breng	930.
" 10.	John Smith	700.
" 11.	James Hurst	600.
" 13.	John Fredericks	400.
		<hr/>
		\$3,130.

His schedules are dated July 15, 1902. Claims therein set forth and proved by creditors before the referee, between June 25th and July 22d, amount to \$3,700. It thus appears that the bankrupt used the avails of his later purchases to pay ancient and far-away creditors, if his statements are worthy of belief. His actions are despicable, if he tells the truth, and I agree with the referee in his denunciation thereof.

The creditors contend that upon the evidence, taken as a whole and critically examined, it was evident that the names given were those of mythical characters, or, at best, of existing characters to whom was attributed a part in a mythical transaction. Divers efforts were made to compel the bankrupt to corroborate his story by producing the alleged payees, with their statements of such facts as would naturally be in their possession. The referee gave him unusual opportunities to raise a reasonable doubt, but he failed to do so. At a meeting in

New Haven the bankrupt finally produced one man, said to be James Hurst, and another, who was expected to remove the mystery which surrounded Smith. But, just as the performance was about to begin, both witnesses vanished into thin air, and after exhaustive search they were not located, and the mystery remained, and still remains, as impenetrable as ever. Wertzel was a Meriden man, and the bankrupt succeeded in producing him, and it would seem that his testimony must have mollified the creditors, since the amount now ordered to be paid does not include the \$500 which the bankrupt testified he had paid to him.

In these circumstances, the referee issued the order which I am asked to review. I have examined the testimony with care. The circumstances surrounding the alleged payments, when aggregated, fall little short of producing an irresistible inference that the bankrupt did not tell the truth. If there were room for a reasonable doubt to creep in, the creditors ought not to ask the court to apply the rack and thumbscrew, or to experiment upon the bankrupt; but the action of the referee was from every possible viewpoint quite appropriate and laudable. I am satisfied, beyond a reasonable doubt, that on the date of the order the bankrupt had in his possession, or under his control, the moneys which he was ordered to pay over to the trustee, and, as I understand my duty, I must sustain and approve the order. I am fortified in respect of my action by the position which Judge Brown took in *Re Schlesinger* (D. C.) 97 Fed. 930, which was confirmed by the Court of Appeals for this circuit. 102 Fed. 117, 42 C. C. A. 207.

The bankrupt relies upon *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451. I am not persuaded by the reasoning of the majority of the court in that case. Judge Sanborn, in his opinion, while for obvious reasons concurring in the result, sets forth succinctly the principles which evidently controlled the court in the *Schlesinger* Case, and cites several federal authorities in support thereof.

The order herein sought to be reversed was a lawful one, and the action of the referee is sustained.

FORTIN v. MANVILLE CO.

(Circuit Court, D. Rhode Island. March 22, 1904.)

No. 2,714.

§. MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE TO WORK—ASSUMPTION OF RISK.

Where a platform on which plaintiff was engaged to work in removing cotton was not dangerous, except as it became so from time to time when cotton was thrown onto the platform from the third floor of the building above, the hazard was a temporary danger of the business, which plaintiff assumed.

§. SAME—KNOWLEDGE OF DANGER.

Where, in an action for injuries to the servant by being struck by a cotton bale thrown from the third floor of a warehouse to the platform

¶ 1. Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

on which he was working in accordance with the custom of the business, there was no allegation that plaintiff was ignorant of the method of removing the bales from the third story of the warehouse to the platform, but merely an allegation that he was utterly oblivious of the danger and without reason to anticipate danger, the declaration was insufficient.

3. SAME—FELLOW SERVANTS.

Where plaintiff was engaged in removing cotton from a platform, and he was injured by being struck by a bale of cotton thrown onto the platform from the third story of the warehouse, an allegation of his complaint that defendants, without warning, did cause and permit a bale of cotton to be thrown from the third story of the warehouse to the platform, should be construed as an allegation that the bale was thrown by a fellow servant.

4. SAME—DUTY TO WARN.

Where, in an action for injuries to a servant by being struck by a cotton bale thrown from the third story of the warehouse to the platform on which he was working, it did not appear that the practice of so throwing the bales was an unknown risk, or that it was other than one of the ordinary risks of the business, known to plaintiff, a mere allegation that it was defendant's duty to warn plaintiff, which had not been done, without an allegation of facts from which it appeared that a duty to give warning existed, was insufficient.

5. SAME.

In an action for injuries to a servant, an allegation that plaintiff was in the exercise of due care and diligence, and utterly without knowledge or warning of any danger, and without reason to anticipate the same, is not the equivalent of an allegation that plaintiff was not familiar with the way in which the work was done, and that he did not have knowledge of the risks of the business.

On Demurrer to Declaration.

Barney & Lee, for petitioner.

John J. Heffernan, for defendant.

BROWN, District Judge. This is an action for negligence. The first count of the declaration alleges that the defendant company threw, or permitted to be thrown, bales of cotton from a doorway on the third floor of its cotton house to a platform on the first floor; that this platform was used by employes in carrying bales of cotton on trucks from the first floor of the cotton house to the picker room; that, by throwing bales of cotton from the third floor, the platform and first floor of the cotton house were rendered "a dangerous, unsafe, and hazardous place for the employes engaged in trucking bales." The count avers that the defendant "did carelessly and negligently maintain and allow said premises where the said plaintiff was set to work to be in an unsafe and unsuitable condition, and so as to endanger the life and person of the plaintiff (of all of which the plaintiff was ignorant and unaware), by allowing and permitting said opening in said third floor or story of said cotton house to be used for transferring said bales of cotton from said third floor to said platform below, without providing lowering devices or other appliances for lowering said bales of cotton from said third story of said cotton house."

The practice of throwing bales from an upper story was not in itself a violation of the master's duty to provide suitable appliances, or to take reasonable care to maintain his premises in a suitable and safe condition. While, as a general rule, it is the duty of the master to

exercise ordinary care to provide a reasonably safe place to work, this rule cannot be applied to cases in which the very work in which the servant is engaged changes the character of the place for safety as the work progresses. When the servant engages in a work that in its progress makes the working place hazardous from time to time, the hazard of such temporary danger becomes a risk of the business. *Finalyson v. Utica Mining & Milling Co.*, 67 Fed. 507, 14 C. C. A. 492; *Bethlehem Iron Works v. Weiss*, 100 Fed. 45, 40 C. C. A. 270. The danger to which the plaintiff was exposed was a danger arising from the work of transporting cotton, not a danger from the condition of the premises. The persons who were engaged in removing cotton from the third floor were in a common employment with the plaintiff, who was engaged in moving cotton from the first floor. There is no allegation that the plaintiff was ignorant of this method of removing the bales from the third story of the cotton house, and it cannot be inferred from the declaration that this risk was a latent or concealed danger, or that it was not a well-known risk of the business.

The allegation that the plaintiff "was utterly oblivious of danger, and without reason to anticipate danger," is not a sufficient allegation that the plaintiff was not aware of the practice of throwing bales from the third story. The pleader apparently has attempted, in this count, to avoid the questions of assumption of risk, and of negligence of fellow servants, by charging negligence of the master in maintaining its premises in an unsafe condition. The declaration shows, however, an injury resulting from the progress of the work. Furthermore, according to the views of the Supreme Court of Rhode Island in *Dimarcho v. Builders' Iron Foundry*, 18 R. I. 515, 27 Atl. 328, 28 Atl. 661, the allegation that "the defendants, without any warning, did cause and permit a large quantity of cotton, to wit, a bale of cotton, * * * to descend without supports, to wit, to be thrown," must be construed as an allegation that the bale was thrown by a fellow servant. The first count does not, in my opinion, state a cause of action.

The second count is said to be for the defendant's negligence in failing to give the plaintiff warning. The mere allegation of the existence of a duty to give warning is of no avail, unless facts are pleaded from which it appears that the duty to give warning existed. There is no allegation as to the length of time the plaintiff had been engaged in this work, as to his youth or inexperience, or that he was ignorant of the manner of doing the work. It does not appear that this practice of throwing bales out of a window was an unknown risk, or that it was other than one of the ordinary risks of the business, known to the plaintiff. There is no presumption of ignorance of a risk of this kind; and, without an express allegation of the plaintiff's ignorance or inexperience in the work, the existence of a duty to give warning is not apparent. The clause, "while the plaintiff was in the exercise of due care and diligence, and utterly without knowledge or warning of any danger, and without reason to anticipate same," is not the equivalent of an allegation that he was not familiar with the way in which the work was done, and that he did not have

a full knowledge of this risk of the business. The necessity of a warning is to give the servant knowledge of the risk. When he has such knowledge, failure to give warning becomes immaterial. In order to show a duty to give warning, it must appear that the risk was one not obvious or not known to the plaintiff.

Demurrer sustained

In re ROUKOUS.

(District Court, D. Rhode Island. March 16, 1904.)

No. 326.

1. **BANKRUPTCY—SETTING ASIDE COMPOSITION—GROUNDS.**

That a bankrupt made a false schedule or a false oath to his schedule constitutes ground for setting aside a composition for fraud practiced in procuring the same, if not known to the petitioning creditor until after the confirmation, notwithstanding the fact that the order confirming the composition recites that it appears that the bankrupt has not been guilty of any acts which would be a bar to his discharge, and that the offer and its acceptance are in good faith, and have not been made or procured by means contrary to the acts of Congress relating to bankruptcy.

2. **SAME.**

The petition is not demurrable for the omission of an allegation that the petitioner restored, or offered to restore, the consideration immediately on the discovery of the fraud, or for an omission to tender the consideration into court.

3. **SAME—SUFFICIENCY OF PETITION.**

A petition to set aside a composition *held* to state a case for relief, although in some respects too general in its allegations of fraudulent acts on the part of the bankrupt.

4. **SAME.**

A petition to set aside a composition filed within the six months allowed therefor, and which alleges that the fraud charged was not known to the petitioner until after the confirmation, is sufficient, and need not allege the time or manner in which his knowledge was acquired.

5. **SAME—VERIFICATION.**

A verification of a petition to set aside a composition in the usual form for a bill in equity is sufficient.

In Bankruptcy. On demurrer to petition of Lewis E. Harrower to set aside composition.

John F. Byrne, for petitioner.

Van Slyck & Mumford, Charles C. Mumford, and J. Jerome Hahn, for bankrupt.

BROWN, District Judge. This is a demurrer to a petition to set aside a composition for fraud. The bankrupt contends that the petition does not set forth any "fraud practiced in the procuring of such composition," within the meaning of section 13, c. 3, of the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]. The petition charges the making of a false schedule, and of a false oath to the schedule, and the concealment of property. It is urged that these facts were in issue on the question of the confirmation of the composition, that the petition is in the nature of a bill to annul a judgment, and that a judgment cannot be

set aside for perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. The bankrupt relies upon *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Insurance Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362.

While the order confirming the composition recites that it appears that the bankrupt has not been guilty of any acts, or failed to perform any of the duties, which would be a bar to his discharge, and that the offer and its acceptance are in good faith, and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy, this, in my opinion, does not preclude the creditor from setting aside the composition for any acts of fraud in procuring it, discovered since the confirmation, and set forth in a petition filed within six months thereafter, even if such acts would have been a bar to the confirmation of the composition if presented in opposition thereto. That a false statement by a bankrupt as to the condition of his estate, made in a sworn schedule, if relied upon by a creditor in agreeing to a composition, would constitute fraud in procuring the composition, is clear. The purpose of the schedule is to inform the creditors of the condition of the bankrupt's estate. If the creditor believes this information to be true, and is influenced thereby to accept a composition, this is "fraud practiced in the procuring of such composition," within the meaning of section 13, c. 3, of the bankruptcy act. Only frauds known to the petitioner before the confirmation are barred by this section. While section 15, as to discharges, uses the expression, "parties in interest who have not been guilty of undue laches," there is no such limitation in section 13. Upon the bankrupt's construction of section 13, if a creditor believes a bankrupt's oath, makes no further inquiry, and learns of no fraud, he is absolutely precluded from setting up frauds which would have been a bar if discovered and urged before the confirmation. A construction which would require a creditor to disregard a bankrupt's oath to his schedule, and to make an independent investigation into the bankrupt's affairs before agreeing to the composition, under penalty of being finally precluded by the confirmation thereof, would be unreasonable. Compositions are ordinarily made with a view to a speedy settlement. It is not a requirement of ordinary diligence that a creditor should assume a bankrupt to be guilty of a false oath, and, upon such assumption, make, in each case, an independent investigation before agreeing to the terms of the composition. Because creditors must ordinarily rely; to a great extent, upon a bankrupt's statement of his affairs in considering the terms of a composition, and because ordinarily they will extend to the bankrupt a presumption of innocence of criminal offense or fraud, there is a practical danger that advantage may be taken of their reliance upon the bankrupt's sworn schedule. This danger would be especially great if the bankrupt had only to procure a confirmation of the composition in order to preclude all further inquiry into the matters enumerated in section 13 as constituting a bar to confirmation. It was doubtless a purpose of section 13 to guard against the danger that a creditor might be induced to agree to a composition through fraudulent statements of the bankrupt as to the condition of his estate;

and there is no reason why the inquiry should be closed if the statements were made under oath in a schedule filed in the bankruptcy court. It was the clear purpose of the statute to give a definite period of six months within which a petition might be filed to impeach a composition for fraud, the knowledge whereof came to the petitioner since the confirmation. To so limit this section by construction as to exclude all frauds which would bar a confirmation would frustrate the purpose of section 13, and do violence to its terms.

It is further urged that the petition is insufficient in that it does not aver that the petitioner restored, or offered to restore, the consideration immediately on discovery of the fraud, and does not tender the same into court. The object of the petition is to secure additional payments. There is no apparent reason why a petitioner who has received less than his due should surrender this as a condition precedent to getting the full amount to which he is entitled. The setting aside of a composition will not ordinarily have the effect of invalidating pro rata payments made in pursuance of the composition. *Ex parte Hamlin*, 2 Lowell, 571, Fed. Cas. No. 5,993; *Collier on Bankruptcy* (4th Ed.) 155; *Brandenburg on Bankruptcy* (3d Ed.) § 339.

Objection is also made to the petition for lack of particularity in its allegations as to the details of fraud. The petition contains general allegations of the concealment of property, and of false statements in the schedule. Some of the allegations, it is true, have not such particularity as to apprise the bankrupt of the exact matters which will be offered in evidence. The burden is upon the petitioner to show fraud in procuring the composition. He points out specific portions of the schedule which he alleges were false, and alleges the omission of real estate and merchandise. While the allegation that his estate "did comprise real estate" is too indefinite, yet the general character of the merchandise is stated, and there is an averment of the removal and concealment of property of large value, and various places are specified in this connection. If the petitioner desires to introduce evidence as to the possession of real estate, he should amend his petition; but it cannot be said that the petition does not state a case for relief; and it is not apparent that the bankrupt will be prejudiced by proceeding to trial upon the allegations of the petition as to the falsity of the schedule in particulars other than the possession of real estate, and as to the concealment of merchandise.

It is also objected that the petition does not set forth when or how the petitioner learned the facts averred in said petition. It is alleged, however, that the petitioner had no knowledge of the facts alleged prior to the date of confirmation of the composition; and, as he has filed his petition within six months, he has brought himself within the language of the statute, and this, for the purposes of this petition, is sufficient.

Objection is also made that the petition is improperly verified. The verification is in the usual form for a bill in equity. Without examining the authorities, I will make a pro forma ruling that a verification in the usual form for a bill in equity is sufficient on a petition of this character.

Demurrer overruled.

In re ROUKOUS.

(District Court, D. Rhode Island. March 16, 1904.)

No. 328.

1. BANKRUPTCY—PETITION TO SET ASIDE COMPOSITION—EFFECT OF ACTION AT LAW AGAINST BANKRUPT.

That a creditor has commenced an action at law against a bankrupt will not prevent his also maintaining a petition under section 13 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 8427]) to set aside a composition for fraud.

In Bankruptcy. On motion to dismiss petition of Lewis E. Harrower to set aside composition.

John F. Byrne, for petitioner.

Van Slyck & Mumford, Charles C. Mumford, and J. Jerome Hahn, for bankrupt.

BROWN, District Judge. After filing his petition to set aside the composition for fraud in procuring it, the petitioner brought an action at law against the bankrupt. This action is now pending in the Circuit Court. The bankrupt now moves to dismiss the petition to set aside the composition, contending that by bringing an action at law the petition has been abandoned, for the reason that the two proceedings seek substantially the same thing—payment of a further portion of the creditor's claim—and that the two remedies are inconsistent. The immediate object of the petition is to set aside the composition. Apparently the only way in which this can be accomplished is according to the provisions of section 13, c. 3, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]). Brandenburg on Bankruptcy (3d Ed.) § 332. While setting aside the composition would result in an application of the bankrupt's property to his debts according to the provisions of section 64c of the act (30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), and while this would be inconsistent with the acquisition by the creditor of a preference through an attachment, it would not prevent the creditor from reducing his claim against the bankrupt to judgment. As, in the action at law, the creditor cannot accomplish the object which he seeks to effect by his petition, it cannot be said that he has abandoned his petition, or that he should be compelled to make an election between his petition and his action at law.

Motion denied.

In re ROUKOUS.

(District Court, D. Rhode Island. March 16, 1904.)

No. 328.

1. BANKRUPTCY—PETITION TO SET ASIDE COMPOSITION—VERIFICATION.

Where the principal allegations of a petition to set aside a composition are made on information and belief, a verification by an agent of the petitioner, who is not shown to have any personal knowledge of the facts, is insufficient.

In Bankruptcy. On demurrer to petition of Converse, Stanton & Co. to set aside composition.

John F. Byrne, for petitioner.

Van Slyck & Mumford, Charles C. Mumford, and J. Jerome Hahn, for bankrupt.

BROWN, District Judge. The opinion handed down this day on the demurrer to the petition of Lewis E. Harrower disposes of all substantial questions in this case, except the question of the sufficiency of the verification, which in the present case was not made by a party, but by an agent. As the principal allegations of the petition are upon information and belief, and as it does not appear that the affiant has any personal knowledge of the facts, the verification is insufficient. The information and belief of one who is not a party, and who has no knowledge of his own, is immaterial.

Demurrer to petition sustained on the ground of a lack of proper verification.

BROADNAX v. UNITED ENGINEERING & CONTRACTING CO.

(Circuit Court, S. D. New York. March 8, 1904.)

1. SALES—MANUFACTURED ARTICLES—BREACH OF CONTRACT—DAMAGES.

Where, in an action for breach of contract to purchase granite, it appeared that the granite was to be furnished according to dimensions specified in advance, and was to be of a particular kind from certain quarries, the blocks should be regarded as articles manufactured for the purpose demanded, so that the damages should be considered with reference to the cost of production, and not to market value.

2. SAME—VALUE OF MATERIAL RETAINED BY SELLER.

Where, in an action for breach of a contract to purchase dimension granite, no allusion was made at the trial to the value of granite left in the quarry that would have been removed if the contract had been performed, a verdict in favor of plaintiff would not be set aside on the ground that the value of such granite should have been deducted from plaintiff's damages.

3. SAME—MORTAR JOINTS.

Where, in an action for breach of a contract to purchase granite, it appeared that the granite to be furnished would have been in excess of the dressed blocks in place, measured, and equal or exceed the amounts taken up by the mortar joints in the work, a verdict in favor of plaintiff would not be set aside on the ground that such joints were included in the measurement.

4. SAME—RUBBLE BACKING.

In an action for breach of a contract to purchase dimension granite for bridge approaches, evidence reviewed, and held insufficient to authorize an allowance for rubble backing as dimension granite to be furnished under the contract.

At Law.

Henry H. Bowman, for plaintiff.

L. Lafin Kellogg, for defendant.

WHEELER, District Judge. The jury has well found that the defendant agreed to take from, and pay for to, Goss & Small, as-

signors to the plaintiff, "all the dimension granite required in the construction of the New East River Bridge approaches," "to be in accordance with the specifications and acceptable to the engineer," and "to be Crotch Island granite from the quarries of Goss & Small and John L. Goss," in Maine; and that the defendant broke the contract; and that it deprived them of the profits of furnishing 8,059 cubic yards at \$2.415 per cubic yard, amounting to \$19,422.19. The defendant has moved for a new trial for not confining the damages to the difference between the market value and the contract price, and for excessive damages according to the rule adopted in not allowing the value of the granite saved in place of the quarries in computing profits, and by allowing for rubble backing as dimension granite to be furnished, and including mortar joints.

The granite would have to be furnished according to dimensions specified in advance, and, as it was to be of a particular kind, from certain quarries, the blocks would be articles manufactured for that purpose, and not such as would have general market value. The damages would therefore have reference to the cost of production, and not to any market value.

The granite left in the quarry that would have been removed if the contract had been performed would, of course, have some value, near or remote, but more or less according to the limit of supply. This may have been so great that profits would be almost wholly in the chance of getting out at remunerative prices, and not in the sale of the stone. The subject of profits in quarrying and furnishing the stone at the agreed price was carefully gone over at the trial by evidence and by examination of items, and, if the value of the rock in place would have been material, there was ample opportunity to make it appear. As no allusion was made to it, it must be presumed not to have been thought material. The verdict should not be disturbed for what was at most a mere oversight, not made to appear to have been or thought to have been or any consequence.

The amount included in mortar joints was shown to be very small. The granite to be furnished would have been in excess of the dressed blocks in place measured, and perhaps enough so to make up, or more than make up, for the joints. As much was made of this as either party appeared to desire, and no sufficient reason for disturbing the verdict is made to appear on that account.

As the right of recovery depends upon the validity of the contract and extent of the breach, and not upon any delivery or acceptance under it, the extent of the breach should clearly and fairly be made to appear as a foundation of the right. The quantity of dimension granite needed was what the plaintiff's assignors lost by the breach of the right of supplying. The testimony as to this came from the assistant engineer in charge and a contractor concerned in supplying the stone that took the place of what was contracted for. The assistant engineer testified:

"Q. What do you call 'dimension granite?' A. Dimension granite is stone which is cut to dimensions which are known in advance of the cutting of the stone. Q. What is the distinction, or what other kind of granite is there? A. There is rubble. Q. Is it a fact that what is called 'backing' in this bridge is composed of rubble? A. In the approaches, yes. Q. What is backing? A.

Backing is the part of the wall which does not appear on the front. Q. Do you know what the quantity in cubic yards of backing in that wall is? A. Not accurately. Q. Do you know it approximately? A. Yes. Q. What is it approximately? A. It would be 3,180 yards."

The contractor excluded the stretchers and headers of the front courses, but his cross-examination gave ground for including them. The further examination of the assistant engineer was to the apparent effect that these stretchers and headers should be included, but left the backing doubtful. The stretchers appear to have had required dimensions in all three ways—length, breadth, and thickness—but the backing only in thickness. At the trial the evidence seemed sufficient as to the backing to be submitted to the jury. On this review it does not appear to have been adequate to support the finding. The verdict should, in this view, be set aside now, unless that part is obviated; and the plaintiff may prefer to cure it by remission, and should be granted that opportunity. The amount is a mere matter of computation. It is \$7,679.70.

If the plaintiff remits \$7,679.70 of the verdict within 20 days, let the motion be overruled, and judgment entered on the remainder; if not, the motion is granted.

In re KEET.

(District Court, M. D. Pennsylvania. December 23, 1903.)

BANKRUPTCY—SALE OF ASSETS—LIENS—JURISDICTION—DISCRETION.

A court of bankruptcy has power, in its discretion, to order a sale of the bankrupt's property free from liens thereon, though not expressly given in the bankrupt act.

SAME.

Where, by a prompt sale of a bankrupt's assets, interest accruing on liens thereon and taxes will be saved, and the sale could be made by the trustee with less expense than by the sheriff on foreclosure of the liens, which would enable the estate to be settled promptly, without awaiting the outcome of an action by lien creditors to enforce their liens, and the bankrupt's wife had quitclaimed her dower in the property to the trustee, such facts were sufficient to move the court to exercise its discretion to order an immediate sale of the assets free from the liens.

Exceptions to Order of Referee Directing a Sale of Real Estate.

Wm. M. Hargest and John C. Nissley, for trustee.

Benj. M. Nead and Danl. S. Sietz, for exceptants.

ARCHBALD, District Judge. There can be no question as to the authority of the District Court to order a sale of the bankrupt's property, free and clear of liens. This is essential to a complete administration of the bankrupt's estate, and will be implied from the general provisions of the present act, even though not expressly given, as in the preceding act of 1867. *Collier on Bankruptcy* (4th Ed.) 521; *Brandenburg on Bankruptcy*, § 1195; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Nugent v. Boyd*, 3 How. 426, 11 L. Ed. 664; *In re Pittelkow*, 1 Am. Bankr. Rep. 472, 92 Fed. 901; *Southern Loan & Trust Co. v. Benbow*, 3 Am. Bankr. Rep. 9, 96 Fed. 514; *In re San-*

born, 3 Am. Bankr. Rep. 54, 96 Fed. 551; In re Waterloo Organ Co., 9 Am. Bankr. Rep. 427, 118 Fed. 904. It is not, therefore, a matter of power, but of discretion; and while, ordinarily, the latter will not be exercised in favor of a sale where the incumbrances equal the value of the property (In re Styer, 3 Am. Bankr. Rep. 424, 98 Fed. 290; In re Shaeffer, 5 Am. Bankr. Rep. 248, 105 Fed. 352; In re Cogley, 5 Am. Bankr. Rep. 731, 107 Fed. 73), yet there are considerations in the present instance which seem to make it advisable. By a prompt sale at this time, accruing interest and taxes will be saved, a sale can be made by the trustee with less expense than by the sheriff, and the estate will be able to be settled promptly, without awaiting the outcome of the action of the lien creditors in enforcing their liens, all of which is in the interest of the general creditors, which is that which should control. The wife of the bankrupt has also quitclaimed her dower to the trustee, so that the purchaser will take clear of that interest, which is quite material. It is suggested that at a sale by the sheriff more bidders are likely to be present, and so a more favorable price secured. But with the existing incumbrances on the property, the holders will be compelled to protect their interests themselves, and the property will undoubtedly go off to one of them, so that the presence of others will be of little account. All things considered, I am therefore satisfied that a sale should be made by the trustee, as ordered.

The exceptions are overruled, and the order of sale confirmed.

STRICKER v. THE MAURICE.

(District Court, E. D. Pennsylvania. March 4, 1904.)

No. 22.

1. TOWAGE—LIABILITY FOR INJURY OF TOW—NEGLIGENT STEERING.

The master of a barge in tow in a narrow channel, and especially in approaching a bridge with a still narrower draw, is bound, no less than the tug, to exercise vigilance for the safety of his vessel, and the tug cannot be held liable for an injury to the barge which would not have occurred if it had been properly steered.

2. SAME—MANNER OF MAKING UP TOW.

A barge which consents to being towed with another abreast assumes whatever added risk arises from such method of towing.

In Admiralty. Suit for injury to tow.

Horace L. Cheyney, for libelant.

Willard M. Harris, for The Maurice.

John L. Kinsey and Harry T. Kingston, for city of Philadelphia.

J. B. McPHERSON, District Judge. I do not think it necessary to discuss in detail the evidence in this case. It presents the usual difficulties and contradictions, but makes up for them to some extent by offering the testimony of several disinterested witnesses, whose account of what they saw is entitled to considerable weight. In a word, I have come to the conclusion that the barge Rogers, which be-

longed to the libellant, was alone to blame for the accident, and that the fault with which she is chargeable is her master's failure to give proper attention to the wheel during the quarter of a mile that intervenes between the draw of the Baltimore & Ohio Railroad bridge and the draw of Gray's Ferry Bridge, where the barge was sunk. There is no doubt that the barge sheered suddenly to starboard as the Gray's Ferry Bridge was approached, and I think it altogether likely that the few inches more that were needed to carry her clear would have been gained if the masters of the two barges had been attending strictly to the important business on hand. What caused the sheer, I am unable to say, but, in my opinion, the testimony exonerates the tug from fault. The length of the hawsers seems to me to be immaterial. Either 80 feet or 150 feet was safe enough if the barges were carefully steered, but in a narrow river, such as the Schuylkill, especially in approaching a passageway not more than 65 or 70 feet wide, or thereabouts, with a tow 35 feet in breadth, vigilance was demanded of the barges, not less than of the tug. I think, also, that the weight of the evidence establishes the fact that the hawsers were properly adjusted. In my opinion, the barges could not have been towed at all if one hawser had been from 8 to 16 feet longer than the other, as the master of the Rogers is venturesome enough to affirm. It would probably have been safer to tow the two barges tandem instead of abreast, but I cannot say that it was negligence to tow them abreast, in view of the fact that this manner of towing is often done with safety in the Schuylkill. In any event, the Rogers discussed the matter with the tug in the morning before the tow was made up, and expressed a preference for the tandem method; but, when the other barge declined to go behind, because her master did not want to steer, the Rogers did not offer to take that position, apparently being disinclined also to undertake the task of steering, and acquiesced in whatever added risk was involved in being lashed abreast of the other barge. *The Columbia*, 109 Fed. 660, 48 C. C. A. 596. Neither did the tug enter the draw improperly, as it seems to me. She pursued the customary course, and the master of the Rogers himself admitted that "the boat was in the right position to enter the bridge."

I see no ground upon which the city of Philadelphia can be held liable. The municipality was not doing the work of reconstructing the railroad bridge immediately below the Gray's Ferry Bridge, and had no part in taking away the protecting fender from the submerged stringpiece that did the mischief; and neither express nor implied notice of the danger, such as would have imposed upon her the duty of removing or guarding the projecting timber, was brought home to her. There is not sufficient evidence to support the inference of negligence in this respect.

The libel must be dismissed at the costs of the libellant.

In re SPENCER.

(District Court, D. Vermont. March 10, 1904.)

No. 1,125.

1. BANKRUPTCY—PROPERTY CONVEYED TO BANKRUPT BY MISTAKE—RESULTING TRUST.

By the will of her grandmother, a fund was left in trust for the benefit of a bankrupt, the trustee to have full control of it, and to use it for the beneficiary as she might need from time to time. The trustee arranged to invest the fund in a homestead to be conveyed to him, but used by the bankrupt, but by mistake the deed was made to the bankrupt. *Held*, that a trust resulted in favor of the trustee, who paid the purchase money, and the property became a part of the estate of the grandmother, and was not subject to the bankrupt's debts.

In Bankruptcy. On petition for sale of homestead.

Elisha May, for petitioner.

Harland B. Howe, for bankrupt.

WHEELER, District Judge. This cause has now been heard on a petition of Leon Le Marr, creditor in an attachment more than four months before the proceedings for the sale of an alleged homestead of the bankrupt subject to the lien of the attachment. The homestead came from the estate of the bankrupt's grandmother by will, which provided that: "Nevertheless Nettie's part shall be dealt out to her as she may need from time to time for her own use and comfort, but shall not be paid into the hands of her husband," and gave the executor "all the power and trust." The executor has been succeeded by an administrator de bonis non and trustee by appointment of the probate court, who arranged with the bankrupt to invest the trust fund in the homestead to be conveyed to him. The first payment of \$100 was sent by the husband to the grantor, with directions to have the deed made to the trustee, but it was made to the bankrupt. The subsequent payments have been made by the bankrupt to replace advancements, and bring the trust property into the homestead in the hands of the trustee. It is familiar law that the payment of the consideration money of a deed made by fraud or mistake to another raises a trust by implication in favor of the payor. This is not affected by the statute requiring trusts to be shown by instrument in writing (V. S. § 2219), for trusts resulting or raised by implication of law are expressly excepted. This homestead is therefore now a part of the estate of the grandmother in the hands of the trustee, to be dealt out to the bankrupt by him as she may need for her use and benefit by letting her use it as he may see fit. It is no part of the bankrupt estate, either as a statutory homestead or otherwise, and did not become subject in any way to the petitioner's attachment, so as to create any lien upon it to be administered here. This is no hardship to the petitioner, whose debt, upon his own theory, was prior to any apparent ownership by the bankrupt, and could not have been induced by it.

Petition dismissed.

THE PRINS WILLEM II.

(District Court, E. D. New York. December 29, 1903.)

1. SHIPPING—INJURY OF STEVEDORE—FALLING THROUGH OPEN HATCHWAY.

Libelant, working for stevedores in loading a vessel, on coming up from the hold at night went to the other side of the vessel, in the between-decks, to get his coat, and, it being dark there, in putting on his coat fell through the hatchway, which had been left open in the usual manner, and was injured. A cluster of electric lights had been let down into the hold for the men to work by, and, on their coming out, could have been drawn up so as to light the between-decks, had libelant waited to do so. *Held*, that no negligence was shown on the part of the ship, to render it liable for the injury; the negligence, if any, being that of libelant.

In Admiralty. Action to recover damages for personal injury.

Adolph Ruger, for libelant.

Frank V. Johnson, for claimant.

THOMAS, District Judge. The libelant, employed by a contracting stevedoring firm, was aiding in loading the steamship. When he went to work in the afternoon, he went down to the between-decks through hatch No. 1, and walked along to the port wing, where he left his coat. Thence he went to hatch No. 2, and loaded cargo, consisting of iron pipes, until about half past 4, when he says he went again to hatch No. 1, and went down such hatch to the hold. About half past 5 he came up from hatch No. 2, walked along the front of such hatch to the wing of the ship, and then made his way along the port side of hatch No. 1, to his coat; feeling his way, because it was so dark that he could see nothing. His coat was a garment that he put on over his head. He states that he had put on one sleeve, and was in the act of putting on the other sleeve, when he pitched forward into the hold, and received the injuries for which the action is brought. It seems that during the afternoon some sailors were working at hatch No. 2, between-decks, fixing sails or awnings, and that the upper hatches were off, so that the between-decks at that point were lighted, and there was full light for the libelant to see when he went down and when he placed his garment in the wing, and also when he went down into the hold; but, before he had stopped work at night, the sailors had finished their work, and had covered the hatch on the upper deck so as to shut off the light, but had left the between-deck hatches off, as is the custom. When the darkness came on, a cluster of electric lights were lowered through hatch No. 2 into the hold, to enable the men to work there. There were seven men in the hold, and they all came up at the same time, one after another, the libelant leading, and, when they came on deck, it was only necessary for them to draw up the cluster of electric lights, so as to illuminate the between-decks for all necessary purposes. But the libelant, instead of waiting for the light to be drawn up, made his way in the darkness, with the result stated. He was seriously injured, but the steamship was under no obligation to furnish him a light at the point where he placed his coat; and, even though it had withdrawn the light, as he states, he should have known that the hatch into the hold was open, and should not have made his way to

the place where his coat was, without waiting for the cluster of lights to be drawn up, which would have detained him probably less than a minute. No negligence on the part of the ship is shown. The accident seems to have happened from the libelant losing his balance and falling into the hold while he was putting on his garment. If there was any negligence, it was his own.

The libel should be dismissed.

In re KLEIBS.

(Circuit Court, S. D. New York. March 7, 1904.)

1. ALIENS—DEPORTATION—DEFENSES.

Where an alien arrived by water at the port of New York, and was subject to deportation, as belonging to one of the classes of aliens whose entry is prohibited, it was no defense to his deportation that he had three years before arrived in the United States by water, and had remained for four months, during which he bought a farm, took out his first naturalization papers, and since his second arrival he had contracted marriage in the United States.

Edmund Bittner, for the writ.

Clarence S. Houghton, Asst. U. S. Atty., opposed.

LACOMBE, Circuit Judge. This is a peculiarly hard case, but it is not perceived that there is any theory upon which the petitioner can be discharged. Concededly, he is an alien who arrived by water at the port of New York on November 17, 1903. He was arrested upon a warrant of the Secretary of the Department of Commerce and Labor on February 24, 1904, and was given a hearing before the board of special inquiry, which board found that he was within one of the classes of aliens whose entry into the United States is prohibited. The accuracy of this finding is not disputed, and the petitioner was arrested and held for deportation less than four months after his arrival. The circumstances that he had arrived here by water on a former occasion in August, 1900, and remained in the United States four months, during which time he bought a farm and took out his first papers, and that since his second arrival he has married here, make his case a hard one, but do not relieve him from the operation of the statute.

The writ is dismissed. Attorney for the United States will give two days' notice of application for order of dismissal, in case petitioner may wish to appeal.

MORNING JOURNAL ASS'N V. DUKE.

(Circuit Court of Appeals, Second Circuit. March 1, 1904.)

No. 97.

1. LIBEL—CONSTRUCTION OF LIBELOUS ARTICLE—JURY QUESTION.

A libelous article appeared with headlines as follows: "Murdered Many for Insurance. Agent Here to Probe into a Horrible Conspiracy. Half a Dozen in It. Most Prominent Business Men of S. Incriminated." Smaller headlines announced the amount of money made by the plotters; that New York insurance companies were selected to be victimized; and that policies were taken on invalids, and when they did not die quickly enough they were poisoned. Below these headlines a panel was formed by a border of stars, making it specially prominent, in which under the title "The Conspirators" six persons were mentioned, including plaintiff. In another panel were given the number of those who died by disease and by poison, and whose lives were attempted, etc. Subheadings distributed through the article read: "How Suspicion was Aroused;" "Had been Killed by Strychnine;" "L. Sentenced to Death;" "Supreme Court Judge Aids J.;" "Given Poison in Whiskey," etc. The narrative in small type fairly imported as a whole that plaintiff was a member of the conspiracy and one of the beneficiaries who profited by the frequent mysterious deaths, which had been brought about by poison, though it directly charged him only with fraudulently issuing policies on bad risks. *Held*, that it was not error to charge as a matter of law that the article imputed to plaintiff the crime of being one of several conspirators who had engaged in obtaining fraudulent insurance upon the lives of decrepit and infirm persons whose death, when disease failed, had been brought about by poison.

2. SAME—PLAINTIFF'S REPUTATION.

In a libel suit it is not error to admit evidence of plaintiff's general social and business standing.

3. SAME—DEFENDANT'S SOURCE OF INFORMATION.

Where, in a suit for publishing a libelous newspaper article, plaintiff seeks to recover exemplary damages by showing that the publication was wanton and reckless, and defendant has been permitted fully to show every particle of information relied on by its reporter when he wrote the article, and the documents which the reporter received from a third person are all admitted, and both he and such third person testify fully as to everything that passed between them, it is not error to exclude evidence of an investigation made by such third person, but of which defendant or its agents were not informed when the article was written and its publication determined on.

4. SAME—ACTS OF CO-CONSPIRATOR.

In a libel suit for publishing an article charging plaintiff with having been a conspirator in a scheme to procure fraudulent life insurance and murder the insured, evidence that two other conspirators had made an attempt to poison one of the insured, and that one of them had been indicted, tried, and convicted for murder, is inadmissible.

5. SAME—INSTRUCTIONS—OTHER OFFENSES.

In a suit for publishing a libelous article charging plaintiff with being a conspirator in a scheme to fraudulently issue insurance policies on the lives of decrepit and infirm persons, and, where they did not die quickly enough, to poison them, it is proper to instruct that if the libel charges plaintiff with murder it is neither a defense nor a mitigation of damages to prove that he was guilty of fraud.

† 2. See Libel and Slander, vol. 32, Cent. Dig. § 302.

6. SAME—AMOUNT OF RECOVERY—REVIEW.

Where no instructions were objected to, and no exceptions reserved, an objection to the charge on the subject of exemplary damages cannot be reviewed.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 120 Fed. 860.

This cause comes here upon writ of error to review a judgment of the United States Circuit Court, Southern District of New York, in favor of defendant in error, who was plaintiff below. The action was for libel, and the verdict of the jury awarded \$30,000 damages. A motion was made for a new trial on the ground that the verdict was excessive, whereupon the trial judge carefully reviewed the testimony and the record as it was presented to the jury, and reached the conclusion that "although the defendant justly brought upon itself the severe condemnation of the jury, they visited the offender with too heavy a hand, and exceeded the boundaries of a just discretion," and that a new trial would be granted unless plaintiff stipulated to reduce the recovery to \$20,000. The stipulation was given, and judgment entered accordingly.

Edward M. Shepard, for plaintiff in error.

A. J. Rose, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Many of the assignments of error are concerned with propositions which have already been considered and passed upon by this court in other causes; such assignments may therefore be disposed of by a brief reference to the earlier decisions. It will facilitate the presentation of the cause to discuss the assignments which have been argued here in a somewhat different order from that in which they are presented on the briefs.

1. It is contended that the court erred in refusing to permit the jury to construe the article. This assignment of error is based upon exceptions to portions of the charge and to a refusal to charge. The portions of the charge objected to are as follows:

"That article, in substance, imputed to the defendant the crime of being one of several conspirators who for a number of years, in the state of Mississippi, had been engaged in obtaining fraudulent insurance upon the lives of decrepit and infirm, and, when disease failed, hastening their death by poisoning."

"I may not state the language literally; you have the article, and if I fall into any error you will correct me. The substance of it was that not only did these persons, who were spoken of as the most prominent business men of Scooba, Mississippi, engage in this scheme of fraudulent insurance, but they had carried out the object which they had in view by destroying the lives of the insured."

"The article thus charged the plaintiff with complicity in an atrocious crime or series of crimes."

The defendant requested the court to charge "that it is for the jury to say upon reading the article whether it charges any specific offense against this plaintiff," which was refused.

It is well settled that when there is ambiguity in the language used, so that the alleged libel is capable of being understood in an innocent and harmless as well as in an injurious sense, its true interpretation is a question for the jury; and it is equally well-settled that if, upon an examination of the whole document, it appears to admit of no just con-

struction except one which is injurious to the plaintiff, its meaning is to be determined by the court. *Lewis v. Chapman*, 16 N. Y. 369. Defendant concedes that the article was libelous, since it distinctly charged that plaintiff was guilty of participating in writing fraudulent insurance, but contends that upon a dispassionate and critical reading of the article "the jury might have found that the article in its entirety did not fasten the charge of murder on the defendant in error." The point here raised can be determined only by an analysis of the article in question.

The original is before us. It appears on the seventh page of the issue of Monday July 19, 1897, and is the first article on that page, practically filling three columns. It begins with the following headings, each separated from the one next succeeding it by a dash, printed in capitals of varying size, but all of them conspicuously displayed.

"Murdered Many for Insurance."

"Agent Here to Probe into a Horrible Conspiracy."

"Half a Dozen in It"

"Most Prominent Business Men of Scooba, Miss., Incriminated."

Next follow four more headings, printed in smaller-sized type, separated by dashes, and also arranged so as to challenge the attention of the most casual reader of the paper. They are as follows:

"Seventy Five Thousand Dollars Made By Plotters."

"New York Insurance Companies were Selected for Victimization by the Conspirators."

"Policies Taken on Invalids."

"When They did not Die Quickly Enough to Suit Plotters They were Given Strychnine or Arsenic."

Immediately below this is a sort of panel formed by a border of stars, which makes it especially prominent, and containing the following:

"The Conspirators.

"Dr. W. H. Lipscomb, practitioner, of Scooba, under sentence of death for murder by poison.

"Guy Jack, merchant, indicted for murder by grand jury and out on bail.

"A. A. Hammack, merchant.

"H. Rosenbaum, merchant.

"J. H. Duke, business man of Scooba.

"——— Kramer, business man of Scooba."

It will be observed that the heading stated that there were "half a dozen in it," and that six conspirators are named, of which the plaintiff, Duke, is one. Next follows another similar panel containing this:

"Robinson's estimate of the operation of the crowd:

Policies in which the members appeared as beneficiaries.....	100
Number who died by disease.....	30
Number who died by poison.....	12
Number whose lives were attempted.....	15
Policies now canceled.....	60
Amount cleared and divided by the plotters.....	\$75,000
Still to be paid and divided.....	15,000"

Then follows another panel containing a letter alleged to have been written by Guy Jack, offering to turn state's evidence. This is succeeded by a long narrative in fine type, broken up by the following sub-headings in small capitals:

"How Suspicion was Aroused."
"Had been Killed by Strychnine."
"Lipscomb Sentenced to Death."
"Supreme Court Judge Aids Jack."
"Given Poison in Whiskey."
"Jack's Cool Admissions."

The narrative begins with the statement that W. D. Robinson, a newspaper publisher of Meridian, Miss., has been in this city [New York] for several days in consultation with the officers of life insurance companies, his object being to bring to light the facts in a frightful conspiracy to defraud insurance companies by insuring invalids and decrepits, and, where disease failed, to hasten the death of the victims by means of poison. It states that some of the most prominent men in Scooba are involved; that one is under sentence of death for murder, and another under indictment for the same crime, while "there are still others in the conspiracy." It then describes how insurances were issued on invalids and decrepits; how suspicion was aroused by "the frequent mysterious deaths that occurred" in Scooba, the beneficiaries being almost invariably "a few citizens prominent socially and in a business way"; how the death of one Stewart induced an investigation which showed he had been killed by strychnine, Guy Jack being the beneficiary under his policies. It then gave an account of the indictment, trial, and conviction of Dr. Lipscomb; the indictment and bailing of Guy Jack; the attempt to kill one Eaves by whisky containing arsenic, for which an indictment was found against Rosenbaum. It concluded with the statement that in proceedings in a certain chancery suit Guy Jack made admissions directly implicating other men in the conspiracy, and quoted the following from his alleged testimony:

"Dr. W. H. Lipscomb was a very handy man for J. H. Duke, A. A. Hammack, H. Rosenbaum, and myself in taking out insurance policies on bad risks for insurance companies." "Did you and Duke and others take out policies on bad risks for insurance companies? I certainly did; and Col. Duke insured an old man, ninety years old, and he was put in for forty-five years old; and Kramer insured a man walking the streets with consumption, a negro, that died in less than thirty days; and A. A. Hammack insured a man that was paralyzed in his bed, and Dr. Lipscomb examined him."

The contention of the defendant is that had the jury been permitted to construe the article they might have found that the only offense charged against the plaintiff was that he victimized insurance companies by procuring the writing of fraudulent policies. If their attention were confined to the narrative in small type, such a conclusion might have been reached, because Duke is there mentioned by name only in connection with the fraudulent insurances, although the narrative, considered as a whole, might be taken as fairly importing that Duke was one of the "others in the conspiracy"—one of the "beneficiaries by the frequent mysterious deaths" which had been brought about by

poison. But the jury would not have been justified in confining their attention to the small-print narrative; the headings were equally a part of the publication, indeed the more prominent part. They speak with no uncertain sound; they admit of no inferences contrary to their positive and unambiguous language. They assert that some prominent business men of Scooba were incriminated in a horrible conspiracy, that the plotters had murdered many persons for insurance, that there were half a dozen in it, and they give the names of the six, among which is found the plaintiff's. A finding of a jury that this publication did not charge the plaintiff with being implicated with others in the murder of many persons by the administration of poison should be set aside as in flagrant disregard of its plain intent and meaning, and there was no error in the excerpts from the charge above quoted.

2. A witness who had known the plaintiff for some 20 years testified that he was well known in Mississippi, and, upon being asked, "What in July, 1897, was his social and business standing?" replied: "I can only answer as to his business standing from reputation. I know nothing from my own knowledge as to his business standing. He had the reputation of having a fine business standing at that time. As to his social standing, I know that to have been excellent. His business standing I could only say from reputation." Defendant duly objected to the question, and reserved an exception. The admissibility of such testimony in an action for libel is in dispute upon the authorities. The question, however, was carefully considered by this court in *Press Publishing Co. v. McDonald*, 11 C. C. A. 155, 63 Fed. 238, 26 L. R. A. 53, and decided in the affirmative. The testimony here was closely confined, as in that case we indicated it should be, "to his general social standing, and not extended to minute details of his life," and the exception to its admission is unsound.

3. It is contended that the court erred in excluding testimony of the witness Robinson. This testimony had been taken by deposition, so that the answers as well as the questions are found in the record. It appeared that the narrative part of the libel—that printed in small type—was prepared by Bertrand, a reporter on the paper. Who prepared the headings was not shown. Bertrand testified that he got his information entirely from Robinson, who at the time was the editor of the *Meridian Herald*; that Robinson showed him some newspaper clippings, some of which he identified, and they were introduced in evidence, one of them being an article published in Robinson's own paper. It may be noted that in this account published in the *Meridian Herald*, much of which was reproduced in defendant's article, there was printed a "card given to the press" by plaintiff, denying any knowledge or connection with the conspirators. No mention whatever of this card, or of plaintiff's denial, appears in the article complained of—a circumstance which the jury no doubt regarded as quite illuminative of the degree of care with which the libelous article was prepared. Bertrand testified that, in addition to giving him the newspaper clippings, Robinson sketched over the case to him, "gave him some facts"—a "general outline of the case"—and told witness something about his business with the insurance companies." Rob-

inson then testified that he met Bertrand at the time he was leaving for the depot to return to Mississippi; that he gave Bertrand a number of clippings, telling him that witness was in a hurry, and did not have time to go over the case with him, but that he could get out of them what he wanted. The witness added: "He asked me what I had obtained from the insurance companies in New York. I told him I was in a hurry; * * * opened my hand-satchel, and pulled out some memoranda from the insurance companies, and he copied some of it. What he copied I don't know." Thereupon the defendant sought to introduce further testimony of Robinson, which was excluded. The testimony thus excluded was, in substance, that Robinson called on several insurance companies, asked for the Kempner county records and policies, and was shown them; that at the New York Life Company a Dr. Rogers was detailed to assist him, and he spent two hours going over a stack of canceled policies, besides correspondence between the company and its agents, and a confidential report made by Dr. Rogers to the company. He did not state what this examination disclosed.

It was conceded that neither the reporter nor any other of defendant's employes had any personal ill will towards the plaintiff; none of them had ever heard of him before the newspaper clippings were exhibited. The plaintiff sought to prove malice entitling the jury to give exemplary damages solely by showing that the article was published with a wanton and reckless disregard of plaintiff's rights. Defendant was entitled to meet such proof by showing with the utmost fullness everything that was before it connecting the name of the defendant with the acts of which it accused him. It was entitled to show every vestige of evidence, every particle of information, which its reporter had and relied upon when he penned the article. The record shows that defendant was accorded the fullest latitude to make such proof. The documents which the reporter received were all admitted. He was allowed to state, as fully as his counsel chose to ask him, everything that Robinson told him. Robinson was allowed to corroborate him as to everything that passed between them. Except so far as the imperfections of the memory of these two witnesses and the failure of counsel to elaborate the details operated to obscure the recital, the jury had before it a complete and accurate statement of all the information and alleged information which was before defendant when the libel was published. Upon the extent and character of such information the defendant's case in libel suits must stand or fall, because it is always for the jury to say upon such proof whether or not the conduct of the defendant (or of its agent, the reporter) in publishing the libel upon such information was or was not "wanton and reckless." It is the conduct of the defendant's agent that is in question, and it is his environment at the time he acted which is to be shown. The defendant here sought to go much further, and to show that one of the informants of its agent, a person in no way connected with it, and in no way responsible for its decision to publish or refrain from publishing, had himself made an investigation. All statements that such person made to the reporter touching the character and extent of any investigation he had made were competent, but no such statements were excluded.

Defendant, however, was not entitled to have the informant give the details of an investigation he had made, but of which defendant was not informed when it accepted the informant's statements touching the plaintiff as being sufficient proof to warrant the publication of its article, such details not being before defendant's agents when they made their decision to publish, and were not to be considered by the jury when determining whether such decision was or was not, under all the circumstances, "reckless and wanton." "Only such facts are available in mitigation of damages as were known to the defendant at the time of the publication, and which might have influenced him in making the defamatory statements." *Sun P. & P. Co. v. Schenck*, 98 Fed. 929, 40 C. C. A. 163; *Hatfield v. Lasher*, 81 N. Y. 246; *Bush v. Prosser*, 11 N. Y. 347.

The brief contains the statement that the court "refused to permit Robinson to testify * * * as to what information he gave Bertrand." Not content with the references given on the brief, we have carefully read the entire deposition of Robinson, and find nothing therein nor in the bill of exceptions which supports such statement. The exceptions reserved to excluded testimony of this witness are unsound.

4. The next assignment of error is to the exclusion of the deposition of the witness Sam Williams. The evidence tended to show that Rosenbaum and Lipscomb had made an attempt to poison the negro Williams, who had been insured for Rosenbaum's benefit, and passed by Lipscomb. The evidence clearly was not admissible against the plaintiff, Duke.

5. There was no error in excluding the deposition of Reuben C. Jones, which related solely to the indictment, trial, and conviction of Lipscomb. It was not admissible against the plaintiff.

6. It is contended that the court erred in charging as follows:

"It is no defense and does not tend in mitigation of damages that it be shown that the plaintiff has been guilty of other crimes, or has committed other wrongs than those which were imputed to him by the libel. In other words, if a libel charges the plaintiff with the guilt of murder, it is not either by way of defense, or mitigation or reduction of damages, of any value to prove that he was guilty of fraud; and if a man is charged with having procured a policy, or a lot of policies, upon lives with intent to defrauding insurance companies, it is not in the least a defense, or in the least a mitigation of the defendant's conduct in publishing such a libel, to show that he has been guilty of defrauding a fire insurance company."

The charge in this particular was in accord with the rule laid down by this court in *Sun P. & P. Co. v. Schenck*, 98 Fed. 925, 40 C. C. A. 163, and *Tribune Association v. Follwell*, 107 Fed. 646, 46 C. C. A. 526. As stated in those opinions, it is nevertheless open to defendant to show the bad character of the plaintiff in any particular, because one whose character is bad is not entitled to the same measure of damages as one of unblemished fame. And in the case at bar, referring to evidence which had been introduced to show that plaintiff had undertaken unsuccessfully to effect insurance on the life of practically a dying man, the court charged that, if the jury believed such to be the fact, "it does not prove him a party to a conspiracy with a lot of other scoundrels to defraud New York insurance companies by a series of

insurances, and certainly does not prove that he was a conspirator in a scheme of murder; it does reflect upon his character, and the jury are to take it into consideration." Defendant's counsel apparently does not challenge the general rule referred to in the charge. The brief states that "contention is not made that defendant in a libel suit may, for the purpose of either mitigating or reducing damages, show specific acts of immoral or disgraceful conduct disconnected from the libelous charge." It must be borne in mind that the article complained of charged plaintiff with two different offenses—one, the defrauding of insurance companies by taking out policies in his own favor on lives of old and infirm persons; the other, conspiring with others to poison some of the insured, a conspiracy which had already resulted in the murder of 12 persons. The record shows that the fullest opportunity was given the defendant to show that plaintiff had been engaged in defrauding the insurance companies, and a great deal of testimony was introduced bearing upon that issue. And the court charged: "The truth, however nauseating it may be, is always justification for a libel; and the first inquiry which will arise for your consideration is whether the truth of the defamatory statement has been established. If it has, that is the end of the case, and the defendant is entitled to your verdict." The court, in the excerpt given above, wisely cautioned the jury against accepting this evidence (if they credited it) as justifying the whole libel. The fundamental error of the defendant's argument under this point is disclosed in this sentence from the brief: "The sting of the charge [made in defendant's publication] was victimizing insurance companies by fraud." This is a misconstruction of the libel. As pointed out supra, the most venomous part of the article was contained in the headings and panels, which distinctly charged plaintiff with being at least accessory to the murders of a dozen persons. This part of the court's charge was correct, and under the circumstances of the case was certainly called for.

7. Defendant's last point is that the judgment is for excessive damages, and evidences such a degree of prejudice and passion as to require a new trial. It is contended that the court erred in charging the jury on the subject of exemplary damages that "if the article was published in wanton disregard of the plaintiff's rights, if there were a reckless and wanton publication made without due investigation, that is all the evidence of express malice which it is necessary to show." And other passages are cited from the charge, which it is contended prejudiced the jury against the defendant. It will not be necessary to discuss the argument advanced in support of this point, because none of the passages in the charge which are now criticised were objected to at the trial, and no exceptions reserved, and it is not the province of this appellate court to go into the question whether or not damages are excessive, where no exceptions present errors in trying the cause or in charging the jury.

The judgment is affirmed.

mission of these offenses by imprisonment at a military post or by imprisonment in a penitentiary; that these punishments are essentially different in character, the latter being greater and more odious; and that the discretion to choose between them, or to determine which shall be imposed, is lodged in the court-martial, and cannot be left by that body to the reviewing authority. The fifty-eighth article of war (Rev. St. p. 235, 1 U. S. Comp. St. p. 955) directs:

"In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault, and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the state, territory, or district in which such offense may have been committed."

If read and considered in the light of the law of the place where their offense was committed, it is possible or probable that under this article, and by reason of the conditions existing in the Philippines at the time, the sentences of Brodie and Coffey impose confinement in a penitentiary, and leave to the reviewing authority no discretion as to whether the place of confinement shall be a military post or a penitentiary, but only a duty, upon approval of the sentences, to designate the particular penitentiary in which the convicts shall be confined—a matter which, by paragraphs 941 and 946 of the army regulations of 1895 (paragraphs 1042 and 1047, regulations of 1901), rests in the department commander or higher authority. Counsel for the respondent have not brought to our notice the local laws applicable under the fifty-eighth article. Petitioners have presented their cases as if that article affected none of them, and the conclusion at which we arrive upon the principal question renders it unnecessary for us to consider any other.

The contention of petitioners is based upon paragraph 940 of the army regulations of 1895 (paragraph 1040, regulations of 1901), which says:

"When the sentence of a court-martial prescribes imprisonment, the court will state therein whether the prisoner shall be confined in a penitentiary or at a post, being guided in its determination by the 97th article of war."

If this be the entire military law upon the subject, there can be no doubt that a court-martial, in imposing imprisonment as a punishment, where there is a discretion to say whether it shall be at a military post or in a penitentiary, is required to designate or prescribe in the sentence the character of the imprisonment in this respect. But we think there is another regulation upon the subject which modifies paragraph 940, and excepts these cases from what would otherwise be its plain requirement.

Before pointing out the other and modifying regulation, some prefatory observations may properly be made. The law governing courts-martial is found in the statutory enactments of Congress—particularly in the articles of war, in regulations prescribed by executive authority, and in military usage and procedure. *Carter v. McClaghry*, 183 U.

S. 365, 386, 22 Sup. Ct. 181, 46 L. Ed. 236. Subject to the Constitution and to the laws of Congress, the President, as commander in chief, is authorized to establish and enforce such rules and regulations for the government of the army as he may deem essential to the maintenance of a high standard of efficiency, discipline, and honor, and, as a means to this end, may properly provide for the trial of accusations against persons in the military service, and for the punishment of offenses by them. "The power to establish implies necessarily the power to modify or repeal, or to create anew. The Secretary of War is the regular constitutional organ of the President, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied because they may be thought unwise or mistaken." *United States v. Eliason*, 16 Pet. 291, 301, 10 L. Ed. 968; *Kurtz v. Moffitt*, 115 U. S. 487, 503, 6 Sup. Ct. 148, 29 L. Ed. 458. Nor is it necessary for the Secretary of War in promulgating such rules or orders to state that they emanate from the President, for the presumption is that the secretary is acting with the President's approbation and under his direction. *Parker v. United States*, 1 Pet. 293, 297, 7 L. Ed. 150; *Wilcox v. Jackson*, 13 Pet. 408, 512, 10 L. Ed. 264; *Williams v. United States*, 1 How. 290, 11 L. Ed. 135; *United States v. Freeman*, 3 How. 556, 566, 11 L. Ed. 724; *Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320; *United States v. Farden*, 99 U. S. 10, 19, 25 L. Ed. 267; *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915; *United States v. Fletcher*, 148 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. Ed. 378; 7 Op. Attys. Gen. 453.

In the absence of some statutory provision to the contrary, it is established law in England and in this country that in criminal cases the court determines what, within the limits fixed by law, shall be the quantum and character of the punishment. In other words, the question is not necessarily to be determined by the triers of fact. 1 Bishop, New Cr. L. § 394. While a court-martial cannot be altogether likened unto a civil court, in which the guilt of the accused is to be pronounced by a jury, under the supervision of a judge, and the penalty is to be fixed by the judge within the prescribed limits, it is yet true that a court-martial acts only in response to the call of a superior authority, and that the result of its deliberations is somewhat in the nature of a recommendation to that authority (1 Winthrop, Mil. Law, 632; Davis, Mil. Law, 15), is without effect unless approved by it, and until then is interlocutory and inchoate only (*Runkle v. United States*, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 30 L. Ed. 1167; *Mills v. Martin*, 19 Johns. 7, 30). The superior authority which orders a court-martial, and to which its conclusion must be submitted for approval or disapproval, is spoken of as the reviewing authority. Its action being indispensable to a final conclusion or judgment, the reviewing authority is an essential component of the original tribunal, and is not entirely a court of errors. There is therefore nothing in the character of a court-martial which inherently precludes committing to the reviewing authority the determination of the character of imprisonment to be imposed within the

prescribed limits. No statute is cited, and we know of none, which makes it the duty of the court-martial, when there is a discretion to be exercised, to say whether the imprisonment shall be at a military post or in a penitentiary, and which thereby prevents the adoption of a rule or regulation committing the matter to the reviewing authority for determination. Paragraph 940 of the army regulations before quoted is a rule or regulation promulgated by the Secretary of War under authority of the President, and is not a statute. As has been shown, it was subject to modification by the authority which made it, and its modification would be competently effected and shown by the promulgation of a new or different rule or regulation upon the subject by the Secretary of War, acting under the presumed approbation and direction of the President. We think such a modification was effected and is shown by the following order or direction in the manual for courts-martial issued by the Secretary of War in 1895, and repeated in like manuals issued by him in 1898 and 1901:

"Unless the laws of the state, territory, etc., in which the court is convened, are at hand, it is impossible for the court to determine in all cases whether or not, under the 97th A. W. [article of war], the offender is punishable by penitentiary confinement. Therefore, in case of any doubt, the words 'in such place as the reviewing authority may direct,' will be used in the sentence."

This operated to ingraft upon paragraph 940 of the army regulations a proviso to the effect that where imprisonment is prescribed by the sentence, and it is impossible for the court-martial to ascertain whether, under the local law, the offense may be punished by imprisonment in a penitentiary, the court shall leave the determination of the character of the confinement—whether at a military post or in a penitentiary—to the reviewing authority. The sentences now under consideration conformed to this direction, and, as completed by the reviewing authority, fully comply with the requirement of paragraph 940, as modified.

Counsel for the petitioners earnestly insists that the order or direction in the manual for courts-martial should be entirely disregarded, for two reasons: First, that it is a mere footnote, and not a part of the text; second, that the manual is simply a suggestion as to procedure under military law prepared by the Judge Advocate General for the "information and guidance" of courts-martial, and approved by the Secretary of War, without the approbation or direction of the President, and that therefore it cannot affect a regulation issued by direction of the President for the "government" of the army. While this insistence of counsel has been very forcefully presented, there are several considerations which preclude its adoption by us.

The order or direction is in a footnote to the manual, but an addendum or postscript to a written communication is not for that reason less authoritative than the principal text, if, upon a view of both, they appear to speak a single voice and to be a single communication. The language of this note and the general character of the manual point to a single authorship, and an intention that the note shall command respect and obedience in like manner as the body of the manual. The authorship and obligatory character of the note are also indicated by the declaration in paragraph 1552 of the army regulations of 1895 (paragraph 1761, regulations 1901) that "the standard blank forms used

in army administration, with the notes and directions thereon, have the force and effect of army regulations. * * * All notes or directions on these blanks will, prior to their issue, be approved by the Secretary of War." While this note is not upon a blank form, it is in a standard publication of the War Department, and appears under a portion of the text which prescribes the manner of indicating the character of imprisonment imposed by the sentence of a court-martial. The note is clearly a part of the manual, and intended to have the same force and effect as the principal text.

It is true that in the order promulgating the army regulations the Secretary of War states that they are published by direction of the President for the "government" of all concerned, and that in the order promulgating the manual for courts-martial the Secretary of War makes no reference to the President, but states that the manual is published for the "information and guidance" of all concerned. The difference is one of words only. In legal contemplation, the two orders speak by the same authority, and the relation of that authority to those whose conduct is intended to be affected makes what is said a command in each instance. An officer or soldier would see no difference between being governed by a stated regulation issued by his superior, and being guided by such a regulation. Both orders are signed by the Secretary of War, and neither by the President. Both depend upon the character of the act done, and the authority of the Secretary to represent and speak for the President, rather than upon the presence or absence of any direct statement of the President's approbation of the Secretary's action. The express statement of the Secretary in one order that he acts at the President's direction is not stronger than the implied statement to the same effect in the other, because the authority of the Secretary of War to speak at all, in respect of the matters covered by the army regulations, or those covered by the manual, depends upon the fact that he represents and speaks for the President. Repeated decisions of the Supreme Court, and superior reason as well, forbid any presumption that the Secretary of War, in publishing the manual, acted without the approbation or direction of the President, and intended, independently of the President's will, to inform courts-martial that paragraph 940 of the army regulations, published for their government at the President's direction, could be disregarded, and to guide them to an incomplete and wrongful discharge of official duty. Yet that would clearly be the effect of acceding to the claimed difference between the authority of the army regulations and that of the manual for courts-martial. The rational presumption, and the one which is sustained by judicial precedents, is that in publishing to the army the manual for courts-martial of 1895, and in republishing it in 1898 and 1901, the Secretary of War was not assuming a power which he did not possess, or to act without the approbation or direction of the President, but, as the recognized and legitimate organ of the President, was expressing his competent direction or order in a matter affecting the administration and government of the army. *United States v. Eliason*, 16 Pet. 291, 301, 10 L. Ed. 968; *United States v. Fletcher*, 148 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. Ed. 378. It is otherwise shown that this manual is a supplemental set of rules or regulations established under

the President's direction, and having special reference to courts-martial. As such they are deemed part of the regulations for the army. Digest Op. Judge Advocate General (Ed. 1901) pp. 747, 751. Paragraph 938 of the army regulations of 1895 (paragraph 1039, regulations of 1901), conceded to emanate from the President, directs:

"Whenever by any of the articles of war punishment is left to the direction of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the manual for courts-martial, published by authority of the Secretary of War."

This is a recognition of the authoritative character of the manual.

In the case of Oberlin M. Carter, which has been before the courts several times, there was a conviction upon one charge expressly punishable by dismissal from the army, and upon two charges punishable by imprisonment either at a military post or in a penitentiary. The sentence of the court-martial, in respect of the imprisonment, was "to be confined at hard labor at such place as the proper authority may direct for five years." The President was the reviewing authority, and, upon the approval of the sentence, caused the Ft. Leavenworth penitentiary to be designated as the place of confinement. *Carter v. McClaughry*, 183 U. S. 365, 373, 374, 22 Sup. Ct. 181, 46 L. Ed. 236. Notwithstanding the repeated and earnest efforts of able counsel on behalf of Carter to avoid the execution of the sentence, it passed unchallenged in respect of the point presented by these petitioners. This may be entitled to only slight attention, but a fact in that case which has an important bearing upon the question now under consideration is this: A sentence pronounced and stated in conformity with the note in the manual for courts-martial was there brought directly to the attention of the President, and he exercised the discretion, reserved to the reviewing authority, of determining whether the imprisonment should be at a military post or in a penitentiary, and directed that it be in a penitentiary. That was a plain recognition of the authority of the manual and of the note.

The present cases are altogether unlike *Deming v. McClaughry*, 51 C. C. A. 349, 113 Fed. 639, and *McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049, where a practice in the army and in the executive department which was in violation of an act of Congress was not permitted to prevail in the courts against the unambiguous terms and plain meaning of the statute. Here, no statute forbidding, it was competent for the President, through the Secretary of War, to establish the rule or regulation quoted from the manual, and the only question is whether this was done. The action of the President in the *Carter Case*, the action of three general officers of the army in the cases under consideration, the like action of three other general officers of the army shown in *In re Langan* (C. C.) 123 Fed. 132, and the knowledge of such action, and concurrence therein, of the Secretary of War and the Judge Advocate General, which are also indicated in these several cases, show that the manual for courts-martial and the note named have been so generally and uniformly recognized and given effect as parts of the regulations for the army, both by those who make and publish those regulations and by those who execute them, that any doubt or uncertainty as to the character or force of the manual or its

note ought certainly to be resolved in favor of sustaining this established practice and uniform action. *United States v. Hill*, 120 U. S. 169, 182, 7 Sup. Ct. 510, 30 L. Ed. 627; *Deming v. McClaughry*, 51 C. C. A. 349, 351, 113 Fed. 639; *In re Langan* (C. C.) 123 Fed. 132; *United States v. Tanner*, 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321; *Webster v. Luther*, 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179.

Whether, within the meaning of the rule or regulation prescribed in the manual, the local law was impossible of ascertainment by the court-martial, was in each instance a question for the court-martial to determine, and the form of their sentence shows that they resolved it in the affirmative. The presumptions in favor of official action are such as to make the sentence conclusive upon this matter, and to preclude collateral attack. *In re Chapman*, 166 U. S. 661, 671, 17 Sup. Ct. 677, 41 L. Ed. 1154; *Carter v. McClaughry*, 183 U. S. 400, 22 Sup. Ct. 181, 46 L. Ed. 236.

The sentences were lawful, and the writs of habeas corpus are discharged.

UNION SELLING CO. v. JONES.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1904.)

No. 1,840.

1. WRITTEN CONTRACTS—PAROL EVIDENCE.

Where a contract has been reduced to writing, and imports on its face to be a complete expression of the whole agreement, it will be presumed that the parties have introduced into it every material item and term; and hence parol evidence is inadmissible to add another term to the agreement, though the writing contains nothing on the particular point to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks; and the legal import can no more be varied by parol than can what is written.

2. SAME—SURROUNDING CIRCUMSTANCES.

Though proof of the surrounding circumstances may be introduced to aid a proper construction of uncertain or ambiguous terms in a written contract, such surrounding circumstances do not include prior representations, proposals, and negotiations of a promissory character, leading up to and superseded by the written agreement.

3. SAME—SALES—WARRANTIES—CONSTRUCTION.

Where a contract for the sale of binder twine contained the words "Quality guaranteed," such words were not uncertain or ambiguous, but should be construed to import a warranty that the twine was reasonably fit for the use for which binder twine is designed, and should be salable or marketable under that description, and hence parol evidence was inadmissible to show that such warranty, by reason of prior negotiations between the parties, was intended to include certain representations as to quality.

4. SAME—DAMAGES.

In an action to recover for failure to deliver twine of the quality called for by the contract, the proper measure of damages is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. Neither the vendee's right of recovery, nor the measure of his damages, is dependent on a resale by him, or upon the price obtained at a resale.

¶ 4. See Sales, vol. 43, Cent. Dig. §§ 1285, 1287, 1298.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action by Jones against the Union Selling Company to recover damages for the breach of an express warranty of the quality of twine sold to him by the company under a written contract entered into at Hastings, Neb., June 6, 1900, which described the twine and stated the warranty in this manner: "30,000 pounds of Binder Twine, Crown Brand, as follows: 27,000 pounds Standard, eleven cents per pound; 3,000 pounds Sisal, eleven cents per pound. Gross weight, delivered F. O. B. cars at Hastings. * * * Quality guaranteed." The twine was then in cars at Council Bluffs, Iowa, was to be shipped in a few days, and was to be paid for in cash upon the presentation of the bill of lading. Delivery of the twine and payment of the purchase price were promptly made. The Selling Company was a distributor or wholesale dealer at Omaha, Neb., in the products of the Standard Rope & Twine Company's Mills, which included the Crown brand of binder twine. Jones was a retail dealer in farm implements and binding twine at Hastings, and purchased this twine for sale to farmers in that vicinity, to be used by them in binding their grain. He was not familiar with, and had not dealt in, twine of the Crown brand. All this was known to the company when the contract was made. In addition to the above matters, about which there was no dispute at the trial, plaintiff's petition alleged that, when the contract was made, the words "Quality guaranteed" were agreed by the parties to refer to a proposed guaranty mentioned in a letter from the Selling Company to Jones, dated March 7, 1900, and that this letter was made a part of the warranty. The letter was set forth in the petition, and the portion containing the proposed guaranty reads: "We are the manufacturers of the Sewell & Day and Crown brands of rope and binder twine, and do not hesitate to guarantee the quality of these grades of twine, to be superior to that of our competitors. We quote you: Sisal & Standard binder twine 11½¢. per lb., Manila binder twine 14½¢. per lb., pure Manila binder twine 16½¢. per lb., in small lots F. O. B. Omaha. If you could use 10,000 lbs. or more we could name you a lower price. The twine which we will furnish is all new, of this year's make and put up in the new style 50 lb. flat bales. We have no doubt, but that the quality of the twine which we can furnish will be entirely satisfactory to you and your customers." It was then alleged that the warranty respecting the "quality, character, and condition" of the twine was broken by the Selling Company. "That said twine was not of good quality, and was not suitable for the purposes for which it was purchased by plaintiff. The quality of said twine was not superior to that of the defendant's competitors, but, on the contrary, was grossly inferior to the ordinary and average binding twine then upon the market. That the quality of said twine was not satisfactory to plaintiff or to his customers, and was not of a character with which either plaintiff or his customers ought to have been satisfied. And said twine was not all new, of the make of 1900, but, on the contrary, said twine was old and unsound, knotty, uneven, and much of it rotten and otherwise defective, and practically of very little value." Damages in the sum of \$2,600 were alleged, and judgment was prayed for that amount. These matters were denied by the answer. A trial resulted in a verdict and judgment for plaintiff for \$675, which defendant seeks to have reversed upon this writ of error.

James H. McIntosh, for plaintiff in error.

T. J. Mahoney and J. B. Cessna, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal controversy in this case is over the quality of twine required to satisfy the terms of the express warranty in the written instrument in which the parties stated their agreement. At the trial

the court took the view that it was permissible to determine this by reference to the negotiations which preceded and resulted in the making of the written contract. These negotiations covered a period of three months, and consisted of letter correspondence and separate conversations between the plaintiff and each of two agents of the defendant. All were admitted in evidence over the objection of the defendant. This ruling proceeded upon the theory that the terms of the written contract were uncertain and ambiguous, and could be explained and made certain by extrinsic evidence. If the letter of March 7, 1900, be accepted as giving certainty to the terms of the warranty, it would be satisfied only by the delivery of new binding twine, of the make of 1900, and of a quality superior to that of any binding twine sold by any of the defendant's competitors, and entirely satisfactory to the plaintiff and his customers. If one or both of the conversations be accepted as giving certainty to the warranty, then it would be satisfied only by the delivery of twine of equal quality with certain samples shown to the plaintiff at Omaha by an agent of the defendant during one of these conversations. In the plaintiff's petition the position was taken that the warranty should be interpreted by reading into it the letter of March 7th, and no reference was made to any samples of twine as having such relation to the transaction that they would give precision to the terms of the warranty; but at the trial the plaintiff gave in evidence both the letter and the conversations, although in thus offering an alternative of inconsistent interpretations he was obscuring, rather than clarifying, the meaning of the warranty, and was illustrating the mistake in resorting to this class of evidence to ascertain what is intended by an agreement expressed in writing. The contract makes no reference to the letter of March 7th, or to samples exhibited during the oral negotiations, and does not suggest that either of these was in the minds of the parties when they reduced their agreement to writing, or that the whole agreement is not completely expressed therein. The law applicable to such a contract is nowhere better expressed than in *Thompson v. Libby*, 34 Minn. 374, 377, 26 N. W. 1. It was there said by Judge Mitchell:

"The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks. 2 Phil. Evidence (Cow. & H. Notes) 669; *Naumberg v. Young*, 44 N. J. Law, 331 [43 Am. Rep. 380]; *Hei v. Heller*, 53 Wis. 415 [10 N. W. 620]. And the law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol, any more than what is written. 2 Phil. Ev. (Cow. & H. Notes) 668; *La Farge v. Rickert*, 5 Wend. 187 [21 Am. Dec. 209]; *Creery v. Holly*, 14 Wend. 26; *Stone v. Harmon*, 31 Minn. 512 [19 N. W. 88]."

The rules embodied in this statement of the law are firmly established, and have been frequently declared in the decisions of this court and of the Supreme Court. *Bast v. Bank*, 101 U. S. 93, 96, 25

L. Ed. 794; *De Witt v. Berry*, 134 U. S. 306, 315, 10 Sup. Ct. 536, 33 L. Ed. 896; *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; *Harrison v. Fortlage*, 161 U. S. 57, 63, 16 Sup. Ct. 488, 40 L. Ed. 616; *Wilson v. New U. S. Cattle Ranch Co.*, 20 C. C. A. 245, 249, 73 Fed. 994; *Grand Avenue Hotel Co. v. Wharton*, 24 C. C. A. 441, 443, 79 Fed. 43; *Godkin v. Monahan*, 27 C. C. A. 410, 83 Fed. 116; *Insurance Co. v. McMaster*, 30 C. C. A. 532, 540, 87 Fed. 63; *Green v. Chicago, etc., Ry. Co.*, 35 C. C. A. 68, 71, 92 Fed. 873; *Franklin v. Browning*, 54 C. C. A. 258, 117 Fed. 226; *Wilson v. Deen*, 74 N. Y. 531, 534; *Mast v. Pearce*, 58 Iowa, 579, 8 N. W. 632, 12 N. W. 597, 43 Am. Rep. 125; *Phillips v. Iola Portland Cement Co. (C. C. A.)* 125 Fed. 593, 596; *McQuaid v. Ross*, 77 Wis. 470, 46 N. W. 892; *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 605, 63 N. W. 1013; *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, 625, 75 N. W. 1092.

Where, without fraud, accident, or mistake, the written contract purports to be a memorial of the transaction, it supersedes all prior representations, proposals, and negotiations, and is conclusive evidence that it embodies such of these as were ultimately intended to become parts of the agreement, and that all others were rejected as not expressing the final intention of the parties. *Bast v. Bank*, 101 U. S. 93, 96, 25 L. Ed. 794. If there is uncertainty or ambiguity in the terms employed, the actual condition of things, and the position in which the parties stood at the time of making the contract, may be shown for the purpose of ascertaining the meaning of its terms. *Reed v. Insurance Co.*, 95 U. S. 23, 30, 24 L. Ed. 348; *Phelps v. Clasen*, 1 Woolw. 206, 212, 19 Fed. Cas. 445, No. 11,074. That which may be so shown is frequently spoken of as the surrounding circumstances, but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement. These cannot be thus ingrafted upon it. *Union Stock, etc., Co. v. Western, etc., Co.*, 7 C. C. A. 660, 668, 59 Fed. 49; *Bast v. Bank*, 101 U. S. 93, 97, 25 L. Ed. 794; *Oelrichs v. Ford*, 23 How. 49, 63, 64, 16 L. Ed. 534; *Ferguson Contracting Co. v. Manhattan Trust Co.*, 55 C. C. A. 529, 533, 118 Fed. 791. *Bradley v. Steam Packet Co.*, 13 Pet. 89, 92, 103, 10 L. Ed. 72, involved the use of extrinsic evidence to ascertain the meaning of a written contract "for the use of the steamboat Franklin, until the Sydney is placed on the route to Potomac Creek." A controversy arose as to whether this covered the time when navigation was so completely stopped by ice that no boat could be used. It was held permissible to prove the circumstances which accompanied the transaction, viz., that the defendant for several years had been, and then was, contractor for the transportation of the mail from Washington, D. C., to Fredericksburg, Md.; that the customary route of the mail was by steamboat from Washington to Potomac Creek, and thence by land to Fredericksburg; that the defendant kept an establishment of horses and stages for the transportation of the mail all the way by land at seasons when the navigation of steamboats was stopped by ice; that, when the contract was made, defendant's own steamboat had become disabled, and he was then about completing a new

boat, called the "Sydney"; that it was matter of notoriety, and was known to and understood by plaintiff, when the contract was made, that as soon as navigation should be closed by ice the mail from Washington to Fredericksburg would have to be transported all the way by land, instead of being transported by steamboat to Potomac Creek, and thence by land to Fredericksburg; and that the steamboat Franklin would not be required by defendant, and could not be used by him, when the navigation should be closed. It was further held, in that connection, that it was not permissible to prove that, in the negotiations antecedent to the making of the written contract, it was communicated to the plaintiff by defendant or his agent that the defendant intended to keep the steamboat Franklin in use so long as the navigation remained open, and no longer. *Gilbert v. Moline Plow Co.*, 119 U. S. 491, 7 Sup. Ct. 305, 30 L. Ed. 476, was an action upon a letter of guaranty in which it was attempted to be shown by parol that a prior letter of the person who obtained credit by reason of the letter sued upon was to be taken as an explanation or part of the latter, but this was held not permissible, as the letter of guaranty contained no reference to the prior letter, and appeared to be complete in itself. *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775, was an action upon a written contract for the purchase of "300 bushels of barley," the quality of which was not expressly specified. It was sought to be shown by parol that the purchase was made by sample, and that the barley tendered under the contract was not of as good quality as the sample. In holding the evidence inadmissible, the court said:

"* * * For the purposes of this case, it is unnecessary to determine whether the merchantable quality of the barley to be delivered is a legal implication from the terms of the contract or not. It is enough for the determination of this case to know that there is neither an express statement in the writing, nor a legal implication from what is stated, that the barley was sold by sample, or that it should be of the quality of a sample furnished to the buyer at the time of the contract. This court has repeatedly held that where there is a written instrument binding upon both of the parties thereto, which in itself is a complete contract, capable of being understood and enforced, parol evidence cannot be resorted to to change its express provisions or their legal effect."

Gardiner v. Gray, 4 Camp. 144, was an action upon a written contract for the sale of what was described as "12 bags of waste silk." In rejecting parol proof of a sale by sample offered for the purpose of establishing the quality of the commodity intended to be sold, Lord Ellenborough said:

"I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony."

The same ruling was made in *Meyer v. Everth*, 4 Camp. 22.

The law controlling the operation of a contract is deemed to be, and usually is actually, within the contemplation and intention of the parties, as much as the words in which it is expressed, and becomes equally an essential part of it. *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357; *Bulkley v. United States*, 19 Wall. 37, 40, 22 L. Ed. 62; *Hearne v. Ins. Co.*, 20 Wall. 488, 493, 22 L. Ed. 395;

Rogers v. Kneeland, 10 Wend. 219, 252; Johnston v. King, 83 Wis. 12, 53 N. W. 29; Manistee, etc., Co. v. Shores Lumber Co., 92 Wis. 28, 65 N. W. 865. For this reason the rule that a written contract cannot be varied by parol extends to the legal import or intendment of the contract, as well as to the terms or words in which it is written. The Delaware, 14 Wall. 579, 20 L. Ed. 779; Renner v. Bank of Columbia, 9 Wheat. 581, 587, 6 L. Ed. 166; Bank of United States v. Dunn, 6 Pet. 51, 8 L. Ed. 316; Brown v. Wiley, 20 How. 442, 447, 15 L. Ed. 965; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; Meehan v. Valentine, 145 U. S. 611, 625, 12 Sup. Ct. 972, 36 L. Ed. 835; Godkin v. Monahan, 27 C. C. A. 410, 83 Fed. 116; Mills v. Miller, 4 Neb. 441, 443; Wilson v. Deen, 74 N. Y. 531, 534; Thompson v. Libby, *supra*. A contrary view was declared by Mr. Justice Washington in *Susquehanna, etc., Co. v. Evans*, 23 Fed. Cas. 450, No. 13,365, but it was rejected by the Supreme Court in *Bank of United States v. Dunn and Martin v. Cole*, *supra*.

Turning now to the facts of the case under consideration, it was shown at the trial, as before stated, that the actual condition of things and the situation of the parties at the time of the making of this contract, and then understood and known by both of them, were these: The plaintiff was a retail dealer in binding twine, and was about to buy a supply of that commodity for sale to the farmers of his vicinity for use in binding grain; the defendant was a wholesale dealer in, or distributor of, binding twine of a brand or manufacture with which the plaintiff was not familiar; and the twine which became the subject of the sale was at a point remote from that where the contract was made, and therefore not open to the inspection of the plaintiff. Under these circumstances, the parties entered into a written contract for the sale by the defendant to the plaintiff of "30,000 pounds of binder twine * * * 27,000 pounds standard * * * 3,000 pounds sisal. * * * Quality guaranteed." It is not certain that there is any difficulty in understanding its language or effect when the face of the contract alone is considered, but, read in the light of these surrounding circumstances, which were competently proven, the meaning of the words employed and the intention of the parties are clear, and there is no doubt that the agreement is completely expressed. The legal import or intendment of such a contract is that the seller warrants that the article delivered shall, conformably to its description, be binder twine—that is, reasonably fit for the use for which binder twine is designed—and shall be salable or marketable under that description. This is the rational meaning, and in law the effect, of a warranty of quality, where no special quality is named and no words of limitation are used. *Gardner v. Gray*, 4 Camp. 144; *Jones v. Just*, L. R. 3 Q. B. 197; *Dushane v. Benedict*, 120 U. S. 630, 636, 7 Sup. Ct. 696, 30 L. Ed. 810; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 3 Sup. Ct. 537, 28 L. Ed. 86; *Van Winkle v. Crowell*, 146 U. S. 42, 49, 13 Sup. Ct. 18, 36 L. Ed. 880; *Cleveland Linseed Oil Co. v. Buchannan*, 57 C. C. A. 458, 120 Fed. 906; *Omaha, etc., Co. v. Fay*, 37 Neb. 68, 75, 55 N. W. 211; *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Howard*

v. Hoey, 23 Wend. 350, 35 Am. Dec. 572; Hoe v. Sanborn, 21 N. Y. 552, 562, 78 Am. Dec. 163; Id., 36 N. Y. 93, 98; Merriam v. Field, 29 Wis. 640; Best v. Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; Benjamin on Sales, §§ 656, 657; 2 Story on Contracts, § 1071; 1 Chitty on Contracts, 634; 2 Addison on Contracts, p. *975; Tiffany on Sales, 173.

The effect of permitting the plaintiff to prove the antecedent negotiations was to establish a standard for determining whether the warranty had been satisfied, and the extent of any departure therefrom, which was different from the standard which the parties had established for themselves by their final agreement expressed in writing. This was error.

Error is also assigned upon an instruction given to the jury to the effect that the price obtained by the plaintiff upon resales by him of the twine could not be considered in assessing his damages for the breach of warranty in the sale by the defendant. The plaintiff testified that the value of twine conforming to the warranty would have been 13 cents per pound, while 5 cents per pound was the full value of the inferior twine actually delivered. It was shown that most of the twine had been resold by the plaintiff at prices ranging from about 9 cents to 11 cents per pound, and that these sales were all with a warranty of quality. The proper measure of damages applicable to a case like this is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. Schreiber v. Andrews, 41 C. C. A. 663, 666, 101 Fed. 763. And neither the vendee's right of recovery, nor the measure of his damages, is dependent upon a resale by him or upon the price obtained at a resale. At most, the price thus obtained may be some, but not conclusive, evidence of the actual value. Muller v. Eno, 14 N. Y. 597, 607, 609; Bach v. Levy, 101 N. Y. 511, 515, 5 N. E. 345; Brock v. Clark, 60 Vt. 551, 15 Atl. 175; Atkins v. Cobb, 56 Ga. 86, 90; Reggio v. Braggiotti, 7 Cush. 166, 169; Clare v. Maynard, 7 C. & P. 741, 32 E. C. L. 849. But where the resale is with a warranty of quality, or in ignorance of the actual quality, it is not any evidence of the value of the article in its inferior condition. Muller v. Eno, supra; Brown v. Bigelow, 10 Allen, 242; Miamisburg, etc., Co. v. Wohlhuter, 71 Minn. 484, 74 N. W. 175. There was no error in this instruction.

The judgment is reversed, with a direction to grant a new trial.

GENTRY v. SINGLETON.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1904.)

No. 1,853.

1. EVIDENCE—MATERIALITY.

Where all the facts of a transaction are clearly stated by a witness, his inference or understanding therefrom is wholly immaterial and inadmissible.

2. TRIAL—DIRECTION OF VERDICT.

When the evidence so conclusively entitles one party to a verdict that a verdict for his opponent would have to be set aside, the court may properly direct a verdict in his favor.

3. SAME—TITLE ACQUIRED—POSSESSION OF SELLER AS EVIDENCE OF OWNERSHIP.

Mere possession of personal property by the seller, if there be no other evidence of ownership or power of disposal, will not preclude a third person, who is the true owner, from reclaiming his property or its value from the purchaser.

4. PARTNERSHIP—WHAT CONSTITUTES—EMPLOYÉ RECEIVING SHARE OF PROFITS.

A mere employé engaged to render service in conducting a business, although he is to receive a share of the profits as compensation for his services, is in no sense a partner, and has no power to sell property of his employers, where he has never been held out by them as having such authority.

5. PARTIES—OBJECTION TO NONJOINDER—WAIVER.

Under Mansf. Dig. Ark. §§ 5028, 5031, extended to Indian Territory, providing that a nonjoinder or defect of parties, where the objection is not raised by demurrer to the complaint or by answer, is waived, the right of a plaintiff to recover the value of property converted by defendant cannot be contested on the trial on the ground that the property was owned by plaintiff and a third person in partnership, and especially where such third person testified in plaintiff's behalf, and is thereby estopped to assert any interest in the property as against defendant.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 69 S. W. 898.

N. A. Gibson, Benj. Martin, Jr., and N. B. Maxey, for plaintiff in error.

Preston C. West, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was an action in the United States Court for the Indian Territory by Singleton against Gentry to recover the value of 56 steers alleged to have been the property of the plaintiff, and to have been converted by the defendant to his own use. A trial by jury resulted in a judgment for plaintiff, which was affirmed by the Court of Appeals for the Indian Territory. *Gentry v. Singleton*, 69 S. W. 898. It is complained, first, that at an early stage of the trial the court held that, if the defendant desired to contend that the number of steers included in the transactions under ex-

¶ 4. See Partnership, vol. 38, Cent. Dig. § 43.

amination was less than 56, he must carry the burden of proving that fact. Even if the ruling was erroneous when made, no harm or prejudice resulted from it, because thereafter it was affirmatively shown by uncontradicted evidence produced by plaintiff, and also by evidence produced by defendant, that 56 was the correct number. It is complained next that defendant was, by several rulings at the trial, unduly restricted in the cross-examination of John A. Skaggs, a witness for plaintiff. If there was error in this, it was equally without harm or prejudice, because defendant subsequently amended his answer, and then, without any restriction, proceeded with the cross-examination of the witness, and fully interrogated him upon every matter covered by these rulings. Another complaint is that Charles Bruner, a witness for defendant, was not permitted to answer the question, propounded by defendant: "Who did you understand you were selling the cattle to?" Bruner, who was then the owner of the steers, sold them shortly before the alleged conversion, and the purpose of his examination was to show to whom the sale was made—whether to plaintiff, or to plaintiff and others, including one Henry, to be mentioned later. Bruner's recollection of the transaction seemed entirely clear, and he was permitted to testify to all that was said and done at the time of the sale. The inference or understanding to be properly drawn from what occurred at that time was to be determined by the court and jury, and the unexpressed thought or understanding of the witness was wholly immaterial.

The principal reliance for a reversal is upon the action of the court, at the conclusion of the evidence, in instructing the jury to return a verdict for the plaintiff, leaving for the jury's determination only the amount of damages. In this the court followed the established rule that, when the evidence so conclusively entitles one party to a verdict that a verdict for his opponent would have to be set aside, the court may direct a verdict for the party entitled to it. *Elliott v. Chicago, etc., Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Coughran v. Bigelow*, 164 U. S. 301, 307, 17 Sup. Ct. 117, 41 L. Ed. 442; *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 492, 17 Sup. Ct. 158, 41 L. Ed. 524; *Motey v. Pickle, etc., Co.*, 20 C. C. A. 366, 74 Fed. 155; *Ponder v. Jerome Hill Cotton Co.*, 40 C. C. A. 416, 100 Fed. 373; *Cudahy Packing Co. v. Marcan*, 45 C. C. A. 515, 106 Fed. 645, 54 L. R. A. 258. This case comes well within this rule. The uncontradicted evidence showed this state of facts: Singleton and the witness Skaggs entered into an arrangement whereby the latter was to buy cattle in the Indian Territory with money supplied by the former, and the cattle were to be taken to Kansas by Skaggs, and there sold, and the profits divided equally between them. Skaggs then entered into an arrangement with one Henry, whereby the latter, or a man furnished by him for the purpose, was to assist Skaggs in caring for the cattle and in taking them to Kansas, and was to receive as compensation for this service one-half of the profits to which Skaggs would be entitled. Henry was to have no interest in the cattle, and was not to have authority to buy or sell. Singleton assented to this arrangement. Skaggs and Henry subsequently went to the home of the witness Bruner, and the 56 steers before named were then purchased from

him. The negotiations leading to the purchase were entirely between Skaggs and Bruner, and the steers were paid for by Skaggs' individual bank checks, drawn against money supplied by Singleton. Henry was introduced to Bruner by Skaggs as "the man that is helping me with the cattle." The steers were to remain for a short time in the pasture of Bruner, without his being responsible for them; Skaggs stating "that he or Mr. Henry would be around there to look after the cattle." A few days later, Skaggs branded the steers with a brand in which Henry is not claimed to have had any interest. Without the permission or knowledge of Singleton or Skaggs, Henry took the steers from Bruner's pasture and sold them, with other cattle of his own, to defendant, who bought, shipped, and sold the steers without knowing their true ownership, or Henry's relation to them. There was some evidence to the effect that prior to this transaction Henry and Skaggs had been together much, and that it was "understood" in the community that Henry was "associated or connected" with Skaggs in the "cattle business"; but there was no evidence that either Singleton or Skaggs had held Henry out as a partner, or as authorized to buy or sell cattle on behalf of either or both of them, or as having an interest in the steers. Nor was there any evidence that Henry had made any other sale of cattle belonging to Singleton and Skaggs, or either of them. Neither Singleton nor Skaggs received any part of the purchase price paid to Henry, or otherwise ratified the sale to defendant. After learning what had been done with the steers, and without unreasonable delay, Skaggs informed defendant of their true ownership, and of the unauthorized character of the sale. Referring to this, the defendant testified:

"Q. You stated, I understood, Mr. Gentry, that, whilst your communications were going on about a settlement with Mr. Skaggs and Mr. Singleton, that you received a telegram from Mr. Henry to hold onto those cattle—that he would guaranty the title? A. I received a telegram at Checotah signed 'J. N. Henry.' I don't know anything about it. Q. You were then informed that Henry was the man that sold you the cattle, and that he had no right to sell them to you, and you made no inquiry about Henry? You had been informed that Henry had no right to sell those cattle when Skaggs came there? You knew where Henry was, because you got a telegram telling you to hold onto them? A. Yes, sir. Q. That he would defend them in any court? A. Yes, sir. Q. You relied on that, and did not make any further effort to collect from Henry? A. Yes, sir."

Henry soon left the country and his whereabouts were thereafter unknown. As bearing upon the ownership of these steers, as between plaintiff and Skaggs, plaintiff testified:

"Q. Were you the owner of the cattle sued for in this action? A. Yes, sir."

Skaggs was a witness, and did not assert any right or claim against defendant, but testified on behalf of plaintiff:

"Q. For whom were you buying cattle? A. For Mr. Singleton. Q. The plaintiff in this action? A. Yes, sir."

The principles of law which determine the rights of litigants upon such a state of facts are few and well recognized. The general rule, predicable of a simple transfer from one party to another, where no other element intervenes, is that no one can transfer a better title to personal property than he himself possesses. To do more, he must be

clothed with power of disposal by the true owner, or must be held out by him as possessing such power, and an innocent third party must rely upon this apparent authority, or the transfer must be ratified or confirmed by the true owner after it is brought to his notice. Ownership usually carries with it the right to possession, and the relation between the two is such that possession may properly be said to be *prima facie* evidence of ownership, but it is not more. Ownership is the principal thing, and ordinarily controls the possession, which is secondary or incidental. Whoever buys from one in possession must see to it that he has some title or authority other than that which is conferred by mere possession, because the possessor may be a thief or a servant without power of disposal, neither of whom can give a good title, no matter how innocent the purchaser may be, or how much he may pay for the property. It follows that mere possession of the vendor, however acquired, if there be no other evidence of ownership or power of disposal, will not preclude a third person, who is the true owner, from reclaiming his property or its value from the vendee. *Mechem on Sales*, §§ 154-159; *Stanley v. Gaylord*, 1 *Cush.* 536, 48 *Am. Dec.* 643; *Baker v. Taylor*, 54 *Minn.* 71, 55 *N. W.* 823; *Jetton v. Tobey*, 62 *Ark.* 84, 34 *S. W.* 531. In one view of the evidence, the possession of Henry was that of a thief, and in no possible view was it of a higher order than that of a servant without authority to sell. In neither view could he transfer the title to defendant.

It is urged that the arrangement between Skaggs and Henry, made with Singleton's assent, constituted Henry a partner in the business in which Singleton and Skaggs were engaged, and empowered him, as to third parties, to make sales of the partnership property. While the general rule is that participation in profits is presumptive evidence of partnership, an employé or servant who has no power as a partner in the firm, and no interest in the profits, as property, and who is simply engaged as an employé or servant, and is to receive a stated sum out of the profits, or a proportion of the same, as compensation for his services, is not a partner in any sense. This is also true of one who receives part of the profits of a commercial partnership only by way of compensation for a loan of money. *Berthold v. Goldsmith*, 24 *How.* 536, 542, 543, 16 *L. Ed.* 762; *Meehan v. Valentine*, 145 *U. S.* 611, 619, 624, 12 *Sup. Ct.* 972, 36 *L. Ed.* 835; *The J. P. Donaldson*, 167 *U. S.* 599, 605, 17 *Sup. Ct.* 951, 42 *L. Ed.* 292; *Stevens v. McKibbin*, 15 *C. C. A.* 498, 68 *Fed.* 406; *Randle v. Barnard*, 26 *C. C. A.* 568, 81 *Fed.* 682; 1 *Bates on Partnership*, §§ 36, 37. The evidence clearly shows that Henry furnished his own labor, or that of another person provided by him, as an employé or servant; that he had no power or voice in the management of the business; and that he had no interest in the profits, other than that the compensation for his labor, or that furnished in its stead, was measured by a certain proportion of the profits. He was not a partner.

The evidence conclusively entitled the plaintiff to a verdict, and made it the duty of the court to direct the jury accordingly, unless there was some obstacle in a matter yet to be noticed.

It is insisted on behalf of defendant that the arrangement between Singleton and Skaggs possessed such elements as made it a partner-

ship, and thereby invested the title to the steers, and the right to recover for their conversion, in the two partners jointly, instead of Singleton alone. Pomeroy's Code Remedies, § 223. But in our view of defendant's situation and Skaggs' relation to this action when the court came to instruct the jury, it is unnecessary to determine whether the agreement between Singleton and Skaggs made them partners, or, if it did, whether Singleton alone could ordinarily recover more than his portion of the damages. See 1 Chitty on Pleadings (16th Am. Ed.) p. *75; 1 Sutherland on Damages, §§ 134, 137. Under the Statutes of Arkansas, which have been extended to the Indian Territory (Mansf. Dig. §§ 5028, 5031; Ind. T. Ann. St. 1899, §§ 3233, 3236), a non-joinder or defect in parties plaintiff, not raised by demurrer to the complaint or by answer, is waived. *Yonley v. Thompson*, 30 Ark. 399, 401; *Clark v. Gramling*, 54 Ark. 525, 528, 16 S. W. 475; *Seip v. Tilghman*, 23 Kan. 289; *Bliss on Code Pleading*, § 411. No suggestion of a defect in parties was made by demurrer or answer, and thereafter defendant was not in a situation to complain that Skaggs had not been joined as a party plaintiff. For another reason Skaggs was precluded from asserting a right of recovery against defendant. He had fully acquiesced in the prosecution of this action, wherein Singleton asserted exclusive ownership of the steers, and sought to recover the entire damages; and he had given material support to Singleton's claim by giving testimony, as before shown, which was inconsistent with any right of recovery in himself. Skaggs was therefore estopped, as against defendant, from claiming any interest in the property converted. *Sullivan v. McConnell*, 19 C. C. A. 400, 73 Fed. 130; *Barney v. Dewey*, 13 Johns. 224, 7 Am. Dec. 372; *Hobbs v. McLean*, 117 U. S. 567, 580, 6 Sup. Ct. 870, 29 L. Ed. 940; *Birdsell v. Shaliol*, 112 U. S. 485, 487, 5 Sup. Ct. 244, 28 L. Ed. 768; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476, 492. And defendant was in no danger of being compelled to respond twice for the same act of conversion.

There was no error in directing a verdict for plaintiff. The judgment is affirmed.

THE EDMUND L. LEVY.

(Circuit Court of Appeals, Second Circuit. March 4, 1904.)

No. 116.

1. TOWAGE—LIABILITY OF TUG FOR INJURY TO TOW.

The agreement of a boat to be towed at her own risk does not exempt the tug from liability for damages occasioned by her own negligence, or the failure of the master, who is responsible for the navigation of both vessels, to exercise ordinary care and skill to see that the tow is properly made up, and that the hawsers are of proper length, strong, and securely fastened, because such liability does not arise out of the towage contract, but is imposed by law. On the other hand, the master of a boat, who offers her as a tow, represents her as sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage, and the tug is not liable for damages resulting from the weakness, decay,

¶ 1. See *Towage*, vol. 45, Cent. Dig. §§ 15, 19, 28, 29.

or leaks of the tow, or other defects which render her unseaworthy, and which are not known or obvious to the master of the tug.

2. **SAME—NEGLIGENCE OF TUG—EVIDENCE CONSIDERED.**

Evidence considered, and *held* not to sustain the claim of a libellant that the sinking of a canal boat, while being towed by a tug through floating ice, was due to the negligence of the tug in using a hawser from 125 to 150 feet long, but to show by a preponderance that under the circumstances such length was a proper one, and that the tow was properly made up and carefully navigated.

Appeal from the District Court of the United States for the Eastern District of New York.

This is an appeal by the claimant, Thomas Quigley, from a final decree, entered February 14, 1903, in favor of the libellant, John O'Connor, for \$1,834.55 on account of damages sustained by his canal boat, E. Remington & Sons, because of alleged negligence of the tug *Levy* while towing the canal-boat through the ice in the upper Hudson river in December, 1900. The facts are accurately stated in the decision of the court below.

J. Parker Kirlin and Amos Van Etten, for appellant.
Nelson Zabriskie, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. There is no dispute that the condition of the river as to ice, for some distance below Albany, was known to the master of the *Remington* before the voyage commenced. By the terms of the contract the canal-boat was to take the risk of ice and weather, the tug agreeing to tow her only so far as the existing conditions would permit. But, as is aptly stated by the District Judge:

"Because the canal-boat assumed the risk of ice, she did not thereby authorize towing in the same manner as if the ice were absent."

We do not deem it important to discuss with greater particularity the terms of the contract for the reason that it did not change the reciprocal obligations which the law devolved upon the parties.

The tug was neither a common carrier nor an insurer of the boat or her cargo. She was not required to exercise the highest degree of skill, but reasonable diligence and care only. She was bound to know the channel and whether she could complete the voyage with safety, so far as safety depended upon known facts, or facts easily capable of ascertainment. The agreement of the canal-boat to be towed at her own risk did not exempt the tug from liability for damages occasioned by her own negligence. That liability does not arise out of the towage contract, but is imposed by law. The master of the tug was the pilot of the voyage and responsible for the navigation of both vessels. It was his duty to exercise ordinary diligence to see that the tow was properly made up, that the hawsers were of the proper length, strong and securely fastened. On the other hand, the master of a boat offering her for towage represents her as sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage. If she be unseaworthy by reason of weakness, decay or leaks and such defects are not obvious to the master of the tug he will be absolved from responsibility where such unseaworthiness causes the damage complained

of. The tug undertakes only for that degree of skill, care and prudence necessary for the management of a seaworthy boat. The *Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The Quickstep*, 9 Wall. 670, 19 L. Ed. 767; *The Lady Pike*, 21 Wall. 1, 22 L. Ed. 499; *The William Murtaugh* (D. C.) 3 Fed. 404; *The Syracuse*, 6 Blatchf. 2, Fed. Cas. No. 13,717; *The Florence* (D. C.) 88 Fed. 302.

Various faults were alleged in the libel, but it is unnecessary to consider any except the charge that the tug was negligent in towing with too long a hawser. On this ground alone she was inculpated by the District Judge. He says:

"After much consideration and some doubt, it seems to the court that it was not prudent to carry the tow on so long a hawser, breaking a channel proportioned to the width of the tug, and probably little more than the width of the canal-boat, so that sheering on the hawser would bring the canal-boat with considerable violence against the ice on either side. It is perfectly apparent that a hawser 150 feet long would permit unnecessary sheering or swinging, and that the tow would be to a greater extent ungovernable. Whatever doubt exists from the conflicting statements of the parties, the balance would seem to turn in favor of the libellant, by the evidence of Mr. Briggs, who was a man of obvious character and understanding, and familiar with the river and navigation through ice therein."

We find ourselves unable to concur in this conclusion for the following reasons:

First.—In our judgment the preponderance of evidence tends to establish the proposition that a hawser from 125 to 150 feet in length was a proper one to use. The tow was arranged in tandem fashion shortly after leaving Cocksackie. The master of the canal-boat, who had 40 years' experience on the river and had been frequently towed through floating ice, made no complaint of the length of the line at this time. He does not say that the length was unusual or improper. There is testimony that at one time he called to the tug to shorten the line, but this was after the final bump was given, near New Baltimore, to which the sinking of the boat is attributed. At the trial he testified that in his judgment a 70-foot hawser would have been long enough. The only other witness for the libellant was John N. Briggs, the consignee of the cargo, who evidently impressed the court as a most intelligent and disinterested witness. He is engaged in the ice and coal business at Coeymans and was certainly not qualified to express an expert opinion upon the question in controversy. He testified that the hawser should not have been more than 30 or 40 feet at the most. Opposed to this extremely meager and unsatisfactory testimony is the opinion of several experienced river pilots, two of whom have spent over 30 years in navigating the Hudson, that not only was the hawser of the usual and proper length, but that it would have been impossible to handle the tow in the ice with a shorter line. Not alone in the number of the witnesses, but also in their experience, does the testimony of the claimant far outweigh that of the libellant.

Second.—The District Judge had the great advantage of seeing and hearing the witnesses and, in ordinary circumstances, his finding upon a disputed question of fact would not be disturbed on appeal, but the rule is not applicable to the present controversy for the reason that it is presented in this court upon a somewhat different state of facts.

The District Judge was in doubt, and it is evident that the testimony of Mr. Briggs finally induced him to resolve that doubt in favor of the libellant. Indeed, he says so explicitly. Twice in the opinion Mr. Briggs is referred to; once as "a very reliable witness" and, again, as "a man of obvious character and understanding." It is probable that this reliance upon the testimony of Mr. Briggs was due in a great measure to the fact that he testified that he had no interest in the controversy. On the reference to compute the amount of damages he presented claims aggregating \$167 and was allowed by the commissioner \$204; which included a partial loss on the cargo of \$164. In an evenly balanced case these facts, if known to the trial judge, might have turned the scales the other way. Without imputing any intentional wrong to Mr. Briggs we are unable, upon the record now presented, to regard him as "a very reliable witness."

Third.—The use of a long hawser is supported by reasoning which seems to be based on experience not only but upon common sense. Assuming that the use of a hawser 30 or 40 feet in length would have a tendency to lessen the swinging of the tow, a point which is by no means clear on the proof, it seems reasonably certain that this would only be substituting one danger for another. With a short line the boat would get all the force of the quick water from the wheel, thus making her less steady and harder to tow. It would also subject her to the danger of having ice thrown with all the force of the back-wash against her bow. In addition to this the danger of collision would be serious. It frequently happens, indeed it happened upon the morning in question, that upon entering a field of ice the progress of the tug is impeded and almost stopped. In such circumstances the tow, being only 40 feet behind, would inevitably overtake the tug and crash into her stern. The master of the tug in arranging his tow should place the boats in the positions which experience has shown to be the safest, taking into consideration all the dangers to be apprehended. We think this was done in the present instance. A hawser 125 to 150 feet in length seems to combine the two essentials of avoiding the back-wash and at the same time enabling the tug to keep command of the tow.

Fourth.—It appears from the libellant's testimony that the first severe blow, the one which caused the disaster, was received not on the side but "right on the bow" of the canal-boat. Such a blow could hardly be attributed to the yawing of the boat. It might have happened with a short hawser, or two hawsers, or with the boat lashed to the side of the tug. The assertion that it was the result of using a hawser 150 feet in length seems hardly warranted by the proof. Again, the channel was a crooked one and it was impossible to avoid some sheering as the tow swung around the turns. The boat was down at the head and had a starboard list; she had no rudder. Had she been properly loaded it is not unlikely that her tendency to sheer would have been overcome, to some extent, at least.

Fifth.—The burden was upon the libellant to establish negligence by a preponderance of testimony and we think he has failed to do so. It is unnecessary to consider the other accusations against the tug. The trial judge unquestionably selected the strongest ground upon which

to sustain a finding of negligence and, by implication, at least, he found with the claimant upon the other allegations of fault. The tow was properly made up in tandem fashion and with the Remington, which was the heaviest loaded boat, ahead. The libelant admits this and the testimony shows that it would have been practically impossible to have towed the boats abreast or in any other way than the one adopted. It would have been an idle proceeding to have sent the tender, the tug Caswell, ahead to break a channel. The Levy was perfectly competent to do this, and did do it. The Caswell's place was with the tow rendering such assistance as was in her power. During the greater part of the time, after leaving Coxsackie, she was made fast to the port side of the Remington. The allegation that the speed of the tug was excessive is unsupported by the proof. On the contrary it appears that it took her about five hours to make the distance of eight miles between Coxsackie and New Baltimore. She towed with care and at times barely made steerage way.

The decree of the District Court is reversed, with costs, and the cause is remanded with instructions to dismiss the libel, with costs.

THE ONEIDA.

(Circuit Court of Appeals, Second Circuit. March 21, 1904.)

No. 78.

1. **SHIPPING—DAMAGE TO CARGO—BURDEN OF PROVING SEAWORTHINESS.**

In a suit to recover for loss of cargo by the sinking of a ship, the burden of proving seaworthiness at the beginning of the voyage rests upon the shipowner.

2. **SAME—SEAWORTHINESS—INSTABILITY DUE TO IMPROPER LOADING.**

A vessel cannot be said to be seaworthy for a voyage where, at its inception, she has little, if any, metacentric height, and a list of 8 or 9 degrees, and her cargo weight is so distributed that her instability must increase as she proceeds from the consumption of coal and water.

3. **SAME—HARTER ACT.**

A ship started on her voyage with a list of 8 or 9 degrees, which increased to such an extent, in consequence of her improper loading, that it was imprudent to proceed, and she put in at an intermediate port. Having opened a port to readjust the cargo while lying at a pier, the ship gave a sudden lurch, which brought the port under water, and she sank, damaging the cargo. *Held*, that the damage was attributable to her initial instability, which rendered her unseaworthy at the beginning of the voyage, and for the consequences of which the owners were not exempted from liability by the Harter act.

4. **SAME—MEASURE OF DAMAGES—VALUE OF DAMAGED CARGO.**

A ship carried a cargo of cotton from Charleston to New York, from which place it was to be forwarded to Liverpool, but under a separate and independent contract of affreightment. The bill of lading provided that in case of loss or damage the value of the cotton in Charleston at the time

¶ 1. Implied warranty of seaworthiness, see note to *The Carib Prince*, 15 C. C. A. 388.

See Shipping, vol. 44, Cent. Dig. § 482.

¶ 3. Statutory exemption of shipowners from liability, see note to *Nord Deutscher Lloyd v. President of Insurance Co. of North America*, 49 C. C. A. 11.

of shipment should be taken as the basis for computing the damages. The cotton was damaged before its delivery in New York through the unseaworthiness of the ship. *Held*, that the contract of carriage terminated in New York, and the ship was entitled to credit for the value of the cotton in its damaged condition in that market, and not in the Liverpool market, and that it was error to give credit for the proceeds of its sale in Liverpool, less the freight from New York, the amount being materially less than would have been realized by its sale in New York.

5. SAME—ERROR OF SURVEYORS—ESTOPPEL.

The cotton was shipped to Liverpool for sale in compliance with the recommendation of the surveyors who adjusted the loss, and with the knowledge of the shipowners, who made no objection. *Held*, that they were not bound by the erroneous decision of the surveyors, nor estopped to claim credit for the New York value of the cotton, where they at no time gave a positive assent to the substitution of the Liverpool value.

6. SAME—MEASURE OF DAMAGES.

Under a bill of lading for cotton to be carried from Charleston to New York, which provided that loss or damage to the cotton should be computed on the basis of its value at the time and place of shipment, where it was delivered in New York in a damaged condition, the shipowner is not entitled to have the amount of the freight deducted from its value as ascertained pursuant to such provision.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal by the Clyde Steamship Company, as claimant and owner of the steamship *Oneida*, from the final decree of the District Court of the Southern District of New York, in favor of the libellant, entered February 17, 1903, for the sum of \$40,112.82. The libellant, J. Raymond Smith, is assignee of the owners and underwriters of the cargo of the *Oneida* which was damaged by reason of the sinking of the ship at Pier 29, East river, New York, on September 21, 1897. The opinion of the District Court holding the *Oneida* liable is reported in 108 Fed. 880.

Henry Galbraith Ward and Charles H. Hough, for appellant.
Wilhelmus Mynderse, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We concur in the conclusion of the District Court that the *Oneida* was unseaworthy when she left Charleston. A few words only need be added. The burden was upon the claimant to show that the vessel was in a fit condition to transport the cargo undertaken to be carried; in short, that she was seaworthy. The *Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. —. This burden has not been sustained. The *Oneida* was not in a fit condition to carry her cargo to Boston, Mass., having in view all the conditions reasonably to be expected during the voyage. At the time she broke ground she had a starboard list of eight or nine degrees and within 24 hours thereafter she rolled over and took an equal list to port. This list increased until the morning of the 20th of September when she again turned to starboard with a list of 15 degrees, which was gradually increased, and at one time reached 24 degrees. This condition cannot be accounted for either by the state of the weather or the slight shifting of the cargo. The instability indicated at Charleston steadily increased as the ship continued her voyage. In the nature of the case this was inevitable and must have been known to her master at the time. The coal and water

were stowed below the center of gravity and as these were consumed the tendency to become topheavy increased. It cannot be said that a vessel is in a seaworthy condition which has at the inception of her voyage, little, if any, positive metacentric height, a list of eight or nine degrees, and her cargo weight so distributed that her instability must increase as she proceeds. Perhaps the most persuasive proof of her inability to reach her destination safely is found in the fact that the list increased so rapidly that on the morning of the 21st, when there was a starboard list of 22 degrees, her master, fearing that she would be unable to reach Boston, put into the port of New York in distress.

The subsequent disaster which overtook the Oneida can be traced directly to the improper distribution of the cargo at Charleston. The sequence of events leaves little room for doubt regarding this proposition. The faulty loading produced a list which necessarily increased as the vessel proceeded. Increasing instability made the completion of the voyage imprudent. The danger of continuing made deviation a wise precaution. In order to readjust the cargo it became necessary to open a cargo port in the lower between decks. Opening the port, followed by the sudden lurch of the ship, caused the damage to the cargo. Thus the damage can be traced directly to the initial instability. This was a fault from the consequences of which the ship is not relieved by the provisions of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]). The *Southwark*, supra, and cases cited; The *Germanic*, 124 Fed. 1, 59 C. C. A. 521; The *C. W. Elphicke*, 122 Fed. 439, 58 C. C. A. 421; The *Manitou* (D. C.) 116 Fed. 60, affirmed (C. C. A.) 127 Fed. 554.

The claimant contends that there was error in ascertaining the damages, in respect to the foreign shipments, by taking into consideration the value of the cotton at Liverpool rather than at New York where the claimant's contract of carriage ended; New York having been substituted for Boston by agreement. The claimant also insists that it was error to allow the libellant coastwise freight on the cotton from Charleston to New York and ocean freight from New York to Liverpool. The commissioner commenced his computation by fixing the value of the cotton at the amount stated in the invoice. Both parties appear to be content with this basis of computation, at least there is no exception challenging its accuracy. The bill of lading contains the following clause:

"In ascertaining the amount of such damage, the same shall be computed at the value or cost of the said goods or property at the time and place of shipment."

The parties differ as to the proper construction of this language, but not in the particular now under consideration, and we start, therefore, with the assumption that the cost or value of the cotton at the place of shipment is correctly stated. Should the ship have received credit for the value of the cotton at Liverpool or New York? Seventy-three bales of damaged domestic cotton were sold in New York for \$28.88 a bale, a very much higher price than was obtained in Liverpool. We think the contract with the Oneida simply contemplated a carriage of the goods to Boston, there to be delivered to a separate and wholly

independent carrier. When this delivery was made the obligation of the ship terminated. In other words the port of Boston was the place of destination as between those parties and there the value of the goods in their damaged condition was to be ascertained irrespective of the fact that the owners had contracted with a separate carrier to convey them to Liverpool. Especially is this true in a case where the through voyage was broken up by the refusal of the subsequent carrier to receive the goods in their damaged condition. But New York was by the request of the owners substituted for Boston and the reciprocal rights and obligations of the parties must be considered as they accrued at the former city. *Marshall v. N. Y. C. R. Co.*, 45 Barb. 205, affirmed 48 N. Y. 660. The claimant was, therefore, entitled to credit for the value of the cotton at New York unless it or its agents agreed to the contrary. It was the opinion of the surveyors that the cotton should be forwarded to Liverpool for sale. Mr. Putnam testified as follows:

"It was my opinion, based on the Liverpool market, that it was desirable to forward the cotton to Liverpool. New York is a large market for damaged cotton; it is a good market; New York and Philadelphia. Personally I know nothing about the market in Liverpool for damaged cotton. There are large quantities of damaged cotton sold in Liverpool, probably more than in New York, and it is supposed to be a better market for damaged cotton than New York. * * * When I stated to Messrs. William P. Clyde & Company that it was advisable to send the damaged cotton to Liverpool under through bills of lading they didn't object to it at all, they didn't make any effort, they tried to do it. * * * I know of no interest they had in the cotton after delivery under through bill of lading to Boston. * * * If, in point of fact, it appears that the cotton that was forwarded to Liverpool sold at very much lower rates it simply indicates an error, in my judgment, in having it go forward."

Mr. Coe, an average adjuster, testified:

"The damaged cotton was delivered to the underwriters against their guarantees, and they had the sole control and disposition of it."

The cotton went forward with the full knowledge of Clyde & Co., and it is true that they did not object, but we fail to find that they assented to the proposition that the value of the cotton was to be ascertained with reference to the Liverpool market and that the entire expense of getting it there was to be borne by them. The contention of the libellant is that the claimant's rights were entirely in the hands of the surveyors and that the claimant was remediless no matter how ill-advised their recommendations might be or how disastrous the consequences, provided they were made in good faith. "If the surveyors," says the brief, "had reported that the damaged cotton could be sold to the best advantage in Kamchatka, it would have been quite proper to send it there for sale, and the expenses of the transportation would be a charge against the proceeds of the sale." It would seem to follow as a natural conclusion from this contention that the insurers and owners were at liberty to convey the cotton from port to port until one was found where market conditions were favorable, and always at the expense of the claimant. We cannot accede to this view.

There is force in the suggestion that when the cotton was forwarded all parties expected a general average in which event the adjustment would have been made with reference to values and losses at New

York. This is evidenced, inter alia, by the indemnity agreement, dated September 27, 1897, which the underwriters gave to the Oneida. The first and third clauses are as follows:

"First: To protect, indemnify and hold harmless the said steamer Oneida, her owners, agents and all concerned therein, from and against any claim or demand that is or may be made for any damage or loss that may be claimed to have been caused by the deviation or change of route aforesaid. This agreement not to prejudice any claims which the owners, shippers or underwriters of said cotton may have by reason of occurrences prior to the date hereof. * * * Third: To pay upon demand such proportion of general average, salvage and special charges on said cotton, sound and damaged, as may be found to be due on adjustment."

In view of all the circumstances and conditions, we do not think that the mere acquiescence of the agents of the claimant in the forwarding of the cotton to Liverpool binds the claimant to the extent of charging it with the entire loss attributable to an act which is now conceded to have been a serious mistake. The cotton did not belong to claimant. Even had an objection been made there was no power to enforce it. The case presents no elements of an estoppel. The owners saw fit to send the cotton to a foreign market but this does not change the rule of damages in the absence of an agreement express or implied that such was the intention of the parties. It follows, of course, as a corollary of the foregoing that the claimant should not be charged with the ocean freight.

The failure to object to the substitution of the Liverpool market for the New York market did not operate to bind the claimant to the large outlay necessary in order to get the goods to the former market. Something more than mere silence was necessary to produce such an obligation. Not only is there no evidence that the claimant agreed that it would pay the ocean freight but on the contrary the record shows that the claimant at all times expected to be paid for the service. Clyde & Co. rendered their freight bill to Johnson & Higgins and at no time waived their right to be reimbursed for the outlay thus occasioned. The libellant relies solely on a negative acquiescence where an affirmative promise is required.

The only remaining exceptions, necessary to be considered, are those challenging the action of the commissioner in adding the coastwise freight, paid the claimant, to the invoice value, thus depriving the claimant of the freight earned in carrying the cotton from Charleston to New York. Were this an ordinary action at common law, with no express stipulations between the parties regulating the measure of damage, the ruling of the commissioner in this regard could not be sustained. The rule governing such cases is well stated as follows:

"The damage sustained by the plaintiff from the failure to perform this contract was clearly the value of the apples in New York at the time they should have been delivered, pursuant to the contract, in the condition the defendant undertook to deliver them, less the price to be paid for the service." *Sturgess v. Bissell*, 46 N. Y. 462; *Rodoconachi v. Milburn*, 18 Q. B. D. 67.

In the present case, however, the parties have seen fit to agree to compute the damage in case of loss at the value or cost of the property at the place of shipment, and there is much force in the argument that, in such circumstances, the shipper should not lose the amount paid for

freight. We are not disposed to interfere with the action of the commissioner in following a rule which has long been established in the admiralty courts. *Pearse v. Quebec S. S. Co.* (D. C.) 24 Fed. 285; *The Lydian Monarch* (D. C.) 23 Fed. 298.

It follows that the decree must be reversed, without costs in this court, and the cause remanded to the District Court with instructions to compute the damages in accordance with this opinion.

WALLACE, Circuit Judge (concurring). In concurring in the opinion of the court I deem it proper to state the reasons why, as it seems to me, the ship, and not the cargo owner, should bear the part of the loss represented by the freight upon the damaged goods from Charleston, the place of shipment, to New York, the substituted place of delivery.

The general rule is that, in case of a loss of the goods, the carrier is liable to the shipper for their market value at the point of destination, less the amount of the freight charges due for their transportation; and the same rule applies where the goods are merely damaged, and are delivered in their damaged condition, with the qualification that the value of the goods in their damaged condition is to be deducted. Presumably the cost of transportation to the place of destination is an element of the market value of the goods at that place; and when the shipper recovers their market value, or upon the basis of their market value at that place, he obtains full indemnity. As the shipper thus gets the benefit of the transportation, the carrier should not lose the freight. In the present case, however, the general rule is deflected by the peculiar condition in the bill of lading. That condition was as follows:

"It is further mutually agreed that in case any loss, detriment, or damage is done to or sustained by any of the goods or property herein receipted for during transportation, * * * in ascertaining the amount of such damage the same shall be computed at the value or cost of said goods or property at the time and place of shipment."

Obviously, this clause cannot be construed literally, as it would be preposterous to suppose that the parties intended that, in case of a partial or even a trifling damage, the loss should be estimated at the whole value or cost of the goods. In reason it must mean either that the damage recoverable shall not exceed the cost or value of the goods at the time and place of shipment, or, alternatively, that as a basis for computing the damages their cost or value at the place of shipment is to be substituted for their market value at the place of destination. The language is more consistent with the latter meaning. The clause was probably inserted for the benefit of both parties, and to relieve either from the chances of an excessive loss arising by abnormal fluctuations in the market value of the goods occurring after the time of shipment; and whereby the market value at the time of delivery might be much higher or much lower than at the time of shipment, or than ordinarily. Reading it as intended to eliminate an element of uncertainty in estimating possible loss, it can be given due effect without burdening the shipper with the cost of the transportation of the goods. Under a bill of lading like the present the shipper's loss

is fairly measured by the difference between the cost or value of the goods at the time and place of shipment and their value in their damaged condition at the place of delivery, together with the expenses incurred for their transportation. The carrier really obtains the benefit of the transportation, and the shipper does not, because, applying this rule of damages, the carrier is allowed the value of the damaged goods at their place of delivery. There is no justice in requiring the shipper to pay for a benefit which inures wholly to the carrier.

IRON CITY TOOLWORKS, Limited, v. WELISCH.

(Circuit Court of Appeals, Third Circuit. February 17, 1904.)

No. 48.

1. SALES—PATENTED ARTICLES—AGREEMENT TO MANUFACTURE—DELIVERY—DAMAGES—LOSS OF PROFITS.

In an action for breach of a contract to manufacture and deliver to plaintiff patented picks intended for sale to Alaska miners, by reason of defendant's failure to deliver the same as agreed, no element of loss of profits could be considered in the computation of damages which was uncertain, speculative, and not clearly and unqualifiedly proved.

2. SAME—EVIDENCE.

In an action to recover for breach of defendant's contract to manufacture and deliver patented picks to plaintiff, which he intended to sell to Alaska miners, evidence of anticipated profits, based on plaintiff's sale of a sample pick or picks to a miner, which had been made in a blacksmith shop, at retail, before the making of the contract, and as to his opinion concerning the market for the same had they been delivered as agreed, was inadmissible, as too remote and speculative.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. R. Blair, for plaintiff in error.

Wm. B. Rodgers, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and McPHERSON, District Judge.

GRAY, Circuit Judge. In the court below, Welisch, the defendant in error, was plaintiff, and the Iron City Toolworks, Limited, the plaintiff in error, was defendant. The action was one of assumpsit, brought by plaintiff against the defendant, to recover damages alleged to have resulted from a breach of contract between the plaintiff, a citizen of the state of California, and the defendant, a partnership association existing under the laws of the state of Pennsylvania, doing business at Pittsburg in that state. The facts disclosed by the record, so far as they are pertinent to the question before us, are as follows:

The original contract between the parties was in writing, dated June 25, 1900, and therein the defendant, for the consideration mentioned, undertook to manufacture for the plaintiff one thousand pickeyes and ten thousand picks, to be shipped not later than ninety days from date to the plaintiff, in California. One hundred dollars was paid in cash, and \$2,700 deposited in escrow in a Pittsburg bank. The pick was

of a certain kind, for which the plaintiff had, in 1892, obtained letters patent. It was called an adjustable pick; that is, the arms or points of the pick are detachable from the central part, or the pickeye, into which the handle is inserted. Delivery was not made by defendant, in accordance with the contract, at the expiration of 90 days, but a sample pickeye, with points to match, was shipped to and received by the plaintiff in California. The plaintiff objected that the adjustable parts of the sample did not fit, but he kept the same in his own possession until November 25, 1900, when he visited the defendant in Pittsburg, and agreed that defendant should go on and complete the order, one half of the picks to be delivered in December, 1900, and the other half in January, 1901, neither party waiving any rights he then had. Defendant failed to furnish the picks within the time thus extended, and, on February 2, 1901, the suit was brought in the court below. The trial resulted in a verdict and judgment in favor of the plaintiff, for \$2,750. The plaintiff in error has filed here 14 assignments of error to the admission of testimony and to the charge of the court.

The main question, however, underlying them all, and with which we are here alone concerned, is, whether the plaintiff was entitled to recover as damages, alleged profits which he claimed he might have realized but for the breach of contract on the part of the defendant. Over the objection of the defendant, the plaintiff was allowed to testify, as follows:

"Q. Were picks of this kind in demand for the purpose of the Alaska mining operations? A. Yes, sir. Q. Well, was that a large demand, or not? A. Well, it is the most practical pick. Of course we don't all agree upon that point, but this new pick in comparison with the old pick is as a breach loading gun would be to a muzzle loading gun. Q. State whether there was a demand for picks of this character such as this. A. There was a demand for picks, and the better the pick the more demand for them. * * * Q. Well, Mr. Wellsch, would you have been able to have sold these picks if they had been delivered in the season of 1900? A. Why, yes, sir. * * * Q. Mr. Wellsch, at what profit could you have sold these goods if they had been delivered according to contract? A. I have not had a direct offer because I had nothing to deliver as far as the jobbing of it was concerned. Retail, I was offered five dollars a pick by a miner going out, that is a pick and two points. That was retail. They offered to me to take along and so save weight and time."

This testimony is somewhat indefinite, but, as plaintiff afterwards testifies that this was in San Diego, where he was then in the clothing business, and that he removed to San Francisco in May, 1900, we must assume that this was prior to that month, and therefore prior to the making of the contract in question; and further, that the pick or picks that were sold to a single miner, were of the sample picks which he testified to having had made by a local blacksmith. The plaintiff further testified that, in May, 1900, he sold out his men's furnishing and clothing business, in the city of San Diego, Cal., and removed to the city of San Francisco; that at the time of the making of the contract with the defendant, there was a great excitement over the discovery of gold in Alaska, and that 40,000 miners went to Alaska during that season, and that there was a great demand for picks. Upon this testimony of the plaintiff himself, as to what profits he believed he might have made, had the contract been fulfilled according to its terms, the learned judge of the court below charged, as follows:

"It will be for you to determine whether there was a breach of this contract, whether there was any delivery here of the subject-matter of this contract within the extended time, within the two months. If you find upon those questions in favor of the plaintiff, you will then be confronted with the question of damages. This article, the subject-matter of this written contract, was not an article upon the general market; that is to say, the plaintiff could not go into the general market and buy these picks. It was a patented article. If it had been an ordinary article of commerce, such as flour, coal, or ores, or any manufactured article in common use and common sale, the market value would be the standard to which the jury would resort in settling damages, but this article was not upon the general market, it was a patented pick, and therefore I charge you that in view of the subject-matter of this contract, and looking at all the circumstances surrounding the transaction as testified by both sides, that the measure of damages here is the actual loss the plaintiff sustained by the defendant's breach. * * * Under the evidence in this case, you will determine what the plaintiff could have sold these picks for if they had been delivered to him in accordance with the terms of his contract. You will remember that the delivery under the written contract was to take place within ninety days, not later than the 23d or 24th of September, and you will not fail to observe that if the plaintiff's version of the extension of the agreement is correct, and upon that subject the letter here speaks, his rights under the written contract were preserved, 'neither party waiving any rights he now has,' so that if the terms of the extension agreement were not complied with by the defendant, the plaintiff had a right and has a right to fall back upon any breach that occurred on the original contract, and you will ascertain from the evidence what his loss, what his actual loss, was by reason of the failure of the defendant company to furnish these picks. The law in a case of this kind seeks, as far as is humanly possible, to give compensation to one who has been aggrieved by a breach of contract, pecuniary compensation, and in accordance with that principle of law I have instructed you, and I now repeat the instruction, that the true measure of damages here, the just and legal measure of damages, is the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. You have the testimony of the plaintiff as to the demand and as to what he was offered for these picks, and you have in the order figures by which, it seems to me, you may arrive at the actual loss he sustained if you find in his favor."

The learned judge stated to the jury that the true measure of damages here, was the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. This, as a broad statement of the general rule, is quite correct. The difficult question is, what are the elements of this "actual loss," which is to be the measure of damage in a given case? or, in this case, how far are expected profits, or profits which plaintiff claims might have been realized but for the breach of contract by the defendant, such an element? No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved, and for this reason, the general rule, correctly stated by the learned judge in his charge, has always excluded proof of uncertain or speculative profits. So, where there is no market price for an article, damages cannot be computed upon the belief of plaintiff, or other witnesses, whether more or less probable, that the commodity contracted for, and not delivered, could have been sold for a certain price. Such evidence has not the degree of certainty required by the law, and the hardship that may in particular cases accrue to individual plaintiffs by the exclusion of such testimony, must be weighed against the greater hardship and inconvenience that would result in the administration of justice from the admission of testimony of so vague and indefi-

nite a character. An exception to the general rule, excluding expected profits as a basis for the computation of damages, or perhaps it would be better called a modification of its application, is found in cases where the failure of the defendant, to deliver, has at least deprived the plaintiff of the benefit of a definite contract which he has made in reliance on the fulfillment of his contract with the defendant. The doctrine in this regard is clearly stated in *Western Union Telegraph Company v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479, as follows:

"It has been well settled since the decision in *Masterton v. The Mayor of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38], that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment. In the language of the Supreme Judicial Court of Massachusetts, in *Fox v. Harding*, 7 Cush. 516: 'These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.' Page 522."

In *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 205, 11 Sup. Ct. 503, 35 L. Ed. 147, Mr. Justice Lamar, in delivering the opinion of the court, says:

"The authorities both in the United States and England are agreed that, as a general rule, subject to certain well-established qualifications, the anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach; but in the application of this principle the same uniformity in the decisions does not exist. In some cases of almost exact analogy, in the facts, the adjudications of the courts in the different states are directly opposite. The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the nonfulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms."

In that case, it was decided that evidence as to the profits expected to be derived from the sale of flour, which plaintiffs would have manufactured had defendants furnished the machinery for doing so, according to contract, could not be admitted. Such losses were, in the opinion of the court, "rather remote and speculative than direct and immediate results from the breach alleged."

We think that, by the great weight of authority, the testimony as to what profits the plaintiff might have made by the sale of these picks, had they been delivered according to their contract, should be excluded as too remote and uncertain to form the basis of a finding of damages. And this too, even if the testimony as to such anticipated profits had been more certain and precise than it was. As it is, the evidence is wholly confined to the testimony of the plaintiff himself, who testifies merely as to his opinion and belief, stating no fact except the one so vaguely testified to, of his sale of a sample pick or picks to a miner, prior to the making of the contract. As plaintiff himself says, this

was a retail, and not a jobbing, sale, and it would be manifestly unjust to make it the criterion of the price the plaintiff would have received for the whole number of picks contracted for, had they been delivered. What the cost and expense to the plaintiff would be, in making the sale of these picks, is not alluded to. No facts are adduced in support of plaintiff's opinion. It is hard to imagine a case where profits could be more justly characterized as speculative and uncertain.

We are of opinion that the learned judge in the court below erred in submitting to the jury, as a basis for their computation of damage, the question of what profits the plaintiff might have gained by the sale of the picks, had they been delivered to him by defendant, according to contract.

For this reason, the judgment below must be reversed, and a venire de novo awarded.

ARK FOO et al. v. UNITED STATES. HOO FONG et al. v. SAME. JUNG MAN v. SAME.

(Circuit Court of Appeals, Second Circuit. February 23, 1904.)

Nos. 86, 87, 119.

1. CHINESE—EXCLUSION—FINDINGS—REVIEW.

Where a commissioner's determination rejecting the evidence of citizenship in a proceeding for the deportation of a Chinese alien on the ground that he did not believe the testimony that the defendant was only 29 years of age was affirmed by the district judge, and there is nothing in the record to show that the commissioner's conclusion as to defendant's age was incorrect, the ruling will be affirmed.

2. SAME.

Where a witness to the citizenship of a Chinese alien testified that defendant was born in the United States, but was unable to state any facts concerning the village where it was alleged defendant was born, and where the witness testified he lived for 18 years—the only event which he recalled with certainty being defendant's birth—and, in answer to a question as to his business, stated that he did "odd jobs and loaf," a finding of the commissioner rejecting his testimony, affirmed by the district judge, will be affirmed on appeal.

3. SAME—OFFER TO BE SWORN.

Where a witness to the citizenship of an alleged Chinese alien was not impeached or discredited, but was clear and straightforward, and no criticism was made with regard to the same by the commissioner, and the alleged alien was not requested to be sworn in his own behalf, his failure to offer himself as a witness was not a sufficient reason for ordering him deported.

Lacombe, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of New York.

These are appeals from decisions of the District Judge of the Northern District of New York, affirming orders of United States commissioners adjudging that the appellants are Chinese laborers unlawfully

¶ 1. Citizenship of Chinese see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

within the United States and ordering their deportation to the Empire of China. The appeals were argued together.

R. M. Moore, for appellants.

Taylor L. Arms, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. In the case of Ark Foo and Ark Toy the commissioner states his reason for rejecting the evidence of citizenship offered in their behalf as follows:

"The two defendants were in court and the witness swears that the defendant Ark Foo is twenty-nine years of age. I was satisfied from said defendant's appearance that he was certainly over forty years of age and therefore placed no reliance in the witness' story."

The district judge held that the commissioner's determination in this regard should not be disturbed on appeal. We concur in this ruling. There is nothing in the record to show that the conclusion as to Ark Foo's age was incorrect. At the argument a photograph of Ark Foo purporting to have been taken in December, 1903, was handed to the court. Even though we were permitted to consider this photograph it proves nothing that enables us to say that the commissioner was wrong in his conclusion that Ark Foo is over 40 years of age. To the commissioner is delegated the duty to determine, in the first instance, these questions of fact, and if it were perfectly apparent to him, as he says it was, that the appellants' witness had falsely stated the age of one of them the commissioner was justified in rejecting the entire testimony.

In the case of Hoo Fong and Lee Cheong Ging the commissioner declined to give weight to the testimony of the appellants' witness, called to establish their citizenship in the United States, because he was utterly unable to state any facts concerning the village of Martinez where it is alleged the appellants were born and where the witness testified he lived for 18 years. The only events which he recalled with certainty during this long period were the births of the appellants. In answer to the question, "What is your business?" he answered, "Do odd jobs and loaf." He was evidently a worthless individual and because of the inherently improbable nature of his story the commissioner disregarded his testimony. The district judge agreed with the commissioner and we are convinced that this court should not disturb these findings.

In the case of Jung Man an entirely different proposition is presented. A witness was called who established without contradiction the citizenship of the appellant. The witness was not impeached and there was nothing in his testimony to discredit it. It was a clear, straightforward statement. The commissioner makes no criticism of the testimony or of the witness. He does not suggest that the testimony is unsatisfactory or contradictory, or that there was any point requiring explanation. Neither he nor the district attorney requested the appellant to be sworn, as was done in *Ex parte Sing* (C. C.) 82 Fed. 22, and in the recent case of *United States v. Leung Shue* (D. C.) 126 Fed. 423. There can, therefore, be no escape from the conclusion

that the commissioner would have accepted the appellant's testimony and would have ordered his discharge were it not for the fact that he failed to take the witness stand. The logical deduction from this ruling, stated bluntly, is that after a Chinese person has proved himself a citizen and entitled to remain in the United States, the commissioner may conclude that he is not a citizen and that he must be deported simply because he was not sworn as a witness; and this, too, in a case where no one requested him to be sworn and where he could have no personal knowledge of the facts in controversy. We are confronted with the naked question, where a Chinese person seeks to enter the United States on the ground that he is an American citizen, and has established his citizenship by unimpeached testimony, does his failure to be sworn constitute a sufficient reason for ordering his deportation? It is difficult to understand upon what theory the affirmative of this proposition can be maintained. Of course, numberless cases have arisen, and may arise in the future, where the failure of the defendant to testify may throw suspicion of the gravest character upon his defense as where, for instance, his own declarations that he was born in China are placed in evidence against him. But the case at bar is not embarrassed by any complications of this character. The crucial question was whether or not the appellant was born in the United States. From the very nature of the issue he could have no positive knowledge upon this point. Necessarily his testimony must have been hearsay. The record shows that he was born in Albany, Or., twenty-six years ago and that he left the United States and returned to China when he was 13 years of age. It is, therefore, quite apparent that he could have given no evidence which would have thrown any light upon the time and place of his birth, and yet the fact that he stood mute is the sole reason for his deportation. Indeed, the district attorney quotes with approval the language of a reported case to the effect that the claim of a Chinese person that he is entitled to citizenship "must be substantiated by better testimony respecting his birth in the United States than that of himself, based solely upon what his parents told him and the hearsay testimony of other witnesses." The commissioner suggests that a boy of 13 would be able to state "innumerable things with reference to his life in this country, the house and village where he lived and his voyage back to China, which would materially assist the court in arriving at the truth." Just what these things are is not apparent, especially when it appears that Albany is a "small town with no names or numbers to the streets." As to the voyage it was in all probability as eventless as those taken by others of appellant's countrymen. It is undoubtedly true that a shrewd cross-examiner might have involved appellant in contradictions upon these collateral matters, but we see no reason why he should voluntarily subject himself to such an ordeal. If the rule contended for be sustained the defendants, in cases like the one at bar, will find themselves confronted by a dilemma which impales them upon one horn or the other. Whether they testify or fail to testify the result is the same—deportation. In *United States v. Leung Shue*, *supra*, the case was stronger for the government, in one respect at least, than the case in hand, for the reason that the district attorney requested the defendants to take the

stand in their own behalf which, by the advice of counsel, they refused to do. The judge there clearly states the rule as we understand it to be. He says:

"They [the defendants] have proved their case by a credible and credited witness, and there is neither law nor reason for requiring defendants to take the stand and submit to examination in such a case upon pain of deportation."

See, also, *United States v. Hung Chang* (D. C.) 126 Fed. 400, 405.

We think the commissioner should have discharged the appellant.

It follows that the decision in the case of *Ark Foo and Ark Toy* and in the case of *Hoo Fong and Lee Cheong Ging* must be affirmed.

In the case of *Jung Man* the decision is reversed and the case is remanded to the District Court with instructions to discharge the defendant.

LACOMBE, Circuit Judge (dissenting). In the first two causes I concur in the result, but dissent from the methods by which conclusion is reached, and in the third cause dissent in toto. In each of these causes the majority of this court has examined, discussed, and analyzed the testimony given before the commissioner, and has reached a conclusion in accordance with its own impressions as to the credibility of the witnesses. I do not understand that this court has any such function to discharge. Certainly, without any opportunity to see the witness and the defendant, or to observe in what way the testimony is given, it would be very ill equipped to discharge such function. In *Chin Bak Kan v. U. S.*, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, the Chinese person had set up a claim of citizenship, and a hearing at which witnesses were examined was had before a United States commissioner. That officer held that the Chinese person had "not made it appear to me [the commissioner] that he was a subject or citizen of any other country than China," and adjudged that he be removed from the United States. Appeal was taken to the judge of the District Court, who affirmed the judgment, and, the construction of a treaty being involved, appeal was taken direct to the Supreme Court. After indicating that it had power to dispose of the entire case, that court says:

"But as the jurisdiction of the commissioner is sustained, we are of opinion that we cannot properly re-examine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is a fortiori justified. The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respects to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that, where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated hearings on the facts."

The three causes were heard, each before a different commissioner. In each, one witness only was called—a Chinese person, who in each case testified that he was the uncle of the defendant. In each case the defendant, who was charged with being unlawfully within the United States, was informed of the charge against him, and was advised that he would be permitted to make a statement with or without oath, or to refuse to make any statement or to answer any question

put to him, and was entitled to a reasonable time to send for and advise with counsel, and to procure the attendance of witnesses. The result in each case was a failure to satisfy the commissioner by satisfactory proof that he was entitled to remain in the country, and the District Court affirmed the commissioner's decision. In the case of Jung Man the majority of the court seems to have reached the conclusion that the citizenship of the defendant was established by the witness he called, and that the commissioner arbitrarily decided against him, and rejected the "clear, straightforward statement" of his witness, not because he disbelieved it, but because defendant did not himself testify. I do not so read the record. The commissioner expressly finds that defendant "has not made it appear to me that he was a subject or a citizen of some other country than China," and the district judge says, "This court is not satisfied that the statement of the defendant's witness is true, and hence the defendant failed to sustain his contention." The "clear, straightforward statement" of the alleged uncle is extremely meager. He had not seen the defendant for 10 years. When he last saw him (in China), defendant was only 16 years old. How the witness was able to identify the boy of 16 in the man of 26—whether by his general appearance, by any distinguishing marks, by any conversations about past events, or in any other way—he wholly failed to indicate. If the decisions of the commissioners who see and hear the witnesses are to be reversed by this court on the theory that such attenuated evidence, when uncontradicted, is convincing, the attempted enforcement of the Chinese exclusion laws seems likely to become a farce.

LANSING BOILER & ENGINE WORKS v. JOSEPH T. RYERSON & SON
et al.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1904.)

No. 1,252.

1. BANKRUPTCY—FRAUDULENT CONVEYANCES—INTENT.

Bankr. Act, § 3, subsec. 1 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), makes the execution of those conveyances which by the common law and the statute of Elizabeth were held void, as tending to hinder, delay, or defraud creditors, a ground for adjudicating the grantor a bankrupt; and subsection 3 relieves such grantor from the consequences of subsection 1 if he can prove that at the date of filing the petition he was solvent. *Held*, that the test as to whether a conveyance by an alleged bankrupt was fraudulent, within subsection 1, is the bona fides of the transfer, and hence it was error for the court to assume that, because a mortgage executed by the alleged bankrupt covered the whole of its property, it was necessarily within such section, and to refuse to admit evidence of the good faith of the transfer.

2. SAME—STATUTES—CONSTRUCTION.

Bankr. Act, § 3, subsec. 2 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), provides that the transfer by a debtor, while insolvent, of any portion of his property to some of his creditors, with intent to prefer them over others, shall constitute an act of bankruptcy; and the term "insolvency" is defined by section 1, cl. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419] as the condition of a person whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall

not, at a fair valuation, be sufficient in amount to pay his debts. *Held*, that the "property conveyed," as used in such provisions, in so far as it related to a mortgage of a corporation's entire property, did not include the mortgagor's remaining estate, where, as in Michigan, the mortgage does not transfer the title, but creates a lien only, and hence, where such estate was greater in value than the mortgagor's unsecured debts, the execution of the mortgage did not constitute an act of bankruptcy.

Appeal from the District Court of the United States for the Eastern District of Michigan, in Bankruptcy.

Certain creditors of the Lansing Boiler & Engine Works, a Michigan corporation engaged in manufacturing and mercantile pursuits at Lansing, in that state, filed their petition in the District Court about May 1, 1903, praying that, for causes set forth in the petition, the said corporation should be adjudged bankrupt. The petition alleged the present insolvency of the corporation, and that it had committed certain acts of bankruptcy, as follows: (1) In that on January 10, 1903, it conveyed to a trustee, for the benefit of some, but not all, of its creditors, all its property, with intent to hinder and delay its creditors, and that the trustee had accepted the trust and taken possession of the property. (2) In that on the day last mentioned it executed to the same trustee, for the benefit of the same creditors, a mortgage of all its real and personal property, intending thereby to hinder and delay its creditors. (3) In that it executed such a mortgage as is above stated, intending thereby to hinder and delay its other creditors, of which the petitioners are a part. (4) "In that it did heretofore, to wit, on various dates since that time, pay divers and sundry other creditors, while insolvent, intending by so doing to prefer such creditors so paid over the other creditors." (5) "In that it did, while insolvent, transfer various and sundry portions of its property to certain of its creditors, intending to prefer such creditors over other creditors." The respondent appeared and answered the petition, denying each and all the alleged acts of bankruptcy, and denying that it then was, or at any time had been, insolvent. The issues were tried before the court, no jury having been demanded. Upon the evidence submitted, the court adjudged the respondent, the Lansing Boiler & Engine Works, bankrupt. From this adjudication, respondent appealed.

Thomas, Cummins & Nichols and Russell Ostrander (Clark, Jones & Bryant, of counsel), for appellant.

Bowen, Douglas, Whiting & Murfin, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

Having made the foregoing statement of the case, SEVERENS, Circuit Judge, delivered the opinion of the court.

Although the acts of bankruptcy alleged in the petition were technically several, it is quite clear from the record that the ground relied upon consisted in the giving by the corporation on January 10, 1903, a mortgage of all its property to a trustee for the benefit of a part of its then existing creditors, with intent, as is alleged, to hinder and delay its creditors, and the further ground that at the date of the transaction the corporation was insolvent, and that it was intended thereby to prefer some of its creditors. The evidence submitted to the court on the hearing showed that at the date alleged, January 10, 1903, the respondent gave a mortgage of all its property to a trustee to secure the payment of certain portions of its indebtedness, amounting to about \$27,000. The petitioners were not among those thus secured. The respondent defended upon the grounds that, at the time the mortgage was given, its property, at a fair valuation, was worth \$70,000 or more, and that all its debts, including those named, did not amount to more than \$35,000; that the giving of the mortgage was

without any fraudulent intent, and was for the purpose of securing bona fide indebtedness; and that it was not insolvent either at the time the mortgage was given, or at the time the petition was filed. And the respondent tendered evidence tending, as was claimed, to support these several propositions. The court, however, was of opinion that, inasmuch as the mortgage covered all the property of the respondent, it could not but be that the creditors not secured were hindered and delayed thereby, and that the mortgagor must have known and intended that consequence, and refused to admit evidence to show that the mortgagor did not intend to hinder, delay, or defraud its creditors by the giving of said mortgage. Touching the charge of having given preference while it was insolvent, the court held that, in estimating the fair valuation of the assets of the respondent, only such property as was not covered by the mortgage should be taken into account; and, it not being claimed that there was property of that description, the court refused to admit evidence offered to prove that the fair valuation of the property mortgaged was as much as \$70,000.

We think the court erred in its view of the law in regard to these questions.

As to the first, it is to be observed that subsection 1 of section 3 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) makes those conveyances which by the common law and the statute of Elizabeth were held void, because fraudulent, a ground for adjudicating the grantor a bankrupt. No question of solvency or insolvency or of preference arises under this subsection, except as they bear upon the issue of good faith in making the conveyance, saying nothing now of the provisions of subsection 3 of section 3, which relieves the consequences of subsection 1, if the respondent can prove that at the date of filing the petition he was solvent. The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens v. Shiffler* (D. C.) 112 Fed. 505. And so construed, the test of the conveyances intended by subsection 1 of section 3 is that of the bona fides of the transfer. *Loveland's Bank*. (2d Ed.) § 51. For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or present consideration, is not forbidden by such statutes, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor. This is the law in Michigan. *Hill v. Bowman*, 35 Mich. 191; *Jordan v. White*, 38 Mich. 253; *Olmstead v. Mattison*, 45 Mich. 617, 8 N. W. 555; *Oliver & Roberts Wire Co. v. Wheeler*, 106 Mich. 408, 64 N. W. 195. We think, therefore, that the court erred in assuming that, because the mortgage covered the whole property of the debtor, it necessarily followed that a case was made out under said subsection 1, and that no proof of good faith could prevail against that assumption. Upon the vital question of the bona fides of the mortgage, it was of importance to consider, among other things, what was the value of the property mortgaged, when compared with the indebted-

ness of the company. Moreover, the testimony of those conducting the transaction was admissible to prove its actual good faith. In the end, when all the available light had been shed upon it, the court would be in a situation to judge whether the transaction was prompted by a fraudulent motive or a legitimate one.

If it was found that the mortgage was given with a fraudulent motive, and so within said subsection 1, a further question would arise under subsection 3 of section 3—whether or not the respondent was solvent at the time of the filing of the petition. As the ground of that defense, and the considerations applicable thereto, are of the same nature as those inherent in the next following topic, we will postpone it to that place.

The second subsection of section 3 defines as an act of bankruptcy the transfer by the debtor, while insolvent, of any portion of his property to some of his creditors, with intent to prefer them over the others. We assume that in the present instance there was an intent to give a preference to the beneficiaries of the mortgage. However, such preference is not forbidden unless made while the debtor is insolvent. The term "insolvency" is thus defined in clause 15 in section 1 of the act:

"Cl. 15. A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419].

In determining the question of the insolvency of the debtor, the District Judge was of opinion that the language of said clause 15, excluding from the estimate any property which the debtor may have transferred with intent to defraud his creditors, would prevent the consideration of any part of the value of the mortgaged property as the assets of the debtor in the reckoning. It was contended for the respondent that the continuing interest of the respondent in its property should be considered as having remained in the corporation, and that, as that amounted to \$43,000, and the unsecured creditors had claims amounting to only \$8,000, or, putting it in another way, that as the value of the assets was \$70,000, and the total indebtedness, secured and unsecured, was \$35,000, there was no ground for the allegation that the company was insolvent when it gave the preference, or at the date of filing the petition. Holding to his view as above expressed, the District Judge refused to go into the inquiry in respect to the value of the company's property, or to consider its value subject to the mortgage. The correctness of this ruling depends upon the construction to be given to the words in said clause 15 of section 1, "exclusive of any property which he may have conveyed," etc., with intent to defraud his creditors. Of course, if it be found that the mortgage was given bona fide, no question of this sort will arise. But assuming that issue to be found otherwise, the question of construction above stated arises.

By the law of Michigan, a mortgage, whether of real or personal property, does not convey the title, but imposes a lien only for the

amount secured. *Lucking v. Wesson*, 25 Mich. 443, 445; *People v. Bristol*, 35 Mich. 28, 32. And the estate of the mortgagor is a valuable asset, at least for the amount of the excess, even if the debt should not be otherwise paid. The mortgagor's estate may be taken on execution issued on a judgment against him, or it may be sold by him in the ordinary course of business at private sale, and produce its value. This estate is not transferred by the mortgage. How the case might be if the conveyance was of the whole legal estate, we are not called upon to determine. It might be that such a conveyance would be an impediment or hindrance to the trustee in the execution of his trust which the debtor could not be allowed to interpose. But here, in respect to the excess, the trustee is not obstructed. We think that the taint of *mala fides* intended by clause 15 of section 1 extends only to that which is conveyed, or purports to be conveyed, and not to an interest or estate which it does not pretend to convey. *Loveland's Bank*. (2d Ed.) p. 156. And, on general principles, if we discard the old test of insolvency, it seems absurd to say that a man is insolvent because he has transferred some of his estate with intent to defraud his creditors, when he has an estate remaining which is abundantly sufficient to pay all his debts, and open to seizure for the satisfaction thereof, or which he has an absolute right to dispose of and liquidate in cash.

In *Vaccaro v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279, this court, in holding that a partnership could not be held insolvent so long as any of its members were solvent (that is to say, so long as any such member had sufficient property, after his private debts were paid therefrom, to pay the creditors of the firm), held, in effect, that assets charged with a prior lien should be credited to the debtor, to the extent of the surplus, in determining his solvency. As the debts of an individual partner are a paramount charge upon his private estate, and the partner's estate would come to the trustee burdened therewith, such conditions would very much resemble the essential facts we have in the present instance, and there is no difference in any material fact which would remove this case from the operation of the principle thus recognized. Our conclusion would seem to be in accord with the motive of Congress in prescribing the new definition of insolvency.

If what the respondent offered to prove is the fact, it had enough, after satisfying the mortgage lien in full, to pay these other creditors several times over. It cannot be doubted that this equity of redemption, if we call it such (though it is not a very accurate expression as applied to these conditions), or the surplus interest or estate of the mortgagor, is an asset in the hands of the trustee, and there is no impediment to his appropriating it. We are therefore of opinion that the court was mistaken in thinking it could not take into account the value of the estate not conveyed by the mortgage, in determining the value of the assets of the respondent, in order to compare them with its debts.

The order appealed from will therefore be reversed, with directions to take further proceedings upon the footing of the petition not inconsistent with this opinion.

McMICHAEL & WILDMAN MFG. CO. v. RUTH et al.
 (Circuit Court of Appeals, Third Circuit. March 1, 1904.)

No. 37.

1. PATENTS—SUIT FOR INFRINGEMENT—TITLE TO SUPPORT.

An executory agreement by patentees to transfer to a third person an interest in patents not identified therein does not operate as an assignment, and cannot be set up by defendants to impeach the title of an assignee of the patent in a suit for its infringement, to which such third person is not a party.

2. SAME—INVENTION.

The fact that an expert, with a patent before him, might be able to build up the structure covered thereby, by selecting and adapting appliances theretofore known, does not overcome the presumption of invention arising from the granting of the patent, where neither the same combination in its entirety nor the same mode of operation had previously been described or known.

3. SAME—INFRINGEMENT—KNITTING MACHINES.

The McMichael and Wildman patent, No. 500,151, for an automatic rib-knitting machine, covers a combination of novelty and utility, and discloses invention. Claims 1 and 2 construed, and held infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 123 Fed. 888.

Ernest Howard Hunter, for appellant.

Joseph C. Fraley, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The appellant was plaintiff in the court below, and the appellees were defendants. The suit was begun by bill in equity, which charged the infringement of letters patent No. 500,151, dated June 27, 1893, granted to Abner McMichael and Frank B. Wildman, for "automatic rib-knitting machines." The answer alleged, inter alia, that the complainant was not the owner of the entire patent, but that a one-third interest therein was owned by one Lewis Jones, and the point presented by this defense, though not dealt with by the court below, confronts this court at the outset.

The only documentary evidence which was adduced for the purpose of showing title in Jones is as follows:

"Bristol, Pa., 2/18/1889.

"We the undersigned, F. B. Wildman of Bristol, Bucks Co., Pa., and Abner McMichael, of Philadelphia, Pa., do agree, in consideration of the fact that Lewis Jones of Philadelphia has been at the expense of working out an improvement invented by us, on automatic circular sleavers to transfer to said Lewis Jones one third ($\frac{1}{3}$) interest in all of the improvements patented thereon also to transfer to said Lewis Jones one third of any patent which may be issued to us in the future, provided same or any portion thereof has been developed at the expense of said Lewis Jones. Signed this _____ day of February 1889.

"Abner McMichael.

"Frank B. Wildman.

"Witness: _____."

This instrument is wholly executory. It is not an immediate assignment, but an agreement "to transfer." It does not identify the pat-

ent or patents to which it relates, and the obligation it imports is qualified by its proviso. It is obvious, therefore, that it did not convey the legal title to one-third of any patent, and whether or not Jones himself could, upon this writing, together with extrinsic evidence, successfully invoke the aid of a court of equity to establish his supposed interest in this particular patent, is a question which is not now determinable, for he is not a party to this suit. Consequently, this appellant, who in fact holds the legal title to the entire patent, cannot be required to litigate that question at the instance of parties other than Jones, whom it charges with its infringement.

We have not been convinced that the presumption of validity which arises from the grant of a patent was rebutted in this case. Upon this subject "the defendant's proposition is that the substitution made by the patentees did not require invention, but was a mere exercise of selection, wholly within the domain of mechanical skill"; and if it were true that what was done by McMichael and Wildman did not require invention, but only the exercise of mechanical skill, the conclusion which the appellees ask us to deduce from this proposition would, of course, be inevitable. But, in our opinion, the creative faculty of the inventor, and not merely the ingenuity of the skilled mechanic, was exercised in producing the patented combination. This art had been already highly developed, and these patentees brought to it nothing of a fundamental character, but they did, by their "improvements," create a construction which had never before existed, which has proved to be commercially successful, and the novelty and utility of which are especially and quite persuasively indicated by the fact that (as will presently be seen) the appellant itself has appropriated it. The claims involved are:

"(1) In a knitting machine, the combination of a stationary dial carrying the needles, a rotary cam for operating said needles, and having one portion thereof movable for the purpose of varying the amount of reciprocation of the needles, a crank shaft rotating with said movable part of said cam, rotatable supports for the cam and crank shaft, connections between said cam and crank of the crank shaft whereby the latter moves the former, a second shaft geared to the first mentioned shaft and adapted to rotate simultaneously in an opposite direction, arms secured to the respective shafts at different elevations so that when one is thrown in the other is thrown out, pattern mechanism, and projecting parts moved by the pattern mechanism for bringing said parts into the path of either of the arms for operating said arms, respectively, at different times.

"(2) In a knitting machine, the combination of a stationary dial carrying the needles, a rotary cam plate having a cam for operating said needles of the dial, and having one portion of the cam movable for the purpose of varying the amount of reciprocation of the needles, a crank shaft rotating with said movable part of said cam, a rotating support for the cam plate, a connection between said cam and crank of the crank shaft whereby the latter moves the former, a second shaft mechanically connected to the first-mentioned shaft and adapted to rotate simultaneously in an opposite direction, arms or projections secured to the respective shafts at different elevations so that when one is thrown in the other is thrown out, pattern mechanism, and projecting parts moved by the pattern mechanism, for bringing said parts into the path of either of the arms for operating said arms respectively at different times, and a removable ring piece adapted to rotate with the cam and carry the said shafts."

Attentive examination of the testimony and exhibits has fully satisfied us that although it is perhaps possible for an expert, having the patent in suit before him, to build up the structure covered by these claims, by selecting and deftly adapting appliances theretofore known, "yet it would still be true that neither the same combination in its entirety nor the same mode of operation" had previously been described or in any manner exemplified. *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68. In *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 492, 20 Sup. Ct. 708, 44 L. Ed. 856, cited for the appellees, the combination of the patent there in question had been in prior use, and what was decided was that it did not involve an exercise of the inventive faculty to employ the same combination for a different purpose.

The decree of the Circuit Court was based wholly on its finding that the defendants below had not infringed, and upon that subject the learned judge said:

"The precise point at issue between the parties appears in the following question and answer from the cross-examination of defendants' expert: '(114) If the court should be of opinion that the connection between the rock shaft and the second shaft in defendant's machine is a geared connection, this particular combination of elements [i. e., the combination described in complainant's patent] is found in defendants' machine? Ans. With the assumption made in the present question that the pin and slot connection found in defendants' machine is identical with the geared connection referred to in the patent in suit, the combination of elements specified may be found in defendants' machine.' In view of this definite statement, a detailed description of the defendants' machine is unnecessary. It has a pin and slot connection between the shafts, instead of the connection described in the claims of the patent, and, considering the prior art, I am of opinion that the complainant cannot successfully assert that the device employed by the defendants infringes the patent in suit. * * * The characteristic of the complainant's machine is that it employs gears as the connection between the crank shaft and the second shaft, whilst the defendants do not employ gears."

We are unable to concur in the view which, as appears from this extract, was taken of the question of infringement by the court below. In our opinion, the restrictive construction of the claims upon which it was founded was not warranted by the terms of the patent, nor demanded by the prior state of the art. Neither of these claims contains the word "gears." In the first, the phrase is, "a second shaft geared to the first-mentioned shaft"; and in the second it is, "mechanically connected with the first-mentioned shaft." So far, therefore, as the first claim is concerned, there is nothing in its terms to justify its restriction to any particular gears; and in the specification it is said: "We do not limit ourselves to the mere details of construction, as they may be modified without departing from the invention." The first claim, therefore, does not appear upon the face of the patent to be limited to the gears in the drawings, but covers any geared connection capable of performing the purposed function; and that the second claim, in which the words "mechanically connected" are used, includes any mechanical connection by which the required movements may be imparted by either shaft to the other, seems to be too plain for argument. Nor did the prior art necessitate the narrow construction which was put upon these claims by the court below. The appellees'

expert in effect testified, and we think with accuracy, that there had not previously existed any combination including each of the elements of either claim, and, accepting this statement, it follows that, if the construction of the appellees does embody those elements in the same combination, it is an infringement. *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 3 C. C. A. 559. Therefore the only substantial question which remains for consideration is that which has been heretofore adverted to, and which was regarded by the learned Circuit Judge as presenting the precise point at issue, viz.: Is the connection between the rock shaft and the second shaft in the appellees' machine a geared connection? Defining a geared connection as, with reference to claim 1, we have already defined it, we are of opinion that it is. As is said in appellant's brief, the inherent character of the appellees' connection is not changed by calling it "a pin and slot connection." Although the tooth which projects from one shaft is provided with a pin which engages with teeth projecting from the other, this does not alter the true character of the mechanism or its mode of operation. The requisite function is performed by the pressure of a tooth or projection of one shaft on a tooth of the other shaft, and hence the connection is certainly mechanical, and the understanding of appellant's expert that it is also a geared connection accords with our construction of that term, and is, we think, correct.

Having reached the conclusion that the claims in controversy are valid, and being of opinion that the Circuit Court erred in its finding that they had not been infringed by the appellees, the decree appealed from must be reversed, and the cause will be remanded to that court, with direction to enter a decree in the ordinary form, and upon both claims, in favor of the plaintiff below.

**AMERICAN DELINTER CO. v. AMERICAN MACHINERY &
CONSTRUCTION CO.***

(Circuit Court of Appeals, Fifth Circuit. February 23, 1904.)

No. 1,309.

1. PATENTS—SUFFICIENCY OF DESCRIPTION.

It is not essential to the validity of a patent to insert in the drawings and specification a description of every detail. It is sufficient if the description is such as to enable a mechanic skilled in the art to construct the device patented.

2. SAME—FAILURE TO SPECIFY MINOR PART.

A patent for a machine for delinting cotton seed, which shows that the seed is to be fed into the machine at one end and discharged at the other, is not invalidated by the failure to specify or show in the drawings a feed screw or other device for assisting to move the seed through the machine; the machine being operative without it, but it being obvious that some such device would aid the passage of the seed through the machine, and when in fact it was used in the construction of the first machine.

3. SAME—INFRINGEMENT—COTTON SEED DELINTER.

The Thomas patent, No. 503,103, for a machine for delinting cotton seed, was not anticipated, and, although the parts were old, shows a com-

* Rehearing denied April 5, 1904.

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 133, 135.

bination producing a machine of novelty and greater utility than any previous machine in the art. Claims 5 to 9 also held infringed by the Baxter delinter, made in accordance with patent No. 659,840.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

The following are the drawings and specifications of the Thomas delinter, which are referred to in the opinion:

METHOD OF AND APPARATUS FOR DELINTING COTTON SEED.

No. 503,103.

Patented Aug. 8, 1893.

Fig. 1

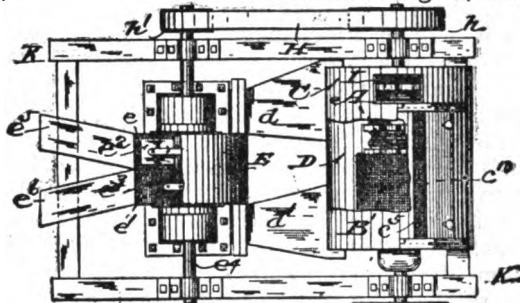


Fig. 2

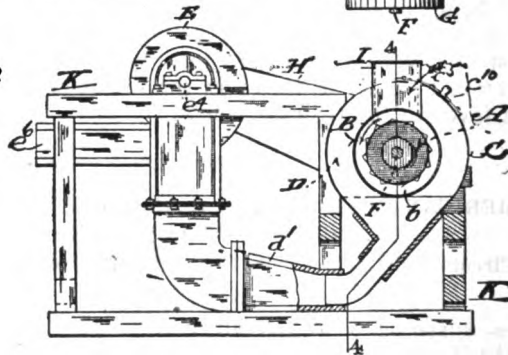


Fig. 3

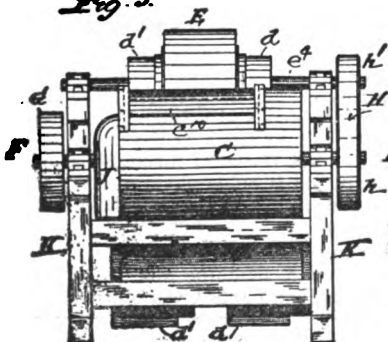
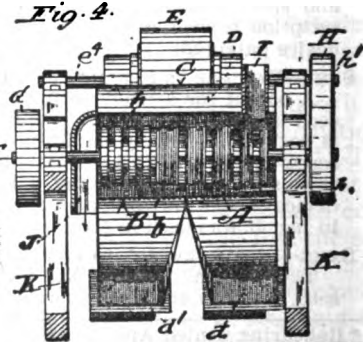
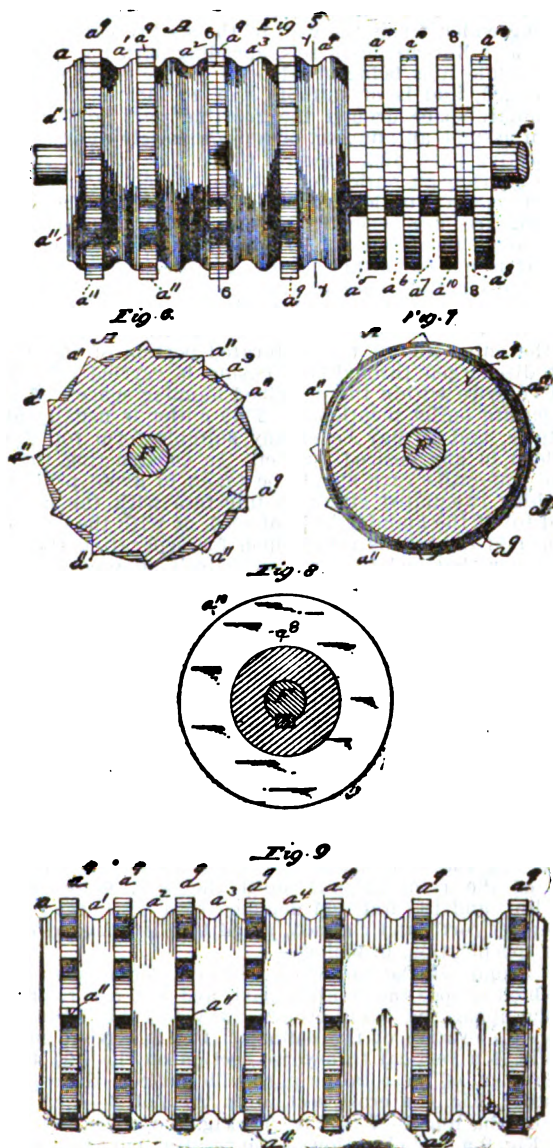


Fig. 4





"To All Whom it may Concern:

"Be it known that I, Abner D. Thomas, of Little Rock, Arkansas, have made a new and useful improvement in methods of and apparatus for delinting cotton seed, of which the following is a full, clear, and exact description.

"In carrying out the improvement the lint-bearing seed is fed into a receptacle containing a lint-cutting or seed-abrading part which, in its general outline,

is cylindrical or approximately cylindrical, and which is arranged horizontally and adapted to be rotated in a vertical, or approximately vertical, plane. The shell or casing which forms the wall of the seed-receptacle is not in itself intended to serve as a lint-cutting or seed-abrading part, but to form a support for the material while it is being acted upon by the rotating part, and it is shaped and arranged, and is of suitable size, to inclose an annular, or approximately annular, space around the rotating part so that the material being treated can assume an annular, or approximately annular, form around the described rotating part, and, opposite the surface of the rotating part, it is perforated to provide an outlet for the lint which is separated from the seed. There is a separate outlet for the denuded seed. The perforations in the shell or casing are large enough, and are suitably formed, to enable the lint to escape through them, but not so large that the denuded seed can pass through them. It is not essential that the perforations, as a system, extend entirely around the circumference of the shell or casing, but it is desirable for them to so extend as thereby an outlet for the lint is obtained in all directions around the body of seed being treated. An escape flue for the lint connects with the outer side of the perforated portion of the casing through which the lint discharged through the casing is carried off. The denuded seed is worked endwise within the described annular space and is discharged through the separate outlet mentioned. This outlet is usually at the end of the seed-receptacle, and it may be of any suitable form for the purpose in question, and lead to any desired quarter. In constructing the perforations which form the lint-outlet care should be taken to avoid projections, roughnesses, or anything calculated either to interfere with the movement (hereinafter referred to) of the annular body of seed, or with the escape of the lint. The rotating part is the means relied upon for separating the lint from the seed, and to further that end it is not only itself adapted to be rotated but it is also so shaped or contrived as to cause its motion to be communicated to the surrounding body of seed to cause it in turn to rotate or move within the annular space, so that all portions of it are presented to the surface or surfaces of the rotating part and all the different lint-bearing seeds substantially brought directly into contact with the rotating part, to be uniformly and thoroughly treated. That is, the lint-bearing seed, as a body, is carried around in the annular space, but at a slower rate than that at which the rotating part is revolved—say about one half as fast—and the seed in consequence, is abraded by the rotating part, and at the same time in all parts of the rotating body of seed the seed is stirred and tumbled about and overturned and thereby uniformly treated, and an additional feature of the improved method consists in advancing the seed-roll endwise through the seed receptacle and thereby carrying the seed repeatedly around the rotating part, and subjecting the seed again and again to the abrading, cutting, or tearing action of the rotating part until the seed becomes substantially stripped of its lint, and the lint and denuded seed discharged separately, all as is hereinafter set forth and claimed, aided by the annexed drawings making part of this specification, in which—

"Figure 1 is a plan of the improved delinter, portions of the inner and outer casings which inclose the rotating part, and also a portion of the casing of the air-moving apparatus, being broken away to exhibit the interior; Fig. 2 a side, sectional, elevation of the delinter; Fig. 3 a front end elevation of the delinter; Fig. 4 a vertical transverse section on the line 4—4 of Fig. 2; Fig. 5 a side elevation of the rotating part which effects the separation of the lint from the seed; Fig. 6 a cross section on the line 6—6 of Fig. 5; Fig. 7 a cross section on the line 7—7 of Fig. 5; Fig. 8 a cross section on the line 8—8 of Fig. 5; Fig. 9 a side elevation of the rotating part in a simpler form.

"The same letters of reference denote the same parts in all the figures.

"A represents the rotating part.

"B represents the perforated casing which incloses the annular space, b, around the rotating part.

"C represents an outer casing which incloses a flue, D, which surrounds the casing, B. This flue leads to an air-moving apparatus, E, and preferably in the form of the two branch flues, d, d', which lead, respectively, from the end

portions of the flue, D, or casing, B, and which respectively connect with the two chambers, e, e', of the air-moving device. For while a single escape flue and air-moving device will answer to move the lint from the chamber, D, I prefer, for a reason presently mentioned, to employ the two separate escape flues and to make the air-moving device a double one, as thereby the lint can be graded and the different grades separately discharged from the delinter. To accomplish this the air moving device is in the form of a pair of fans, e², e³, attached to the same shaft, e⁴, but rotating in the separate chambers, e, e', respectively, and separate outlets, e⁵, e⁶, lead from the chambers, e, e', respectively, substantially as shown. The rotating part, A, is attached to a suitable shaft, F, and by means of a pulley, G, thereon, power can be transmitted to effect the revolution of the part, A, at as rapid a rate as may be desired, and by means of the belt, H, leading from another pulley, h, upon the shaft, F, to a pulley, h', upon the shaft, e⁴, the rotation of the fan is accomplished.

"I represents a suitable inlet through which the lint-bearing seed is introduced into the seed-receptacle, b, and J represents a suitable outlet for the seed after the lint has been separated therefrom.

"A suitable frame-work, K, sustains the described parts of the delinter.

"The part, A, so far as the general object of the improved delinter is concerned, may be constructed of any suitable material, materials, part or assemblage of parts, and in any suitable shape so long as it, as a whole, is calculated to both move and carry around the body of lint-bearing seed, and to cut, abrade or otherwise separate the lint from the seed, and as one desirable form thereof the part, A, is composed in portions, if not largely or wholly, of corundum, and in the particular shape shown substantially in Figs. 5 to 8, and as follows: As a whole the part may be considered cylindrical, but beginning at that end of it which is opposite or next to the inlet to the seed-receptacle and proceeding to or toward the opposite end of the part, the surface of the cylinder is in the form of a series of channels or grooves which encircle the cylinder, and which at various intervals are separated by portions which are serrated, pointed, or shouldered, or otherwise shaped, to catch hold of, stir, lift, and drag around the surrounding body of lint-bearing seed in the manner described.

"In the present illustrations, a, a', a², a³, a⁴, a⁵, a⁶, a⁷, a⁸, represent the grooves, and a⁹, a⁹, a⁹, a⁹, represent the pointed or shouldered portions, and a¹⁰, a¹⁰, a¹⁰, a¹⁰, represent circular, disk-like portions, which are used more especially in conjunction with the channels or grooves a⁵, a⁶, a⁷, a⁸, and which, when used are at that end of the cylinder which is toward the denuded-seed outlet, substantially as shown. The channeled or grooved portions serve more especially to cut, abrade, and separate the lint from the seed. The portions, a⁹, a⁹, serve as stated to move, lift, and drag the seed. The channeled or grooved portions, a⁵, a⁶, a⁷, a⁸, are considerably deeper than are the other channeled or grooved portions and they serve, in conjunction with the circular portions a¹⁰, to provide an extended abrading surface past which the nearly-denuded seed is, in the operation of the parts, moved and thereby substantially completely stripped of its lint. They serve therefore to finish the treatment of the seed and I consider them desirable, although the improvement can be largely, if not entirely, carried out by means of a cylinder which does not have them, but which may be constructed substantially as shown in Fig. 9. The channeled or grooved portions, a, a', etc., preferably have the waved contour shown, and said portions, beginning at the inlet end of the cylinder, successively preferably increase in width substantially as shown, and the shouldered portions are successively arranged farther and farther apart. The points, projections or shoulders, a¹¹, of the portions, a⁹, project in practice, radially beyond the adjoining channeled or grooved surfaces, substantially as shown. The entire cylinder, A, may be composed of a series of separate parts, a, a', etc., a⁹, a¹⁰, assembled and united upon the shaft, F, and connected therewith, to be rotated as a single part. As the portions, a⁹, serve rather to agitate and drag the seed it is not so essential that they be composed of abrading material or be adapted to cut or abrade the lint. But the capacity of the cylinder, A, as a lint-separating device, is increased by adapting the portions, a⁹, to serve also as a lint-separating means.

"In operation, the lint-bearing seed is introduced into the seed-receptacle and the abrading cylinder, A, is set in motion. The seed works its way throughout the receptacle and assumes the described annular form around the cylinder. The cylinder acts upon the seed immediately adjacent to it and the separation of the lint from the seed is initiated. At the same time, owing to the described projections upon the cylinder, the body of seed as a whole is caused to rotate within the receptacle and to follow the cylinder in its movement. The cylinder, in respect to that feature of it which enables its motion to be imparted to the body of seed or seed-roll as it may be termed, is provided with projections which while they engage the interior of the roll allow the roll to slip, or travel around at a slower rate than the cylinder, for the reason that they do not take a complete and positive hold of the roll, and also to some extent by reason of the contact of the exterior of the roll against the perforated casing. The preferred distance from the extremities of the projecting portions of the cylinder to the surrounding casing is about seven eighths of an inch. The seed as a body not only travels around within the casing, and by reason of its slower rate of movement is acted upon by the cylinder, but is also in all parts of it stirred and turned to cause the seed throughout the thickness of the roll to be presented to the action of the cylinder. And further, and owing to the horizontal arrangement of the cylinder, the seed, which is by the action of the cylinder lifted or carried into the upper portion of the seed-receptacle, is in position to drop, and by reason of its gravity it does drop onto the cylinder and the seed in consequence is further subjected to the abrading action of the cylinder and in consequence is more thoroughly treated. In thus presenting the lint-bearing seed to the cylinder care must be taken not to crowd it against the surface of the cylinder, as in such case the cylinder is liable not only to remove the lint but also to cut the hulls of the seed something which is quite undesirable, for the value of the entire process depends largely upon separating the lint without any admixture of any part of the seed. For this reason it is necessary for the lint-bearing seed to be presented gently to the cylinder and this is accomplished by having a sufficient thickness of seed-body, substantially as described, around the cylinder as thereby a yielding support is constantly provided for those of the seeds which are for the time being immediately in contact with the cylinder. The roll as stated is preferably introduced into the seed receptacle at one end thereof, and it, as a body, is not only caused to rotate in the manner described but it is also advanced toward the opposite end of the seed receptacle, and in this way the seed is repeatedly subjected to the action of the cylinder and thereby given ample opportunity for becoming stripped of its lint. The separated lint is continually being exhausted through the outlets in the casing and the seed escapes through its own outlet at the end of the seed receptacle. The operation is a continuous one as long as the machine is in operation and the lint bearing seed supplied thereto. Air is admitted into the flue, D, preferably through the opening, c⁸, in the casing, C, and the opening can be graduated by means of the slide, c¹⁰. The inlet, I, is not shown in Fig. 3.

"I claim—

"(1) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll and then subjecting such roll internally to a rubbing or cutting action whereby the lint is separated from the seed.

"(2) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll, revolving the same on its axis, and, while so moving, subjecting it internally to a rubbing or cutting action, whereby the lint is separated from the seed.

"(3) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll, revolving the same on its axis, and while so moving, subjecting it internally to a rubbing or cutting action, whereby the lint is separated from the seed, and discharging the separated lint at the external surface of the roll.

"(4) The herein described method of separating lint from seed which consists in forming the lint-bearing seed into an annular roll, revolving the same on its axis; and at the same time stirring the roll, and, while so moving it, subjecting the roll internally to a rubbing or cutting action, whereby the lint

is separated from the seed, and discharging the separated lint at the external surface of the roll.

"(5) In a seed-delinter, the combination of a horizontally-arranged, rotating cylinder and an outer casing, said casing being perforated to provide an outlet for the separated lint and seed, and said cylinder having channeled and shouldered portions to effect the movement of the seed in the form of a roll and the separation of the lint therefrom, substantially as described.

"(6) In a seed-delinter, the combination of a horizontally-arranged rotating cylinder and an outer-casing, said casing being constructed and arranged to provide for the formation of an annular roll of lint-bearing seed around said cylinder, and being perforated to provide an outlet for the separated lint and seed, and said cylinder having projecting portions to effect the rotation of said roll as described and having cutting or abrading surfaces to effect the separation of the lint from the seed.

"(7) In a seed-delinter the combination of a horizontally-arranged, rotating cylinder, an annular lint-bearing seed receptacle surrounding said cylinder, a lint-discharge flue without said seed receptacle and an air moving apparatus, said receptacle having an inlet for the lint-bearing seed and an outlet for the denuded seed, and its casing being perforated to provide an outlet for the separated lint, and said cylinder having projecting portions to effect the rotating of said roll as described and having cutting or abrading surfaces to effect the separation of the lint from the seed, substantially as described.

"(8) In a seed-delinter a horizontally arranged cylinder in combination with a surrounding annular, seed receptacle, said cylinder having channeled surfaces for effecting the separation of the lint from the seed and having pointed or shouldered portions for effecting the rotation of the lint-bearing seed around said cylinder, said channeled portions being deeper at the seed-delivery end of the cylinder.

"Witness my hand this 4th day of February, 1893.

"Abner D. Thomas.

"Witnesses :

"H. H. Schmuck.

"A. H. Thomas."

The following are the drawings and specifications of the Baxter patent, referred to in the opinion :

No. 626,848.

W. C. BAXTER.
COTTON SEED DELINTER.
Application filed Dec. 4, 1892.

Patented Oct. 10, 1899.

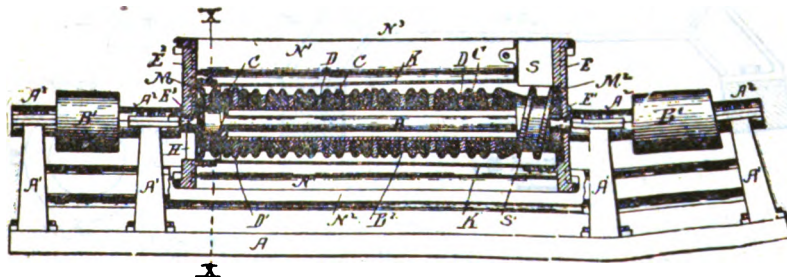


Fig. 1

"To All Whom it may Concern :

"Be it known that I, William C. Baxter, of East Bridgewater, in the county of Plymouth and state of Massachusetts, have invented a new and useful improvement in cotton-seed delinters, of which the following, taken in connection with the accompanying drawings, is a specification.

"My invention relates to improvements in machines for removing the lint from cotton-seed; and it consists in devices by which a much better feeding

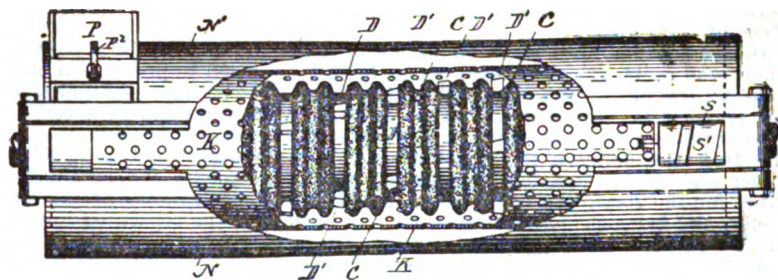


Fig. 2.

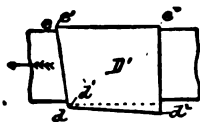


Fig. 7.

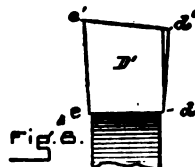


Fig. 6.

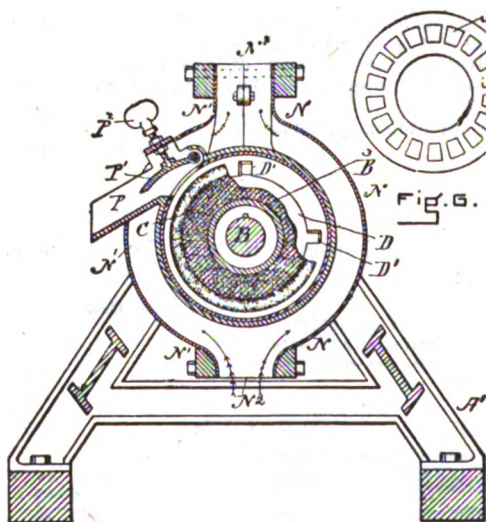


Fig. 5.

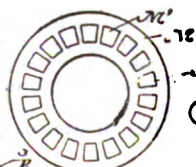


Fig. 6.

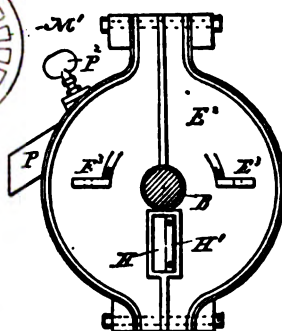


Fig. 4.

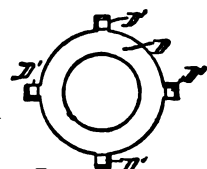


Fig. 3.

action is attained, the practical working of the machine is improved, and there is no danger of the running parts becoming clogged.

"My invention is illustrated in the accompanying drawings, in which—

"Figure 1 shows the machine partly in elevation and partly in vertical section. Fig. 2 is a plan showing the essential features of my machine, a part being represented as broken out to show the interior construction. Fig. 3 is a vertical section taken on line, X X, Fig. 1, enlarged. Fig. 4 shows in end elevation the cylindrical part of my machine; Figs. 5, 6, 7, and 8, details.

"The framework of my machine is represented by A, A', A². The main shaft, B, is mounted on bearings, A², A² (see Fig. 1), and is driven by the belt-

pulleys, B', B'. A sleeve or hollow shaft, B², is mounted upon the shaft, B, and is rigidly affixed to it. At each end of the sleeve, B², a disk is attached, one, M², of these disks permanently fixed to the sleeve, but the other, M, is screwed on, as shown in Fig. 1.

"C, C, are a series of abrading or grinding wheels mounted upon the sleeve, B². These wheels, C, C, are made of corundum wholly or in part and are more or less grooved circumferentially, as shown. Between each pair of the wheels, C, C, I place a metallic disk, D, each of which has teeth or projections, D', D'. These teeth are arranged spirally, as shown in Fig. 2, so that as they rotate they have a tendency to feed the cotton-seed along, as well as to act as stirrers and also to assist in removing the lint from the seed.

"The teeth, or, as I prefer to call them, 'stirrers,' D', D', are made in a peculiar form to adapt them to their work. This form is clearly shown in Figs. 7 and 8. In Fig. 7 a stirrer is shown in plan and in Fig. 8 in front elevation. The front face, d, e, e', d', is inclined, as indicated, so as to have a tendency to cause the seed to advance along the cylinder from the feed end to the discharge end. The side face (indicated by the line, d, d²) is also inclined, so as to force the seed in the same direction. The top face, d', e', e², d², is also inclined, as indicated by the line, e', d', Fig. 8, for the same purpose. The front face of the stirrer being inclined, as shown, serves as it travels through the seed to force the seed primarily against the corundum rolls, from which it is forced outward against the inner surface of the perforated cylinder, so that the lint is rubbed or ground from it, and the position of each seed is constantly changed throughout the mass. At the same time the seed is packed in the mass with sufficient pressure to be so held against the grinding-roll that the lint will be ground away.

"From the above it may be seen that the stirrers act to prevent the machine from clogging, to assist in the delinting operation, and to advance the seed from the feed end to the discharge end of the machine.

"It will be observed that the corundum wheels, C, C, and the disk, D, D, constitute a delinting-drum mounted upon the shaft, B, which is driven with great force and rapidly by the belt-pulleys, B', B'.

"A perforated cylinder, K, surrounds the working or delinting drum. This cylinder, K, is made conical, being smaller at the left-hand end than at the right—that is, it is larger at the end which receives the seed to be delinted (from the chute, S) than at the end from which the denuded seed is delivered to the outlet, P. This construction allows of a larger space between the drum and the interior of the perforated cylinder at the feed end than at the delivering end, which is highly desirable, especially in connection with the suction, as the seed when entering are covered with lint and require more space than when the lint has been taken off from them and they are about to pass out of the machine through the outlet, P. This same result could be attained by making the diameter of the delinting-drum larger at the discharge end than it is at the feed end and by making the perforated cylinder, K, of the same diameter at each end. The perforations in the cylinder, K, are larger at the feed end than at the discharge end, for the reason that the lint is longer and requires larger orifices for escape than is required at or near the discharge end, when the seed-covering is of a much finer nature.

"To assist in feeding, I have a worm, S', attached to the shaft, B, at the discharge end of the chute, S, so that as the seed covered with lint fall from the chute they are fed into the space between the delinting-drum and the cylinder, K. As the process of delinting goes on the lint works out through the openings in the cylinder, K, and is carried off by a suction applied at N². In practice a hood or receiving-chamber is mounted at N² to receive the lint that is removed from the seed, the seed passing out through the chute, P. For convenience I place an adjustable door or valve, P', in the chute, P, which may be operated by the screw, P². By adjusting the valve, P', the discharge of the denuded seed may be regulated—that is, the seed may be held back just enough to keep the space between the delinting-drum and the perforated cylinder well filled and in position to be acted upon.

"The end pieces, E and E², are solidly attached to the framework by the bracket-pieces, E' and E³. (See Fig. 1.) The cylinder, K, and the casing, N, N', are firmly fixed to said end pieces, E and E².

"To operate my machine, the seed covered with lint is placed in the chute, S, and falling upon the worm, S', is fed along into the space between the delinting-drum and the perforated cylinder, K, and there acted upon, being carried around the said drum and gradually forced in a longitudinal direction toward the discharge-chute, P. As the seed is forced along it is subjected to the abrading action of the corundum wheels, C, C, and also to the action of the teeth or stirrers, D', D', on the disks, D, D.

"The end disks, M, M², Fig. 1, are provided with a series of recesses or pockets, M', M' (see Fig. 6), which are used for inserting lead for the purpose of balancing the delinting-drum.

"To prevent the accumulation of dust, etc., between the end disk, M, and the headpiece, E², I have an opening, H, in the headpiece, E², and a scraper, H'. This scraper, H', bears against the face of the end disk, M, and rubs off the dust, forcing it out through the opening, H.

"I claim—

"(1) In a delinter, a rotating drum and a perforated cylinder surrounding it, said drum and cylinder being shaped with relation to each other as shown and described, whereby a chamber is formed surrounding said drum tapering in size from the inlet to the outlet, in combination with means for creating suction about said chamber, and feed and delivery devices, substantially as set forth.

"(2) In a delinter, a rotating drum, and a perforated cylinder surrounding it, the perforations in said cylinder being larger at the inlet than at the outlet, and said drum and cylinder being shaped with relation to each other as shown and described whereby a chamber is formed surrounding said drum and tapering in size from the inlet to the outlet, in combination with means for creating suction about said chamber, and feed and delivery devices, substantially as set forth.

"(3) In a delinter, a rotating drum and a perforated cylinder surrounding it, the parts being so proportioned that the seed-space between them decreases from the feed to the delivery end; combined with a chamber surrounding the cylinder, means for creating suction therein, and means for forcing the seed while in transit against said drum, substantially as and for the purpose set forth.

"(4) In a delinter, a horizontal rotating drum, and a perforated cylinder surrounding it and having its perforations decreasing in size from the feed toward the delivery end; combined with a chamber surrounding the cylinder, and means for creating a suction therein, substantially as and for the purpose set forth.

"(5) In a delinter, a rotating drum, and a cylinder surrounding the same and provided with perforations decreasing in size toward the delivery end, the parts being so proportioned that the seed-space between the drum and cylinder also decreases in size from the feed end toward the delivery end; combined with a chamber surrounding the cylinder, and means for creating a suction therein, substantially as and for the purpose set forth.

"(6) In a delinter a rotating delinting-drum, a fixed perforated cylinder surrounding said drum, a headpiece as E² having a dust-opening as H provided with a scraper adapted to remove dust from the end of the delinting-drum, substantially as and for the purpose set forth.

"(7) In a delinter, a delinting-drum consisting of a series of corundum wheels and disks having teeth, said teeth having the form of irregular hexahedrons the working faces of which are inclined to the line of their motion whereby they act as stirrers, rubbers and feeders, substantially as and for the purpose set forth.

"(8) In a delinter, a horizontal, self-feeding, delinting-drum inclosed in a perforated cylinder; and a seed-escape passage arranged tangentially to the said perforated cylinder; and a regulating-valve swinging upon an axis parallel to the axis of the said cylinder, and having its free end adjustably held; and mechanism for adjusting the said valve, substantially as and for the purpose set forth.

"(9) In a delinter, a rotating delinting-roll, consisting of a series of grinding-wheels, and a series of stirrers, each stirrer having one or more teeth, one or more faces of each tooth being inclined with relation to the axis of the roll, as described, and a perforated cylinder surrounding said roll, said roll and said

cylinder being shaped with relation to each other, as shown, whereby a chamber is formed surrounding said roll and tapering in size from the inlet to the outlet, and the seed in process of delinting is forced during said process toward said outlet, in combination with feed and delivering devices, as set forth.

"In testimony whereof I have signed my name to this specification, in the presence of two subscribing witnesses, on this 2d day of December, A. D. 1898.

"William C. Baxter.

"Witnesses:

"Frank G. Parker,

"Frank G. Hattie."

Robert P. Hains, for appellant.

T. C. Catchings, for appellee.

Before McCORMICK and SHELBY, Circuit Judges, and PAR-LANGE, District Judge.

SHELBY, Circuit Judge. The bill beginning this suit was filed by the complainant (appellant here), an Arkansas corporation, against the defendant (appellee here), a Mississippi corporation. The complainant is the owner of patent No. 503,103, of date August 8, 1893, for a new and useful improvement in methods of and apparatus for delinting cotton seed, and known as the "Thomas Delinter." It alleged that the defendant had infringed the patent of the complainant by making, using, and leasing, and offering to lease, a machine known as the "Baxter Delinter," patented October 16, 1900, as shown by letters patent No. 659,840. The complainant prayed for damages for the alleged infringement and for a perpetual injunction. The defendant answered that the Thomas patent was not valid, and that it had been anticipated in whole or in part by 18 other patents named, and admitted the making and leasing of the Baxter delinter, but denied that in doing so it had infringed the rights of the complainant, and denied that the Baxter delinter was substantially the same as the Thomas delinter in purpose, construction, or operation.

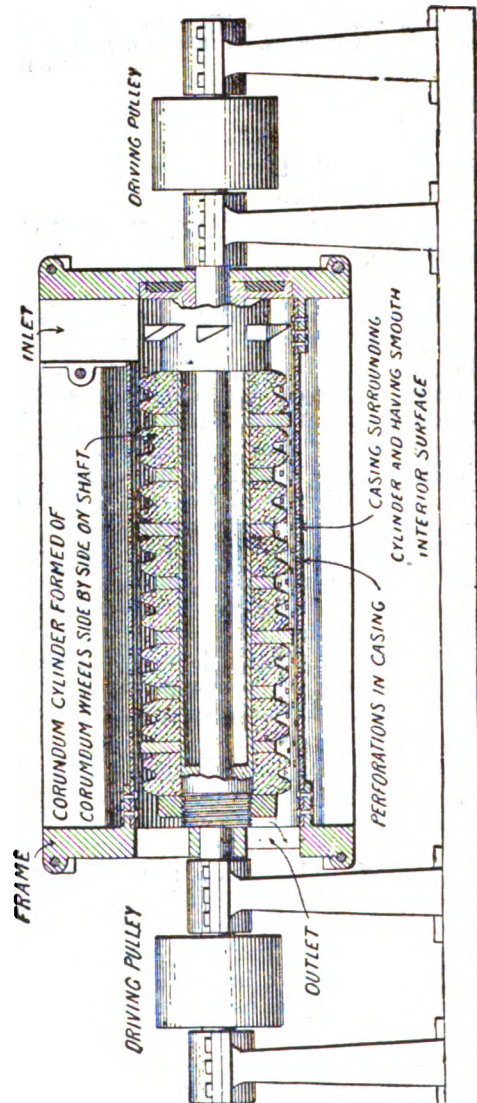
The Circuit Court dismissed the bill, denying the complainant any relief, and an appeal was taken to this court. It is assigned, with proper specifications, that the Circuit Court erred in the decree dismissing the bill.

There are two questions to be decided: (1) Is the Thomas delinter patent valid? (2) Has the defendant infringed that patent?

1. It is matter of common knowledge that when cotton is passed through the gin, while the long lint is separated from the seed, there is left clinging to the seed a short lint. This short lint has some value when separated from the seed, and its separation adds to the commercial value of the seed. It has been evident for many years that a machine that would rapidly and economically delint cotton seed would be of great value. Before the invention of the Thomas delinter several delinting machines had been patented, but an examination of them shows that they differ in many material particulars from the Thomas machine, and, so far as appears from the record, not one of them was successful in its operation. We shall have occasion later to refer to them again.

A Thomas delinter was exhibited to the trial court and to this court at the hearing. Its several parts are shown in the drawings accompanying the patent. Any description we may be able to give will be greatly

aided by the following figure taken from the brief of the appellant, which represents the machine with its several parts adjusted:



The patent, claims, and the other evidence in the record show that the machine is constructed with a central horizontal shaft, supported by a frame at or near each end, with a drawing pulley on each end. On the shaft are placed a series of corrugated corundum wheels, 12 inches in diameter. Between the corundum wheels are space blocks. On the space blocks are stirrers, nearly flush with the corundum wheels. These

stirrers are to stir the cotton seed, and to push them towards the discharging end of the machine. The corundum wheels fastened on the shaft are surrounded by a perforated metal casing, the perforations being large enough for the lint, but not the seed, to pass through them, the inside of the perforated casing being smooth. This metal casing is situated about one inch from the rim of the corundum wheels. Outside of this perforated casing is another metal casing, which is open at the bottom, and connects at the top with a suction fan, which draws the lint through the perforations when it has been scoured from the seed by the corundum wheels. The cylinder of corundum wheels being put in motion by the belts, the seed pass into the machine at the top of the end marked "inlet." They pass through the machine lengthwise, the machine being held close to the corundum wheels by the smooth perforated casing. The seed are delinted by the wheels, and pass out at the bottom of the other end of the machine, marked "outlet," the lint as it is scoured off being separated from the seed by being sucked through the holes in the first casing. Connected with the inlet end of the machine there is a down spout, 6 or 8 feet high, and a screw-shaped block of wood next to the first corundum wheel. The feed of seed being continuous, the space between the cylinder and the perforated casing is filled, and is kept full, although the delinted seed are discharged at the outlet. The rotation of the corundum wheels and the stirrers on the space blocks causes the circular or annular roll of seed to revolve, but at less speed than the corundum wheels. The result is that the lint is removed from the seed, and the lint and seed separately discharged from the machine.

The Thomas patent and the original drawings do not show the feed screw or the screw-shaped block at the inlet. The patent clearly shows, however, that the seed were to be fed to the machine at one end and to be discharged at the other. The evidence shows that in the construction of the first machine a screw-shaped block of wood was placed under the feed spout and next to the first corundum wheel. Later the feed screw was used. It seems evident that some device—blades with slanting edges, a screw-shaped block, or a feed screw—is useful to start the seed in the right direction and push them through the machine. The patent pointedly provided that they should enter at one end and be discharged at the other. The feed spout being kept full, gravity and the motion of the machine would cause the seed to go in the direction intended toward the outlet. The evidence shows, however, that the use of the feed screw or some equivalent device is of advantage in pushing the seed from the inlet to the outlet. In the construction of the machine Thomas would not be confined to making an exact copy of his drawings and specifications. It would be almost impossible to insert in the drawings and description every detail. If the drawings and description furnished are sufficient for a mechanic skilled in the art to construct the device patented, they are sufficient.

We are of opinion that the failure to show a feed screw or an equivalent device in the drawings or the patent does not invalidate the patent.

Eighteen patents have been put in evidence as anticipations of the Thomas delinter. They include patents for grain scourers, for bolting flour, for shaft hangers, for cleaning cotton seed, and several for de-

linting cotton seed. It is unnecessary to examine each of them separately to point out the differences between them and the Thomas machine. Generally, those of them that are intended to be delinters rely on the abrasion of the seed by two rough surfaces, whereas one main idea of the Thomas delinter is that the cotton seed shall be held by a smooth surfaced casing close to the corrugated corundum wheels. The conception of avoiding all roughness or abrading quality on the part of the casing is not evidenced in any one of the patents or machines prior to Thomas'. In his specifications it is said: "In constructing the perforations which form the lint outlet, care should be taken to avoid projections, roughness, or anything calculated either to interfere with the movement heretofore referred to of the annular body of seed or with the escape of the lint." The prior patents, on the contrary, usually rely on making both surfaces that come in contact with the seed rough, or in some way fashioning them that both surfaces should serve in taking the lint from the seed. The record, we think, shows that the delinting is successfully performed when the seed are held by a nonabrading smooth surface close against the delinting cylinder, and it is not shown that machines relying on two abrading surfaces have been successful. The prior patents that in some respects slightly resemble the Thomas delinter are wholly wanting in the devices necessary to continuously and successfully do the work of delinting. They are not susceptible of a continuous feed, or they do not separately discharge the seed and the lint, or they do not provide for the feed at one end and the passage of the seed through the machine lengthwise the machine and the discharge continuously of the delinted seed at the other.

The grant of letters patent for the Thomas delinter is *prima facie* evidence that Thomas was the inventor of the device described in the letters and of its novelty. *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017. The burden, therefore, was on the defendant to sustain the defense that the invention had been anticipated and want of novelty.

The evidence does not leave us in doubt that the Thomas delinter was operative. Dr. Thomas testifies that on the first machine made he and others delinted two car loads of seed. About 40 of the machines were made, and the evidence shows that several of them were operated successfully.

The statute provides that "any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, * * * may * * * obtain a patent therefor." Rev. St. 4886 [U. S. Comp. St. 1901, p. 3382].

Without considering the claims asserted as new processes or methods, we are of opinion that the evidence shows that Thomas invented a new and useful machine, although it is a combination of known elements, and that the invention has novelty and utility. The fact that the machine is an aggregation of known devices does not show that it is lacking in novelty. A machine is of necessity made of known things. The originality is often in the new combination. In no prior delinter do we find united all of the attributes of Thomas', nor is it shown that any prior delinter produced the desired results. It cannot be said, we

think, that it is lacking in novelty, unless the combination he made was one so obvious that it would occur to any one skilled in the art. That the combination is not one evident and easily seen is shown by the fact that Delamare, Gennert, Crawford, and others struggled unsuccessfully to produce a practical working delinting machine. The court is of opinion that the Thomas patent, No. 503,103, is a valid patent for a mechanical device for delinting cotton seed, shown by the drawings, patent, and claims from 5 to 8, inclusive.

2. The remaining question is as to the infringement. There is no conflict in the evidence that the defendant has made, used, leased, and offered to lease a machine called the Baxter delinter, which is described in patent No. 659,840. Models of both machines have been before the trial court and are before this court. The question of the validity of the Baxter patent is not before us for decision. It might be a valid patent as an improvement of the Thomas delinter, and yet an infringement of the Thomas patent, in so far as it copies and appropriates the invention of Thomas. "Two patents may both be valid when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent." *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017. We are aided in the examination of this question of infringement by the evidence of experts, but their opinions are not conclusive. We must form our own opinion, based on all the evidence. With the two patents and the drawings and models before us, aided by the other evidence in the record, we are required to decide the question of infringement. *Hardwick v. Masland* (C. C.) 71 Fed. 887.

Both machines are constructed with a central horizontal shaft, supported by frames. In both machines on the shaft is formed a cylinder composed of a series of corundum wheels, mounted side by side, and containing circular grooves. In both stirrers are arranged between the corundum wheels to stir and lift the seed as the corundum cylinder revolves. Both machines have the perforated casing with the smooth interior surface, the perforations being of a size to permit the passage of the lint, but not the passage of the seed. In both machines there is an inlet for the seed at one end, and an outlet for the delinted seed at the other end. And both machines make the same provision for the continuous ingress of the seed, their passage through the machine lengthwise the machine, and the continuous egress of the delinted seed. Mr. Brown, the defendant's expert, in giving evidence as to the operation of the Thomas machine, did not have access to a Thomas machine. A sentence from his evidence shows how easily he changed a Baxter machine into a Thomas machine. He said:

"No machine like the Thomas patent being available, it was necessary to reconstruct one of the Baxter machines so as to approximate the structure of the Thomas machine. Accordingly, one of the Baxter machines was dismantled, and the alternating stones and toothed rings were slipped off from the shaft of the rotating drum, and the feed screw removed, and then there was slipped onto the shaft in alternation stones and metal rings carrying teeth which were not beveled in accordance with the Baxter patent, and which were not spirally disposed."

These changes made the Baxter machine "substantially" like the Thomas machine.

An examination of the models, the drawings, and patents, and the descriptions of the two machines by the experts, show that in their mechanism and in their practical operation they are substantially the same. The only differences worthy of note, and in these respects the Baxter machine may be an improvement on the Thomas delinter, are that the casing in the Baxter machine is made somewhat larger in diameter at one end than at the other, and that the perforations at one end of the casing are made somewhat smaller than at the other; that the stirrers are shaped and arranged somewhat differently in the Baxter machine, and probably tend to push the seed along the cylinder more than those provided for in the Thomas patent; that the location of the seed outlet is slightly changed, and a swing door used to regulate the outflow of the seed; and a feed screw is used at the end of the corundum cylinder under the feed spout, Thomas having used blades with beveled faces. These changes may be substantial improvements, but the Baxter machine embraces the invention made by Thomas. There is no substantial part of the Thomas machine that is not reproduced in the Baxter delinter. If it be conceded that improvements are added, it is nevertheless an infringement. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Simmons v. Standard Oil Co.* (C. C.) 62 Fed. 928; *Robbins v. Dueber Mfg. Co.* (C. C.) 71 Fed. 186; *Pennington v. King* (C. C.) 7 Fed. 462.

Our conclusion is that the complainant has a valid patent, which the defendant has infringed.

The decree of the Circuit Court dismissing the bill must therefore be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is so ordered.

KLAUDER-WELDON DYEING MACHINE CO. v. STEADWELL DYEING MACHINE CO. et al.

(Circuit Court of Appeals, Second Circuit. March 29, 1904.)

No. 124.

1. PATENTS—INFRINGEMENT—DYEING APPARATUS.

The Weldon patent, No. 354,281, for a dyeing apparatus, though not for a pioneer invention, was not anticipated, and shows patentable invention. Claims 1, 2, 3, and 4 also held infringed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon appeal from a decree of the Circuit Court, Northern District of New York, holding United States letters patent 354,281, December 14, 1886, to Leonard Weldon, for dyeing apparatus to be valid, and its first four claims to be infringed by a machine manufactured by defendants. The opinion of the Circuit Court is reported 122 Fed. 640.

Frederick W. Cameron, for appellants.

F. P. Warfield, for appellee.

Before LACOMBE and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The specification states that the invention relates to the class of dyeing apparatus designed for dyeing textile fabrics, and in which a rotary wheel or cylinder is arranged in the dye vat to intermittently dip the articles to be dyed into the dye-liquor; and the invention consists in an improved construction and combination of the component parts of the dyeing apparatus, whereby its efficiency is materially improved. It will not be necessary to set forth all the details of the apparatus. The following excerpt from the specification and Fig. 3 sufficiently describe it:

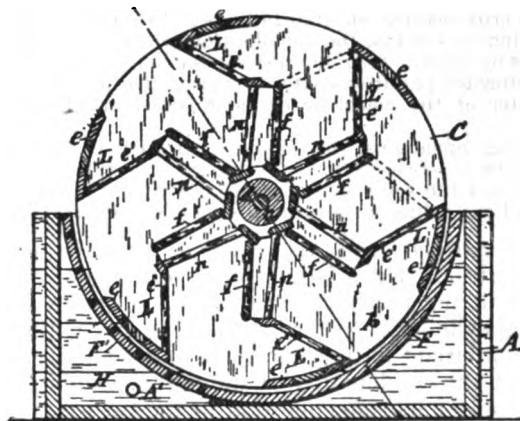


Fig. 3.

"The cylinder, C, I form of two stout heads, b, b (not shown in this figure), * * * secured to a wooden roller, c, through which the shaft, d, of the cylinder is extended and to which it is fastened. Lengthwise the interior of the cylinder, C, are extended a series of buckets, L, L, which are secured at their ends to the inner sides of the heads, b, b. These buckets are formed either V-shaped, or of similar angular shape in cross-section, and are arranged adjacent to the periphery of the cylinder, and preferably in such positions as to make one side, e, of each bucket, form a longitudinal section of the exterior of the cylinder, said side of the bucket being solid, while the other side, e', is perforated or composed of slats placed short distances apart. From the inner edge of each bucket, L, toward the center of the cylinder is extended a slatted or perforated partition, n, and near the aforesaid edge of each bucket is hinged at one edge a gate, f, which has its free edge extended toward the back of the adjacent bucket.

"In operation * * * the fabric or articles to be dyed are thrown into the buckets, L, L, from the top of one side of the vat, and by the rotation of the cylinder, C, said articles are carried in the buckets through the dye-liquor in the vat, and are thus intermittently dipped or immersed therein. The angular or V-shape of the buckets causes the articles to be retained in the buckets after leaving the bath of dye-liquor without moving from the positions in which they were taken up until the buckets are elevated to a position past a vertical line over the axis of the cylinder, C, when the aforesaid articles fall by gravity out of the elevated bucket and onto the back of the perforated side of the subjacent bucket and partition, n, and during this fall the articles

to be dyed are turned over, so that in their succeeding passage through the dye-liquor and toward the top of the cylinder the dye-liquor penetrates the layers of fabric in the buckets in opposite direction from which it passed through the same during the previous revolution of the cylinder, and thus the fabric is dyed more uniformly throughout. Heretofore the buckets of the wheel or cylinder have been formed concave or rounded transversely, and this form of the buckets caused the articles in process of dyeing to be rolled over in the bucket, and thus become more or less entangled or knotted in a mass and dyed unevenly. This, it will be observed, is effectually obviated by the angular or V-shape of the bucket, L, L."

The claims relied on are:

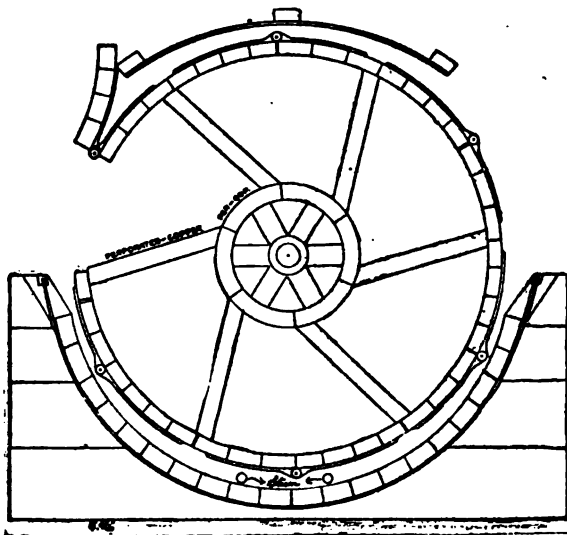
"(1) In a dyeing apparatus the combination with the rotary wheel or cylinder, of buckets formed angular in cross-section, as and for the purpose specified.

"(2) In a dyeing apparatus, the combination, with the rotary wheel or cylinder, of buckets in said cylinder adjacent to the periphery thereof, and of angular form in cross-section, substantially as shown and set forth.

"(3) In a dyeing apparatus, the combination, with the rotary wheel or cylinder, of buckets of angular form in cross-section and adjacent to the periphery thereof, and perforated partitions extending from the inner edge of the buckets toward the center of the wheel or cylinder, substantially as described and shown.

"(4) In a dyeing apparatus, the combination with the rotary cylinder, of buckets of V-shape in cross-section, and having one side solid and the other side perforated, and the solid side thereof constituting a longitudinal section of the exterior of the cylinder substantially as described and shown."

We are not satisfied from the evidence that the patentee was a pioneer in the art, nor that it is due solely to his improvement that the old method of stirring the fabric in the vat with poles has given place to the revolving cylinder. Nevertheless we concur with the judge who tried the cause at circuit in the conclusion that no anticipation has been shown, and that the combination of the patent exhibits patentable invention. The only important question in the case is whether defendants' structure infringes. That structure is shown in the following cut:



The specification very clearly indicates what is the distinctive feature of the combination covered by the first four claims. It is found in the buckets, "formed either V-shaped or of similar angular shape in cross-section." The precise degree of angularity is not stated, but it must be sufficient to enable the buckets to discharge the function which differentiates the operation of the machine of the patent from what the patentee asserts was the operation of earlier machines. The buckets are so arranged that, after the fabric is lifted above the dye-liquor in the vat, it is retained in the bucket till it reaches such a height that the action of gravity will cause it to move from the face of one bucket to the back of the next preceding one, in such a way that the portion of it which has just passed through the dye-liquor resting on the perforated or slatted side of the bucket will re-enter said liquor entirely exposed thereto. Moreover, this change of position, or "turning over," as the patent expresses it, is to be accomplished without allowing the fabric to be rolled over in the bucket, or entangled or knotted in a mass. Inspection of Fig. 3 of the patent shows a degree of angularity which will hold the fabric in the bucket until the bucket has moved "past a vertical line over the axis of the cylinder"—which is the phrase used in the patent; but the claims do not specify any particular degree of angularity, and, although the patent is not a pioneer one, they may fairly be construed to cover buckets whose angularity is such as to carry the fabric so close to the vertical that the change from face to back of bucket will be accomplished with sufficient quickness, and with so slight a movement within the bucket as to avoid the fabric's being rolled over with consequent knotting and entanglement. Looking now at the defendants' machine, it may fairly be held, as complainant's experts contend, that the portion of each compartment which lies in the acute angle formed between the perforated partition and the periphery of the cylinder is substantially a bucket, in which the fabric is held as it is pushed during the lower part of its revolution through the dye-liquor. This bucket has an angularity of shape. It possesses more of a V-shape than it would if the perforated copper partitions were arranged radially from the axis instead of being pitched backward 30° off the radius. Does the angularity thus produced between the periphery and the partition operate to dispose of the fabric during the upper part of its revolution substantially as the bucket of the patent does, and in substantially the same way? Looking at the drawing, it is manifest that the tendency to slip down, bunch, and be rolled over which would result from the use of radial partitions is largely reduced; but the impression was formed at the argument that the angle was not sufficiently acute to produce the operation described in the patent. It is apparent, however, that the quantity of fabric placed in a compartment and the speed of rotation of the machine are factors to be considered. Unfortunately, no working model is produced, and without one it is difficult to determine just what will happen during revolution of the cylinder. We can only consider the testimony on both sides, and dispose of the question according to the weight of evidence.

On this branch of the case the complainant called three witnesses. Goodlet, the expert, had never had any practical experience in the use of dyeing machines. He testified that in defendants' structure the

V-shape of the pockets or buckets causes the material to be retained in them after leaving the bath without substantially changing its position in the buckets until they are elevated to near a vertical line over the axis of the drum, when the fabric falls by gravity from said position upon the back of the preceding bucket. During this fall of the material said material is turned over so as to present a different side to the dye-liquor as the material again enters the bath. "I understand," he says, "that this change in the position of the material is effected without causing said material to roll over and become entangled or wadded." Asked, on cross-examination, if the goods to be dyed, if placed in the bucket formed by the acute angle, would be retained in the bucket until it reached a point past a vertical line over the axis, he replied: "Possibly not. I am not able to say positively, not having experimented with such a machine. But I think it would at least be retained in the pockets until they were in close approach to said vertical line, * * * and I think it would be turned over. It is possible it might slide to some extent on the partitions of the bucket." On redirect, comparing defendants' machine with prior patents in which there were radial partitions, he says that in these earlier machines the fabric would begin to move much quicker, and would roll over and over, so as to become knotted and matted, while in defendants' machines, with partitions 30° off the radius, "the goods are carried well up toward the vertical position before they begin to move, and then they move quickly inward and over at once onto the back of the preceding partition, so that any rolling action of the material which would tend to mat and knot is prevented. * * * The partitions would not reach a horizontal position until the inner ends thereof have reached a point 60° or less from the vertical. * * * It is the purpose of inclining the partition, in both complainant's and defendants' machine, broadly to prevent movement of the stock within the pocket until the rear partition of the pocket has moved a substantial distance from the horizontal toward the vertical line, in order that the movement of the stock, when such movement begins, may be such as to prevent knotting and matting, whether that movement is against the front partition or toward the center of the machine."

Complainant's next witness, Whitely, was a boss dyer; a practical man, who had used both machines. He testified that the incline of the lower wall of complainant's bucket serves to keep the stock from rolling into a ball, which would mat and full, and keeps the stock in good condition. It holds the stock from falling until it has passed the top of center. Of the defendants' machine he says it "operates in the same way [as complainant's], and the incline tends to serve to keep the stock in good shape for processes to follow. * * * It would keep the stock from rolling around and matting and fulling." How it operates to do so he does not particularize.

Complainant's next witness—Sjostrom—was a practical dyer, who had used complainant's machine. Describing its advantages, he said that the incline holds the goods in position until the pocket obtains almost its vertical, "when they are gradually and slowly slid or let drop into the dye-liquor again, thereby keeping the wool free from matting and the garments from rolling up. * * * By the wool or

garments falling out of the pocket after it has crossed the vertical, instead of sliding or falling towards the center of the machine, it drops or falls out near the periphery of the cylinder, thereby causing wool or garments the chance of the tendency to spread and open out," which he considers an important advantage. He never saw one of defendants' machines in operation, but, examining the drawing, testified that, in his opinion, its operation would be the same as that of complainant's. On cross-examination he said that the pockets in complainant's machine hold all that is placed in them till the contents are slid or dropped out, and admitted that, if the defendants' pocket or compartment was filled, "it will remain so; it [the stock] doesn't move at all, [except for] a setting or sliding movement toward the centre of the machine."

The defendants' expert Curtis testified that he had carefully examined and witnessed the operation of one of defendants' machines. He says: "A quantity of stock [how much he does not state] is inserted in a chamber or compartment, * * * and as the drum is slowly rotated the stock slides successively inwardly along one of said partitions until it engages the hub cylinder, along the surface of the hub cylinder until it engages the partition on the opposite side of the chamber, outwardly along the last-mentioned partition until it engages the peripheral wall of the cylinder, along which it slides until it again engages the first-mentioned partition. This movement of the stock is repeated with each rotary movement of the cylinder. * * * The stock has no falling movement, and no other movement except a slight rotary movement, due to the fractional retardation of that side of the wedge-shaped mass of stock which is in contact with the wall of its inclosing chamber." He further testified that the machine he observed was provided with a reversing gear, and was operated first in one direction and then in the opposite direction, and that, in whichever direction it was rotated, "the stock had moved inwardly, along its supporting partition, sufficiently to be out of contact with the periphery of the cylinder by the time the partition had assumed a position downwardly and inwardly at an angle of about 30° to the horizontal." He said that he was unable to distinguish any difference whatever in the movement of the stock within its chamber, due to the inclination of the partitions. From this statement it may be inferred that his observations were conducted when the cylinder was revolving very slowly.

The defendants also called a practical dyer, who was familiar with the operation of both machines. His first description thereof is not clearly expressed. Apparently some words have been omitted either in taking down or in transcription. Further on he states that there is no practical advantage in making the partitions at an angle to the radius; that when the pocket of defendants' machine rises above the water, and reaches a point where the partition leaves the horizontal, the liquor and stock begin to slide towards the center; and that, "as he should judge," when about eight or ten inches above the horizontal, the stock has slid away from the periphery. This witness testified that in operating defendants' machine the compartments are filled with dry stock, which, when wet, occupies about three-quarters of the space.

All this is not especially helpful. On the whole, we have reached the conclusion, as did the Circuit Court, that by reason of the angularity or

the inclination of the partitions the latter become shelves, which, when the machine is operated at a proper rate of speed, will elevate the goods to be dyed so far above the dye-liquor, without substantially changing their position, that within the short distance left to be traversed before the partition begins to descend the position of the goods is shifted from one partition to another, so as to present a different surface to the dye-liquor, with sufficient quickness to avoid the bunching, matting, and knotting which the patentee sought to prevent.

The decree is affirmed, with costs.

HAMMER et al. v. CUTLER-HAMMER MFG. CO. OF WISCONSIN et al.*

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904.)

No. 999.

1. PATENTS—INFRINGEMENT—ELECTRIC SWITCH FOR MOTORS.

The Blades patent, No. 418,678, for an electric switch for motors, was not anticipated, and discloses patentable invention. Claims 1 and 4 also held infringed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 124 Fed. 222.

This is an appeal from a decree adjudging appellants to be infringers of claims 1 and 4 of letters patent No. 418,678, January 7, 1890, to Blades, assignor, for an electric switch for motors.

Claim 1 is as follows: "(1) In a shunt-wound electric motor, the combination, with the field-circuit, of a magnet in said circuit, a hand-switch adapted to open and close the armature-circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and means for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field magnet, substantially as described."

Claim 4 is the same, except that the means for retracting the switch to its initial position is limited to a spring.

The opinion of the Circuit Court, reported in 124 Fed. 222, cites the prior patents.

Francis W. Parker, Edward Rector, and Donald M. Carter, for appellants.

W. Clyde Jones and Keene H. Addington, for appellees.

Before JENKINS and BAKER, Circuit Judges, and BUNN, District Judge.

BAKER, Circuit Judge. The record shows that between 1880 and 1890 there was a rapid development of the electric motor for commercial uses. The series motor, in which the whole current passes in direct connection through the field and the armature, and in which therefore a varying load on the motor in a constant potential circuit would produce changes in revolution from a possibly excessive speed under no load to an undesirable slowness under full load, was found serviceable in cases where the load was constant, or where, the load being

* Petition for rehearing dismissed March 30, 1904.

variable, an attendant was continuously at hand to adjust the current to the load. For factory use, where machines and tools, to perform their functions properly, are required to run at a fixed speed irrespective of changes of work from moment to moment, something steadier was sought, and it was found in the shunt-wound motor in a constant potential circuit, in which the current is divided before entering the motor, the major portion passing through the armature and the minor through the field. At first the shunt-wound motors were made with high resistance armatures to prevent their being burned out when the current was turned on and before the motor had developed its counter electric pressure to protect itself. These motors came nearer the mark of self-regulation than the series kind, because the field, being in shunt, was independent of the varying stress on the armature; but the high resistance in the armature, the rotational energy of the field-magnet remaining constant, left the speed somewhat subject to variations of the load. At this stage of development, several inventors gave their attention to devising governors or regulators. It was next discovered that a shunt-wound motor with an armature of the least practicable resistance was virtually self-regulating under varying loads. But this type was especially susceptible to being burned out at starting and before the motor had acquired a protective speed. So the starting-box, or hand-switch, was inserted in the armature circuit, and its sufficient resistance to the current could be cut out gradually by moving the switch-arm from one contact point to another, until, when the current was fully on, the motor would be in a state of self-defense.

The self-regulating shunt-wound motor with starting-box had been in commercial use some considerable time before Blades entered the field. It was attended with these dangers: The accidental opening of the field circuit, which would likely be destructive of the armature; the leaving of the switch-arm on an intermediate contact point, which would destroy the starting-box, as its resistance coils were not intended nor adapted to be left in circuit; and the failure to return the switch-arm to its initial position, whereby, if the motor should stop on account of the current's being cut off by the opening of a switch at the factory or at the central station, or by the blowing out of a fuse, or diminished by a sufficient drop of potential, and if the current were then turned on or the potential restored, the low resistance armature would be burned out. Manufacturers, with whom were associated some of the greatest inventors and students in the electrical world, well understood and warned their customers against these perils.

The structure portrayed by the patent in suit not only protects the motor and the starting-box from all the aforesaid dangers, but affords additional benefits by effecting an instantaneous release when the field circuit is broken, and a delayed release when the current supply is cut off. This device won immediate recognition and went into general commercial use.

The bringing together, within the mental vision, of these manifold difficulties and the means for overcoming them all, and conferring new advantages, we think evinced a high degree of invention, unless the prior art showed the way and left no room for initiative. To give the results of our examination of the prior art, we think it unnecessary

to detail the structures of the reference patents. The shunt-wound motor with low resistance armature and hand-switch or starting-box was old. The electro-magnet dated back to the beginnings of the electric art. Springs of one sort or another had been employed in various arts, including the electrical.

In regulators for electric generators, and in governors for motors with high resistance armatures, magnets and springs had been balanced against each other on the contact-arms of resistance-coils that were left permanently in circuit, so that a loss in current, by diminishing the energy of the magnet, would permit the spring to pull the contact-arm to a point of less resistance, and vice versa, thus producing a floating switch. The inventors of these devices had not in mind the problem Blades solved, for it had not yet arisen, and the means they applied to their problems will not obviate the perils that were found to attend the shunt-wound motor with low resistance armature and manual starting-box.

In cases where it was desired to start a motor at a distant point without an attendant, a pulling magnet, energized when the current was turned on at the central station, was used to pull, as would the hand of a present operator, the contact-arm of the starting-box from its off to its on position. In these automatic starters no spring is opposed to the magnet. In automatic starters, as such, an opposed spring would be worse than useless; for, the end to be attained being the pulling of the switch-arm from its off to its on position, any force that resists is counter to the object in view. These inventors therefore designedly left out the spring from their combinations as being an element hostile to the accomplishment of their purpose. And if a skilled mechanic, desirous of adding the protective functions of the patent in suit to the function of the automatic starter, had opposed a spring to the pulling magnet in the field circuit, he would have found that the magnet, to be strong enough to pull the switch-arm through its arc against the resistance of the spring, would draw off so much energy from the field that the armature would speed up to a degree that would make the motor commercially inoperative. Not only are starting and stopping opposite operations, but just as there is a material difference between the field-magnet and the pulling magnet of the automatic starter (though magnets are magnets) so we think there is a vital distinction between the pulling magnet of the automatic starter and the retaining magnet of the patent in suit.

Dangers to a motor in operation may arise from an excessive current. The fuse is the ordinary protective device. Certain inventors employed pulling magnets, put into action by the excess of current, to shut down the motor. These overpressure protective devices are inert in the presence of the dangers that threaten from underpressure or no pressure. Their devisers were considering a different problem, and the structures themselves are incapable of filling the office of the instrument described in appellees' patent.

One inventor, preceding Blades, addressed his attention to the dangers to a self-regulating shunt-wound motor in a constant potential circuit that come from a cessation or material loss of current, but missed the mark by directing his efforts to the wrong point, the main

switch. As we read the Shepardson patent, it contains no hint of the Blades structure.

The prior art contains no equivalent combination. We think that there was patentable novelty in the application of an underload retaining magnet to a manual starting-box, in the location of such a magnet in the field circuit of a self-regulating shunt-wound motor, and in adjusting it to act in that location with the starting-box located in the armature circuit. We find nothing in the prior art to militate against the allowance of the claims in suit.

Appellants insist that these claims, which limit the location of the magnet to the field circuit of a shunt-wound motor, must fall by reason of amendments made while the application was pending. The original specification located the magnet "preferably in the field circuit." The field circuit, as distinguished from the armature circuit, implies the shunt-wound motor. No matter, therefore, how broad the applicant made the original description of his invention, the narrowing of the specification and the limitations of the claims in suit left the invention as now claimed within the preferred range of the original specification.

We think the record contains sufficient evidence of infringement. The decree is affirmed.

NATIONAL PHONOGRAPH CO. v. SCHLEGEL et al.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1904.)

No. 1,848.

1. PATENTS—RIGHT OF LICENSEE TO ATTACH CONDITIONS TO UNDERLICENSE—RESERVATION OF RIGHT TO FIX PRICES.

The exclusive licensee for the sale of articles embodying the patented invention or discovery has and controls to that extent the monopoly granted by the letters patent, and may attach such conditions as he sees fit to sales made under his license; and a contract binding a purchaser not to resell for less than certain named prices, or to any other dealer who does not sign a similar agreement, and which makes a compliance with such requirements a condition of the license to use or vend the patented article implied from its sale, is valid and enforceable.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

For opinion below, see 117 Fed. 624.

The bill alleges that complainant is a New Jersey corporation, and defendants are citizens of Iowa; that complainant is the exclusive licensee for the sale of Edison phonographs, record blanks, and records, covered by letters patent owned by the Edison Phonograph Company; that, in conformity with its established plan of selling the articles covered by its license and such letters patent, complainant, on April 27, 1901, entered into a contract in writing, called "Jobber's Agreement," with defendants, whereby, in consideration of sales of said articles to be made by complainant to defendants from time to time at a stated discount, defendants agreed to conform and strictly adhere to and be bound by certain terms and conditions in selling such articles, viz.: (1) To sell only at certain named prices. (2) To sell to no retail dealer who does not sign a prescribed and similar agreement governing and controlling sales by retail dealers. (3) "All Edison Phonographs, Records and Blanks are covered by United States patents and are sold under the condition

that the license to use and vend them implied from such sale is dependent on the observance by the vendee of all the foregoing conditions; upon the breach of any of said conditions the license to use or vend said phonographs, records and blanks, immediately ceases and any vendor or user thereafter becomes an infringer of said patents and may be proceeded against by suit for injunction or damages, or both." The bill also alleges that, under such agreement, complainant sold and delivered to defendants, from time to time, great numbers of Edison phonographs, record blanks, and records, and defendants now have on hand many phonographs, record blanks, and records so purchased; that defendants recognized and conformed to the terms and conditions of said agreement until about March 1, 1902, since which time they have been selling and are continuing to sell large numbers of the phonographs, record blanks, and records so purchased from complainant at prices less than those agreed upon, and to retail dealers throughout the United States who have not signed and who refuse to sign the agreement prescribed for retail dealers. Other allegations relate to the effect of these sales in violation of the agreement, and tend to show pretty clearly that they seriously disturb the business of complainant, and do it irreparable injury. Among its prayers, the bill asks for preliminary and permanent injunctions restraining defendants from selling phonographs, record blanks, or records so purchased from complainant at prices less than those agreed upon, or to any retail dealer who does not sign the required retailer's agreement. After the filing of the bill and the service of process, defendants consented, in writing, to a permanent injunction as prayed, on condition that no damages or costs should be awarded against them, and complainant moved that such a decree be entered upon the bill and the written consent of defendants. The court, however, entered a decree dismissing the bill. The theory upon which this was done is shown by the following extracts from an opinion filed by the judge at the time: "On the former hearing I reached the conclusion that this is a collusive suit. In this I was mistaken, and I now ground my decision upon the facts pleaded in the bill. * * * Is not the contract one that stifles trade? And if it is such a contract, should this court enforce it by the great writ of injunction? * * * And, aside from the phases of the patent law that have been argued, in my judgment the contract in suit cannot be the basis of an action at either law or in equity. And it likewise is my judgment that the contract cannot be upheld, even though the articles of merchandise are covered by patents."

W. J. Roberts (Howard W. Hayes, on the brief), for appellant.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This is not a suit by the patentee or an assignee to enjoin the infringement of a patent, but is a suit by an exclusive licensee for the sale of articles embodying the patented invention or discovery to restrain the future violation of an underlicense or contract for the sale of such articles by a sublicensee. However, the validity of the underlicense or contract and the right of the licensee to restrain future sales in violation thereof must necessarily be determined by the patent laws, and by the rules applicable to a suit by a patentee or an assignee to enjoin the infringement of a patent. Letters patent for an invention or discovery grant to the patentee, his heirs and assigns, "the exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof" for the term of 17 years. Rev. St. § 4884 [U. S. Comp. St. 1901, p. 3381]. This is a monopoly authorized by law, and generally sanctioned by enlightened government. In this case the exclusive right to sell has been trans-

ferred to complainant, and to that extent it has and controls the monopoly granted by the letters patent. An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself, and what part he will transfer to others, and upon what terms he will make the transfer. *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Victor Talking Machine Co. v. The Fair (C. C. A.)* 123 Fed. 424; *Dickerson v. Tinling*, 28 C. C. A. 139, 84 Fed. 192; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728; *Cortelyou v. Lowe*, 49 C. C. A. 671, 111 Fed. 1005; *Edison Phonograph Co. v. Kaufmann (C. C.)* 105 Fed. 960; *Edison Phonograph Co. v. Pike (C. C.)* 116 Fed. 863; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174. After mentioning limitations which attach to all property rights under the general law of the land, none of which is applicable to the facts of this case, it is said in *Bement v. National Harrow Co.*, 186 U. S. 91, 93, 22 Sup. Ct. 755, 756, 46 L. Ed. 1058:

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the article, will be upheld by the courts. * * * The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

It was urged in that case that the stipulation respecting the price to be demanded was violative of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], upon the subject of trusts and unlawful combinations, but the court held otherwise, saying (page 92, 186 U. S., page 756, 22 Sup. Ct., 46 L. Ed. 1058):

"But that statute does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used, and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers."

The condition against sales to retail dealers who do not sign a similar agreement governing sales by them was imposed by complainant in the legitimate exercise of its property right in the monopoly, and for the purpose of rendering it valuable. The complainant had the same right to require that such an agreement be exacted from defendants' vendees that it had to demand it from defendants. Any sale by defendants outside of the terms of their underlicense or contract was an invasion of complainant's lawful monopoly.

The contract which the parties had made, and which defendants were violating, was a valid one, and, upon the allegations of the bill, confessed by defendants, and declared by the court to be not collusive, there should have been a decree for complainant.

The decree is reversed, with instructions to enter a decree permanently enjoining defendants as prayed, but embodying the conditions named in their written assent.

SHADBOLT v. McKEE.

(Circuit Court of Appeals, Second Circuit, March 2, 1904.)

No. 120.

1. PATENTS—INFRINGEMENT—COAL TRUCKS.

The Shadbolt patent, No. 532,216, for an improvement in coal trucks or heavy wagons, consisting in making the box deeper at the back end, with the bottom sloping toward the back, to facilitate unloading, but wider in front, to equalize the weight of the load over the two axles, is not infringed by a wagon in which the top of the box is a parallelogram, but the sides converge toward the bottom uniformly, so that the deeper portion at the back is narrower at the bottom than the front.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Appeal by defendant from a decree of the Circuit Court for the Eastern District of New York, sustaining letters patent No. 532,216, granted January 8, 1895, to the complainant for improvements in coal trucks or heavy wagons, and granting an injunction and an accounting.

Clifford E. Dunn and Jas. T. O'Neill, for appellant.

Edmond C. Brown, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The patent, though relating to wagons of all kinds, is designed more especially to cover heavy trucks, the structure being described and shown as embodied in a coal truck.

The specification states that coal trucks had been constructed, therefore, with a body deepest at the rear end, the bottom sloping from front to rear for convenience in dumping the load and the top being substantially horizontal. This construction placed the weight very unevenly on the two axles of the truck. The object of the invention, so far as it is involved in the present controversy, is "to preserve the sloping bottom and depth at the rear of the body, and yet equalize the load more or less exactly on the two axles." This object is accom-

plished by making the body wider at the front end than at the rear end, the increase in width compensating for the decrease in depth.

The claims are as follows:

"(1) A wagon having a fixed or nontilting body which is wider at its front end than at its rear end, and tapered substantially as set forth and which is deeper at its rear than at its front end.

"(2) A wagon having a body which is deeper at its rear end than at its front end and wider at its front end than at its rear end, the bottom of the body being inclined toward the rear or tail end, substantially as described."

The only defense argued and the only one necessary to consider is that of noninfringement.

The defendant's truck differs from the old type, referred to in the patent, only in having sides which, to a slight degree, slope inwardly toward the bottom. A line drawn around the top of the body forms a perfect rectangle, but the floor is eight inches wider at the front than in the rear. In other words, the sloping sides are nearer together at the deepest part than at the shallowest part, but equidistant, front and rear, if measured on the same plane.

The defendant has not, to any appreciable extent, widened the front end of his truck. He has, because of the converging sides, decreased its width and, therefore, lessened its carrying capacity. This is equally true of the rear end. The carrying capacity is correspondingly decreased and the only tendency to equalize the load on the two axles must be attributed to the sloping sides which, to some extent, must, of course, lessen the load at the bottom of the rear end of the truck.

But even if it be admitted that the defendant's truck to some extent equalizes the load it does so by decreasing the carrying capacity of the truck instead of increasing it and by a construction distinctly different from that described in the patent.

There can be no doubt that the feature of invention which distinguishes it from the prior art is the widening of the front end of the wagon. This feature is emphasized again and again in the drawings, description and claims. Instead of being rectangular at the top the wagon of the patent is cunciform. It is even recommended that the front end may be so broadened as to extend beyond the wheels.

The specification says:

"As the fore wheels can swing in under the body, it would be feasible so to widen the body at the front end as to make it extend out laterally over and above said wheels."

Again, in his testimony, the patentee says:

"The width of the Shadbolt truck being much greater on the front than on the rear, the top of the box is wider at the front end than it is at the back end.
* * * The increased width at the front end of the truck gives a greater storage capacity at the front end."

Assuming that the defendant accomplishes a similar result in equalizing the weight, and this is by no means clear from the record, it cannot be held that he uses the means described and claimed. Instead of making his wagon body wider at the front end than at the rear, whether measured at top or bottom, he uses a body with sides beveled or flared outwardly toward the top, thus decreasing, in a slight degree, the carrying capacity of the pocket at the rear end.

It appears from the testimony that wagons with sides beveled instead of vertical have existed from time immemorial. The sides of the complainant's truck body flare longitudinally towards the front, thus making a much wider space and corresponding storage room there than at the rear end. The sides of the defendant's body diverge from a vertical line, uniformly, the entire distance. It is clear, therefore, that if his truck were constructed with a flat instead of an inclined floor, the increase in carrying capacity would be equal throughout its entire length. The increase at the front would be exactly balanced by a corresponding increase at the rear. Whether the load area is made larger or smaller depends, of course, upon whether or not the flare is made by increasing or decreasing the distance between the tops of the parallel sides.

Given a wagon body with straight parallel sides; if the distance between the sides at the top remains unchanged and the flare is produced by converging the sides towards the bottom, it is obvious that the load space will be decreased; on the other hand, if the sides flare out from the bottom this space will be increased.

In order to hold that the defendant infringes we must find that his wagon is wider at the front than at the rear. Even if the complainant were entitled to equivalents we are of the opinion that the slight decrease in load space, produced by the narrowing of the sides as the depth increases towards the rear of the defendant's truck, cannot be considered as an equivalent for the wide front end which is clearly emphasized as the distinguishing feature of the patented structure.

The complainant has failed to establish infringement.

The decree of the Circuit Court is reversed with costs.

GENERAL ELECTRIC CO. v. NEW ENGLAND ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 93.

1. EQUITY PLEADING—EFFECT OF SETTING DOWN PLEAS FOR ARGUMENT.

By setting down pleas for argument, a complainant admits the facts, but not the conclusions, pleaded therein.

2. PATENTS—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

Pleas to a bill in equity for infringement of a patent which in effect admit infringement up to a date a short time prior to the filing of the bill, but allege that on that date defendant ceased manufacturing the infringing article, except to make up material on hand, and that prior to the filing of the bill it wholly abandoned such manufacture and sale, and has since neither made, used, nor sold the invention of the patent, but has made deliveries on contracts of sale previously made only, do not state facts constituting a bar to the suit, since, admitting such facts, the court may in its discretion grant an injunction to restrain a resumption of the infringement or the continued sale of the infringing articles, and require an accounting.

¶ 1. See Equity, vol. 19, Cent. Dig. § 409.

¶ 2. Pleading in patent infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 123 Fed. 310.

Appeal from a decree of the Circuit Court for the Southern District of New York sustaining defendants' pleas and dismissing the bill of the General Electric Company, the complainant.

Samuel Owen Edmonds, for appellants.

Edward P. Payson and Clifton V. Edwards, for the appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The bill is in the usual form, alleging the infringement of letters patent No. 516,844, granted to Alfred Swan, March 20, 1894. The bill was verified October 10, 1902, and was filed December 13, 1902.

The defendants filed pleas which were once amended by leave of the court. As amended the pleas, though not in identical language, allege, in substance, that the defendants made and sold the infringing devices until "August, 1902, at which time, because of the disapproval by underwriters and slight profits, said defendant company abandoned the manufacture thereof and thereafter made up only its remaining receptacle stock, and since October 10, 1902, it has not itself or by any agent made any sale of such 'receptacle,' but only completed delivery of 'receptacles' sold as aforesaid, and that long before the bringing of this bill for injunction defendant company had wholly and in good faith ceased to make, use or sell itself or by other said 'receptacles 9,171' and the invention of said Swan patent; and is not threatening and does not intend, now or at any time in the future, to manufacture or sell said receptacles, but has in good faith finally abandoned such manufacture and sale."

By setting the pleas down for argument the complainant has admitted the facts but not the conclusions pleaded therein. Farley v. Kittson, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. Ed. 684; Burrell v. Hackley (C. C.) 35 Fed. 833, and cases cited.

We have, then, the following facts: First. Subsequent to the granting of the Swan patent and until August, 1902, the defendants were engaged in manufacturing and selling devices which infringed the patent. Second. From August, 1902, until October 10, 1902, they ceased manufacturing new receptacles and only made up the stock then on hand. Third. Since October 10, 1902, they have not made any new sales of infringing receptacles but have completed the delivery of receptacles sold prior thereto. Fourth. Prior to the filing of the bill they had wholly ceased to make, use or sell the patented device.

If the pleas be analyzed a little closer it will be observed that defendants, in effect, admit infringement prior to August, 1902. In August of that year they stopped making new receptacles, but admit that from August until October 10th they were engaged in making up the stock on hand. They do not deny that they were selling receptacles during this period. After October 10th, the date of the verification of the bill and two months before it was filed, they ceased to sell but continued to deliver infringing receptacles; and for aught that appears have con-

tinued to deliver and are now delivering said receptacles. The pleas draw a sharp distinction between new sales of the infringing devices and their delivery pursuant to old sales, so that the allegation that defendants ceased, prior to the suit, to make, use or sell the patented device is not at all incompatible with the theory that they have a large stock of infringing devices on hand which they can at any time put on the market. In other words, the defendants seem to be of the opinion that it is not an infringement of the patent to distribute infringing receptacles to their customers provided the contract of sale was made prior to August, 1902.

The pleas do not state a complete bar to the suit. Conceding all their averments to be true the court may retain the case in order to do exact equity between the parties. If the case were at final hearing upon the precise facts now developed the court might, it is true, feel warranted in suspending the injunction, but it would not be compelled to do so. The probability is that it would follow the practice, so frequently adopted, where the defendant admits past infringement and is shown to be in a position where he can at any time resume, namely, issue the injunction. The argument in such circumstances is very simple. If the defendant be honest in his protestations an injunction will do him no harm; if he be dishonest the court should place a strong hand upon him in limine. *Chemical Works v. Vice*, 14 Blatchf. 179, Fed. Cas. No. 12,136; *Wollensak v. Reiher* (C. C.) 28 Fed. 427; *Celuloid Co. v. Arlington* (C. C.) 34 Fed. 324; *Sawyer Spindle Co. v. Turner* (C. C.) 55 Fed. 979; *Electric Works v. Henzel* (C. C.) 48 Fed. 375.

The case of *Odell v. Stout* (C. C.) 22 Fed. 169, does not, in our judgment, sustain the defendants' position. Imprimis, the case was heard at final hearing on pleadings and proofs and not on plea. It appeared that the defendant, prior to the suit, discontinued the manufacture of one type of infringing mill and commenced, and, at the time of the suit, was engaged in the manufacture of another type of infringing mill. The court said of the former mill: "If the complaint were only on account of the manufacture and sale of that mill, the case would not be one for an injunction." The opinion concludes with the following statement: "However, as we find that the defendants in this case are infringers, we think it well to retain the whole case under our control, and the injunction and order for an account may be made to apply to the manufacture and sale of both mills." The remark relied on by the defendants here was made after the court, having heard the entire controversy, was "satisfied that the abandonment was in good faith and final."

In the case at bar no such condition exists. Every averment of fact pleaded may be true and still the defendants may have at all times been delivering infringing receptacles pursuant to contracts previously sold. They may at the present time be manufacturing certain parts of the receptacles to be assembled afterwards by the purchaser, thus making them contributory infringers. They may have a large stock of infringing receptacles on hand and they may, when market conditions improve, change their present purpose and resume the manufacture and sale of the infringing devices. In short, as before stated, the pleas do

not allege facts which are a bar to the action. Admitting all the averments to be true the court at final hearing may conclude to grant an injunction and an accounting.

The decree dismissing the bill is reversed with costs and the cause is remanded to the Circuit Court with instructions to proceed therein as the equity rules require.

TAYLOR V. MARSHALL.

(Circuit Court, D. Massachusetts. March 15, 1904.)

No. 1,062.

1. PATENTS—INFRINGEMENT—MACHINES FOR FELTING HAT GOODS.

The Taylor patents, Nos. 263,075, 263,076, 280,095, 297,471, 302,055, and 393,866, for improvements in machines for felting hat goods, if valid, must be limited to the specific form of devices described. As so construed, held not infringed.

In Equity. Suit for infringement of letters patent Nos. 263,075, 263,076, 280,095, 297,471, 302,055, and 393,866—all for machines for felting hat goods—granted to James S. Taylor, respectively, on August 22, 1882, August 22, 1882, June 26, 1883, April 22, 1884, July 15, 1884, and December 4, 1888. On final hearing.

Aaron T. Bates, for complainant.

Friend W. Smith, Jr., and David F. Slade, for defendant.

COLT, Circuit Judge. The complainant, who is the patentee, brings suit for infringement of 6 patents, with 39 distinct claims, for improvements in an old type of machine for felting a roll of hats. This type may be generally described as consisting of two lower rollers journaled in fixed bearings in the same horizontal plane; an upper roller journaled in and carried by a pivoted or swinging frame; a counterbalancing, adjustable weight attached to the rear part of the frame, whereby the upper roller exerts a greater or less pressure on the roll of hats; and a treadle secured to the front part of the frame for raising the top roller to make an opening for the hats. Projections or a spirally wound rope were commonly used on the surfaces of the rollers. The prior art exhibits numerous varieties of this general type of machine.

The rollers are the fundamental and essential thing in a hat-felting machine. At the time of the earliest Taylor patent in suit, there was little room for invention in the connecting mechanism, for raising the top roller to make an opening for the hats, or in the weights, springs, or levers employed in combination with the swinging frame to regulate the pressure of the top roller upon the hats during the operation of felting. On the other hand, the field of invention was open to new and useful improvements in the organization, movement, and form of the rollers, whereby the efficiency of the felting operation might be increased. It was to this primary feature that the Taylor patents in suit were mainly directed. All of them, except the last, are for new and specific arrangements of rollers. The connecting mechanisms in these machines are of a subordinate and auxiliary character, and can

scarcely be held, in the light of the pre-existing art, to have involved any invention. It may further be observed that no one of these specific arrangements of rollers, which constitute the chief feature of five of these patents, has ever, so far as appears, gone into practical use, or made any impression on the art. The most that can be said with respect to the utility of these inventions is that some of the specific forms of connecting mechanism in which they are embodied have found their way into a commercial machine.

The complainant sells or licenses a hat-felting machine called the "Taylor Machine," and the defendant admits that he uses in his mill a number of machines of substantially the same construction; but the difficulty is that the Taylor machine, in its main features, is unlike any of the machines described in the Taylor patents for the infringement of which the present suit is brought. The Taylor machine closely resembles in structure and organization the machines of the prior art. Its only resemblance to the patented machines consists in the use of connecting mechanism which is made the subject of several of the claims of these patents. These claims, upon a broad construction, are void for want of patentable novelty, and, if valid at all, must be limited to the specific form of devices described.

The Taylor machine is composed of two lower rollers journaled in fixed bearings in the same horizontal plane; a top roller journaled in and carried by a swinging yoke or frame, a coil spring attached to the rear end of the yoke, and secured to the main frame of the machine; a hand lever pivoted to the frame of the machine, and connected with the forward end of the yoke by a spiral spring; projections in the form of lags on the surfaces of the rear and top rollers; and a spirally wound rope on the surface of the front roller. These elements, or their equivalents, were old in the art, and, if the complainant had obtained a patent for a machine embodying them in combination, its validity, with little doubt, could have been successfully attacked on the ground of want of patentable novelty or invention.

A reference to the machines of the Taylor patents will show how little they resemble the Taylor commercial machine. In the first of these patents, No. 263,075, dated August 22, 1882, the patentee says:

"The object of the invention is to increase the efficiency of this class of machines, and the process involved in their use, especially by adapting the machine to give the necessary fulling or wringing and fulling motion to the goods while in process of manipulation."

This is accomplished in the first form of the machine described by an organization composed of a relatively small work roller, or "idler, c," and two other rollers. The work roller is without gearing, and "is revolved by the traction of the roll of goods." It is depressed by means of a handle and connecting spring, which is attached to the frame. In operation, the forward motion of the under large roller carries the roll of goods under the work roller, which is raised by the upward pressure of the goods: "the gravity of the goods keeping them from being drawn between the rollers." The action of the machine "differs from that of other machines in which the roller corresponding with the worker, c, instead of being revolved by the goods, acts to revolve them." "In my machine the goods both raise the worker and

cause it to revolve." The specification then describes a modification of the invention, in which an additional cam roller is mounted on the frame. This cam roller is given a movement the reverse of the other rollers, so that when in motion it exerts a retarding effect on the roll of goods. Another modification of the machine is where two of the three rollers are elliptical in form, whereby certain new and advantageous movements are imparted to the rollers. It is manifest that neither the Taylor machine nor the defendant's machine embodies the inventions described and claimed in this patent.

In the second of these Taylor patents, No. 263,076, dated August 22, 1882, the patentee says: "The object of my invention is to facilitate the process of felting hat goods, and other fabrics." Here we find an organization of rollers in the form of a transverse curve. This arrangement makes an opening or chamber between the top rollers for receiving and discharging the goods. The front roller in this machine has a vibratory motion communicated through connecting rods and crank wheels. Upon the surface of the roller are "adjustable knuckles." The specification says:

"While the goods remain therein, the continuous vibrating motion of the knuckled roller, R', in connection with the revolving motion of the three rollers in the direction indicated by the arrows, imparts to the goods a rolling and vibrating movement, while they are at the same time exposed to the heating and cooling action of water and air."

It is apparent that the special features which comprise the invention covered by this patent are not found in the Taylor machine or in the defendant's machine.

In the third of this series of Taylor patents, No. 280,095, dated June 26, 1883, the patentee says:

"This invention relates to a machine specially intended for wool-hat felting, but applicable also to the felting of other fabrics. It consists in the arrangement of the rollers forming the open receiving-chamber, whereby the goods may be freely entered and removed without the use of a treadle or other appliance for opening the chamber, and whereby, further, an elastic or yielding pressure may be exerted upon the goods during the felting operation and the pressure made constant or increased at pleasure, as hereinafter particularly described."

We have in this patent an organization of three rollers—two in fixed bearings in the frame, and the third mounted on a pivoted yoke or frame. The latter or top roller is so balanced by springs attached to the frame as to have a slight tendency to fall forward. The tension of these springs may be varied by adjusting their lower ends to holes in the frame. In the operation of the machine, the front roller, through the adjustment of the springs—

"Slightly rises to admit the roll of goods, and then bears upon them with a degree of force proportioned to the weight or tendency of the roller to fall, and the resistance of the springs. The pressure exerted by the roller, B", is consequently elastic or yielding. Should it be desired to make the pressure constant, this may be done by forcing the roller, B", down and holding it in depressed condition by means of the treadle, d'. The elastic pressure of the roller may also be increased by the same means, or by the use of the treadle conjointly with a special adjustment of the springs, b", to the holes, b⁴. The intention is to so adjust or balance the roller, B", that it shall automatically open or widen the chamber sufficiently for the convenient removal of the goods during and after the completion of the felting process."

The specific organization of rollers set forth in this patent is absent from the Taylor machine and from the defendant's machine. There is notably lacking the feature of the automatic enlargement of the chamber to receive the goods, which is made an element of all the claims except the last, wherein reference is made to a distinctive arrangement of "concave rollers."

In the fourth of this series of Taylor patents, No. 297,471, dated April 22, 1884, we find an arrangement of three rollers in a transverse curve, "such that they form a U-shaped opening or chamber, with its opening above for receiving and manipulating the goods." There is no roller over or before the opening, "so that the roll of goods manipulated in the machine is at all times under the supervision of the operator." To the front roller is attached a compound lever or toggle joint, which is connected with a foot lever. Downward pressure of the foot on the lever causes the compression of the goods through the medium of the front roller, and a light or heavy pressure may be exerted "through the action of the toggle joint." The front roller is so pivoted as to fall or swing by its own gravity away from the open chamber, by which means the goods can be readily removed from the machine. No such organization is present in the Taylor machine or in the defendant's machine.

In the fifth of this series of Taylor patents, No. 302,055, dated July 15, 1884, the patentee says:

"The object of my present invention is to render the machine during its operation more easily controlled by the operator, and to secure a more uniform felting action on the roll of felting material while in the working-chamber of the machine. To this end the invention consists, first, in means for adjusting one roller out of line with the other two, so as to cause more or less longitudinal motion to the roll of felting material at different points of the felting-chamber; second, in providing the rolls with certain new surface irregularities, hereinafter specified and claimed, so as to secure a better action upon the roll or bundle of felting material than has heretofore been accomplished; third, in adjusting the small worker or third co-operating felting-roller so that its action on the material during the operation of the machine will be more easily under the control of the operator; fourth, in certain details of construction and organization, hereinafter described in the specification, and pointed out in the claims."

This statement of the invention indicates how far it is removed from the Taylor machine. Upon the frame of this machine are mounted the two main rollers, one "being placed partially above and back" of the other, "with a suitable large space between them." Supported on the axis of the back roller is a pivoted yoke, and swinging on the bearings of the arms of this yoke is a supplementary frame carrying a very small additional roller, "or worker, c." This work roller is held elastically against the roll of goods by springs which connect the supplemental frame with the yoke. A weight upon the rear arm of the yoke is used as a "counterpoise" to the supplemental work roller "to cause it to exert less than its weight on the material." This weight is "counterbalanced" by the power applied to the lever in the front of the machine. The yoke is provided with arms extending forward, and connected with a hand lever by springs. This lever is pivoted to the frame of the machine. It has upon its surface a pin, which may be inserted in a series of holes upon an upright secured to the frame of

the machine. The required degree of pressure is effected through the lever by inserting the pin in a lower or higher hole in the upright. The yoke supporting the "idler or supplemental roller" is balanced or centered at a point on the line of the center of the back roller for the purpose of keeping the work roller and the back roller at equal distances apart. There are also means provided for adjusting the back roller so that it will be out of line with the other rollers. Upon the surface of the large front roller are secured lags, while around the surfaces of the other rollers rope is wound. Without entering more fully into the specification of the patent, it is apparent that this organization of rollers, frames, and springs is not found in the Taylor machine or in the defendant's machine.

With respect to the claims of this patent which are relied upon, it may be said that the fifth claim must be limited to the specific arrangement of rollers and vertical and lateral springs described in the specification; that the sixth claim must be limited to the hand lever and projecting pin when combined with the balanced yoke and supplemental roller described, or else it is void for want of patentable novelty; and that the seventh claim must also be so limited, or else it is void for the same reason.

The sixth of this series of Taylor patents, No. 393,866, dated December 4, 1888, is for the combination of two rollers with longitudinal projections, and a third roller with annular projections in the form of a specially wound rope. Unless this patent be limited to the longitudinal projections referred to in the specification and shown in the drawings, it is void for lack of novelty or invention. Neither the Taylor machine nor the defendant's machine use this form of projections.

The complainant's evidence in this case is vague, uncertain, and very unsatisfactory. It is largely made up of general statements and broad assertions. It is entirely wanting in any critical analysis of the Taylor patents, the Taylor machine, or the prior art. This has thrown an unusual burden upon the court, although the defendant's proofs and the carefully prepared brief of his counsel have been of much aid.

Upon full consideration, I find the defendant is not guilty of infringement in using machines like the Taylor machine, since that machine does not embody any of the inventions covered by the patents in suit. A decree may be drawn dismissing the bill, with costs. Bill dismissed.

WARREN FEATHERBONE CO. v. ROBERTS & CO.

(Circuit Court, E. D. Pennsylvania. March 18, 1904.)

No. 15.

1. PATENTS—INFRINGEMENT—DRESS COLLARS.

The Warren patent, No. 669,152, for a frame or foundation for collars for dresses, claim 2, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 669,152, for a collar foundation, granted to Edward K. Warren March 5, 1901. On final hearing.

Seabury C. Mastick, for complainant.
Redding, Kiddle & Greeley, for respondent.

ARCHBALD, District Judge.* The patent in suit was issued to Edward K. Warren March 5, 1901, for a frame or foundation for the collars of dresses. Its novelty is attacked by numerous references, as well as by evidence of use in several prior instances, and question is also made as to the patentability of what is claimed to be a simple and obvious device. It is sufficient, however, to decide that, under the construction to be given to the claim relied on, the articles manufactured by the defendants do not infringe.

The first claim of the patent is for a special form, which is not copied. The only remaining claim is as follows:

"(2) In a collar or stock foundation, the combination of a lower band, an upper band of lighter material, and intermediate connecting portions of varying lengths to support said upper band at varying distances from said lower band, said parts being formed of stiffening material, for the purpose specified."

It is an essential of the combination so described that there should be not only a lower and an upper band, but, by comparison, that the two should be different; the one being composed of material characteristically lighter than the other. The plaintiffs contend that the upper band is simply required to be more flexible, and that this is the construction to be given to the words "of lighter material." But while greater flexibility may be the result, and may even have been proposed by the inventor, we are not concerned with the end to be attained, so much as with the means which have been selected for doing so, as expressed in the claim. In the collar frame manufactured by the defendants, both bands are alike, and the same is true of those which the plaintiffs themselves put forth. The greater flexibility of the upper band is due, in both, entirely to its form and its position when in use, and not to any difference in material. The lower band fits down upon the neck, and does not give way, being evenly sustained throughout, while the upper band yields simply because it does not have the same support. If the two were made to change places, not simply by reversing the frame, but by actually substituting the lower band for the upper, and the upper for the lower, they would be found to be identical, and the result unchanged. Regardless, therefore, of the sense imputed by the plaintiffs to the words "of lighter material," the bands do not differ, as they make them, except for the accident of place. The upper band, as the frame is constructed, may be more pliable, but the material is the same. But this does not satisfy the terms of the patent, which, whatever be the sense in which it is to be taken, requires that they should vary. "But," says counsel, conscious of the inconsistency, "this meaning of the words 'lighter material' does not necessarily mean that the upper band must be lighter, in the sense of having a greater degree of flexibility, however attained, than the lower band, because both the lower and the upper band may have practically the same degree of flexibility. All that a fair and reasonable inter-

* Specially assigned.

pretation requires is that the upper band shall be sufficiently flexible to yield to the movement of the neck and chin of the wearer. It follows, therefore, that the two bands may be of substantially equal flexibility, provided the lower band is sufficiently strong to support the rest of the structure. In other words, the expression 'of lighter material' is merely descriptive of the fact that the patentee desired it understood that the upper band should be sufficiently flexible for the several purposes and objects set forth in the specification." But a construction which requires such extremes to sustain it is essentially unsound. The difficulty with it is that it not only varies from the plain reading of the patent, but it puts aside its express terms. The claim calls for an upper band of "lighter material." Granting, for the sake of argument, that this means simply more flexible or yielding, it still applies to the material of which the band is composed, as distinguished from the band itself, and requires it to be comparatively different—whether lighter in weight, or simply more pliable—from the material which composes the other. The contention of the plaintiffs, in its final analysis, is that this does not need to be so; that all that is necessary is that the upper band shall be sufficiently yielding to be effective; and that the material of both bands, as well as the bands themselves, inherently and structurally, may be one and the same. But unfortunately this is not what the patent says, and, except as it can be made to do so, which it cannot, the defendants do not infringe.

Let a decree be drawn dismissing the bill on the ground of noninfringement, with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. SANGAMO ELECTRIC CO.

(Circuit Court, E. D. Pennsylvania. March 25, 1904.)

No. 47.

1. PATENTS—INFRINGEMENT—CONTEMPT—ADVICE OF ATTORNEYS.

On an application to punish defendant for contempt in selling a meter alleged to constitute an infringement of complainant's meter, in violation of an injunction, the fact that such sale was made under the advice of counsel that it did not infringe complainant's patent, while insufficient to protect defendant if it was in fact an infringement, would be considered in determining whether there was an intentional disregard of the injunction, tending to bring defendant into contempt.

2. SAME.

Where, on an application to punish defendant for contempt in violating an injunction restraining the sale of meters infringing complainants' patent, it appeared that but a single sale had been made by defendant since the injunction, and that was of a meter differing in form, if not in principle, from the one established by the decree as an infringement, and that complainant's object was to obtain an adjudication that the meter so sold was in fact an infringement, and such question could be fully litigated on the taking of the account, the motion to punish for contempt would be denied.

In Equity. Rule to show cause why the defendants should not be adjudged in contempt.

Kerr, Page & Cooper, for the rule.

Seward Davis and Charles A. Brown, opposed.

ARCHBALD, District Judge.* This does not impress me as a case in which to declare a contempt. But a single sale by the respondents is shown since the injunction, and that of a meter differing in form, if not in principle, from the one put in issue by the pleadings and proofs, and established by the decree as an infringement. There may be a suspicion of more from the enlargement of the respondents' works, which was made for the avowed purpose of manufacturing this class of meters. But whatever was done in that direction before the injunction, it is denied that there was anything after it, except in the one instance; and this, without further proof on the subject, we are bound to accept. The sale in question, also, was made under the advice of counsel that the disk form of meter did not infringe; and, while that would not suffice to protect it, if it were found that it did, it is at least to be considered in determining whether there was any intentional disregard of the order of the court, bringing the respondents into contempt. To hold that it does infringe, I have got to decide that the particular form of meter so manufactured and sold, though differing from the one directly in suit—having a disk instead of a cylinder as the armature, and the magnet poles being radially set—in reality is one and the same. Confessedly this is just what the plaintiffs seek. They do not so much care to vindicate the authority of the court as to get a decision that the meter to which in their recent manufacturing the Sangamo Company have preferably confined themselves—made according to the one of the forms shown in the Gutmann patent—adopts the principle and invades the terms of the patent in suit. But they have that now in the case against the Mutual Life Insurance Company, 129 Fed. 213, recently decided by Judge Hazel, where it was directly put in issue and passed upon. While I admit that I have awaited the disposition of that case with the general intention of following it, yet I find when brought to the point that I cannot escape by reason of it from considering and determining the question for myself, if I propose to go on and hold the respondents in contempt. And even if the evidence there introduced is to be regarded as before me by the production of the printed record, I should have to pass upon it without the aid of argument, which, to say the least, would be very unsatisfactory. A decision by me, to be of any value, must be an independent one, and have all the customary sanctions, persuasively assisted, it may be, by the views expressed by Judge Hazel, but that is all. Moreover, should the same conclusion be reached, the respondents would be found in contempt retroactively and constructively, and not according to the light which they had at the time; and this, by the aim of the plaintiffs, as already suggested, not so much for the purpose of upholding the decree of the court, as for its effect in the future on this and other cases. Under the circumstances, I do not deem it advisable to go into the question. When it comes to the taking of an account, it will be open to the plaintiffs to insist that a disk meter falls within the terms of the patent, the same as that where there is a cylinder. A large number of this construction were admittedly

* Specially assigned.

sold prior to the injunction, and, if this contention can be maintained, the respondents will have to answer for them. With the question squarely raised in that way, and with appropriate proofs upon it pro and con, it can be disposed of in an orderly and satisfactory manner. *Thomas & Sons v. Electric Porcelain Company (C. C.)* 114 Fed. 407. But I am not persuaded that it should be here.

The rule to show cause is discharged.

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court, S. D. New York. February 8, 1904.)

1. PATENTS—INFRINGEMENT—INJUNCTION—VIOLATION—PENALTY.

Where an injunction was issued against further infringement of a claim in a patent, and after violation of the injunction such claim was held invalid on appeal, the circumstance that the order was improvident in that it was based solely on the claim so held to be void would be considered in determining the penalty to be imposed for such violation.

2. SAME.

Where an interlocutory decree was entered sustaining a patent and holding that defendant's device infringed three claims numbered 2, 4, and 11, and an injunction was duly issued and served, which defendant violated pending appeal, on which claim 2 was held void, but the decree was affirmed as to claims 4 and 11, defendant was not entitled to claim on a motion to punish it for contempt in violating the injunction, that it did not know that its devices were condemned as infringements of claims 4 and 11, and that it was enjoined from further manufacture and sale thereof.

3. SAME—MOTIONS.

Where, on an application to punish defendant for contempt in violating an injunction restraining the infringement of a patent for an improvement in valves for air brakes, served on defendant's attorneys March 19, 1903, the affidavits alleged that an examination of the cars in which the infringing valves were found showed that the cars were dated April, 1903, and that some one "informed" one of the affiants that the cars were "set up" between March 23 and 28, 1903, and that affiant "was also informed," without stating by whom, that all of the braking equipments were delivered by defendant on August 28, 1902, such affidavits were insufficient to show a violation of the injunction.

Motion to Attach for Contempt.

See 113 Fed. 594; 121 Fed. 562; 123 Fed. 306, 632; 126 Fed. 764.

Fred'k H. Betts, for the motion.

Wm. A. Jenner, opposed.

LACOMBE, Circuit Judge. This motion has been kept under advisement, awaiting the determination of two appeals in this suit, which have now been decided. The result has greatly simplified the disposition of the questions raised here. The suit is for infringement of the Boyden patent, No. 481,134, for improvements in valves for air brakes. Infringement was charged of claims 2, 4, and 11. The suit was begun in August, 1900, and in the fall of 1901 a motion was made for a preliminary injunction. It was granted as to claim 2, but decision reserved as to claims 4 and 11, and in October, 1901, a writ of injunction against further infringement of claim 2 was issued and duly

served. In April, 1902, defendant sold four valves infringing said claim to the Boston & Maine Railroad Company. Knowledge of such sale having subsequently come to complainant, a motion was made to attach for contempt. It was granted January 21, 1903, and a fine was imposed. A writ of error to review such decision was sued out, and the Court of Appeals has within a few days dismissed the writ, holding that under the decision of the Supreme Court in the Debs Case it had no jurisdiction to review at that stage of the case. Meanwhile the main cause progressed, and on March 10, 1903, an interlocutory decree was entered sustaining the patent, and holding that the defendant's device infringed all three claims, 2, 4, and 11. Writ of injunction was duly issued and served, and defendant appealed. That appeal came on to be heard, and within a few days a decision has been handed down holding that, in view of the prior art, claim 2 is too broad, and therefore invalid, but affirming the Circuit Court as to claims 4 and 11.

The moving papers on this motion charge the defendant with the sale of some 30 or more infringing devices to the Denver & Northwestern Railroad Company. So far as the alleged sale was in violation of the preliminary order, the circumstance that such order was improvident, in that it was based solely upon a claim which has since been held void, is to be taken into account in determining the penalty for any such violation, and this court thinks it a sound exercise of discretion to decline to enter into an examination of the record to determine as to the fact of sale and as to whether the articles sold infringed that void claim. So far as the interlocutory decree is concerned, however, the situation is different. That decree enjoined articles made in infringement of claims 4 and 11. It was duly served, and defendant had full knowledge of its terms. In view of the fact that defendant sued out an appeal, prosecuted it, and in part succeeded, any suggestion that it did not know that its devices were condemned as infringements of claims 4 and 11, and that it was enjoined from further manufacture and sale thereof is absurd. But the moving papers are defective in that they fail to show a sale subsequent to the date when the interlocutory decree and injunction thereon was served upon defendant's solicitors, March 19, 1903. The affidavits show that an examination of the cars in which the alleged infringing valves were found showed that the "cars were dated April, 1903," and that some one "informed" one of the affiants that the cars were "set up" between the 23d and 28th of March, 1903; and that affiant "was also informed" (he does not state by whom) that all of the brake equipments were delivered by defendant on August 28, 1902. This is not sufficient to show a violation of the injunction on interlocutory decree forbidding manufacture and sale in infringement of the claims which have been sustained.

The motion is denied.

WESTINGHOUSE ELECTRIC & MFG. CO. V. JEFFERSON ELECTRIC
LIGHT, HEAT & POWER CO.

(Circuit Court, W. D. Pennsylvania. March 28, 1904.)

No. 13. •

1. RES JUDICATA—MUTUALITY OF ESTOPPEL—BURDEN OF PROOF.

To entitle a defendant to plead in bar a former judgment to which it was not nominally a party, on the ground that it in fact defended the action, it has the burden of showing that its part in the defense was open and known to the other party, so that the estoppel is mutual.

2. PATENTS—INJUNCTION AGAINST INFRINGEMENT—ELECTRIC MOTORS.

A preliminary injunction granted restraining infringement of the Tesla patents, Nos. 511,559 and 511,560, for an electric motor, and a method of transmitting electrical power, on prior adjudications sustaining the validity of said patents and admitted infringement by defendant.

In Equity. Suit for infringement of letters patent Nos. 511,559 and 511,560, relating to electric motors, granted to Nikola Tesla, December 26, 1893. On motion for preliminary injunction.

Kerr, Page & Cooper and T. W. Bakewell, for complainant.
Arthur Keithley, for respondent.

BUFFINGTON, District Judge. This is an application by the Westinghouse Electric & Manufacturing Company for a preliminary injunction against the Jefferson Electric Light, Heat & Power Company to enjoin infringement of Nikola Tesla patents, Nos. 511,559 and 511,560. These patents were sustained by the Circuit Court of Appeals for the Sixth Circuit, in the case of the Dayton Fan & Motor Company v. Westinghouse Electric & Mfg. Co., 118 Fed. 562, 55 C. C. A. 390, by Judge Archbald, sitting in the Eastern District of Pennsylvania, and by Judge Hazel, sitting in the Western District of New York. The Diamond Meter Company, the maker of the meter complained of, appears in the present case and resists the grant of a preliminary injunction. It is conceded the meter is an infringement of said patents. All the requisites to entitle the complainant to a preliminary injunction therefore appear. Putnam v. Keystone Co. (C. C.) 38 Fed. 234; Conover v. Mers, 3 Fish. Pat. Cas. 386, Fed. Cas. No. 3,123. The Diamond Meter Company, while conceding the general right of the complainant to an injunction by reason of the foregoing adjudications of these patents, contends it is relieved from the effect thereof by reason of an adverse decree against the complainant in a bill in equity brought by it against the Catskill Illuminating & Power Company (C. C. A.) 121 Fed. 831. Res adjudicata constitutes a valid defense, but the burden of establishing it rests on the respondent. 3 Robinson, §§ 983, 1046. Inasmuch as the Diamond Meter Company was not a party to or appeared on the record in that case, but bases its plea of estoppel and res adjudicata on the fact that it defended the same, the law is clear that such defense, in order to constitute an estoppel, must not only have been made by it, but it must have been done openly and to the knowledge of the other party, and this in order that the estoppel be mutual. La Croix v. Lyons (C. C.) 33 Fed. 439; Herman on Estoppel, p. 157; Bigelow on

Estoppel, p. 99; *Cramer v. Singer Mfg. Co.*, 93 Fed. 636, 35 C. C. A. 508; *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528; *Walker on Patents*, § 468; *Litchfield v. Goodnow*, 8 Sup. Ct. 210, 123 U. S. 550, 31 L. Ed. 199. Tested by these authorities, we think the Diamond Meter Company has not shown that its defense in the Catskill Case was openly made, and with the knowledge of the complainant, and that therefore such case is not *res adjudicata* as between it and the complainant. The facts were as follows: The latter filed a bill in equity against the Catskill Illuminating & Power Company charging infringement of these patents in the use of a Shaffer meter made by the Diamond Company. The Diamond Meter Company was not a party to the cause and did not appear on the record. On August 22, 1901, Judge Lacombe at circuit sustained the validity of the patents. Thereupon the complainant company, in the latter part of 1901, began suit against the Diamond Meter Company in the United States Circuit Court in Illinois charging infringement of these patents. On January 25, 1902, the solicitor for the meter company filed an answer, sworn to by the secretary of the company, in which it was stated:

"This defendant is not informed, save by the allegations in said bill of complaint, whether the alleged suit against the Catskill Illuminating & Power Company was begun, prosecuted, and decided as alleged in said bill of complaint. It therefore denies, on information and belief, that any such proceedings in manner and form alleged were had, and denies that it was formally agreed and undertaken to secure the said Catskill Company, not only against the expense of all legal proceedings in the said alleged suit, but also a loss by reason of any judgment for damages and profits which may be entered against defendant in said alleged suit. And this defendant, therefore, denies that it was privy to said alleged suit against said Catskill Company, and that all questions alleged to have been passed upon in said suit are *res adjudicata* as between the parties hereto."

On April 20, 1903, this suit was discontinued. On February 25, 1903, the decision of Judge Lacombe, reported at 110 Fed. 377 (C. C.), was reversed by the Circuit Court of Appeals (121 Fed. 831, 58 C. C. A. 167) on grounds which, as will be noted, were successfully met in the later cases in the Sixth and other circuits. On March 21, 1903, which was after the opinion of the Circuit Court of Appeals was announced, but before a reversing decree therein was entered, a letter was addressed by Mr. Seward Davis to Judge Wallace (who had sat in the case in the Court of Appeals), and to complainant's counsel, resisting an application to withhold sending down the mandate. In such letter this statement is made: "The grounds of complainant's counsel to you were the importance of the case to the complainant. On behalf of the defendants it is submitted that the matter is of still greater importance to the Diamond Meter Company, which is the manufacturer of the meter involved herein and which has defended the suit." In the present case affidavits are presented by the secretary of the Diamond Meter Company who made the affidavit to the answer in the Illinois case above noted, and by the solicitor who filed such answer, setting forth that the Diamond Meter Company assumed the defense of the Catskill Case. There is no allegation, however, in such affidavits, that the Diamond Company informed complainant it was defending the suit or authorized the

Catskill Company to do so. The only allegation in that respect is: "I am informed and believe that the said Catskill Company or its representative notified said complainant or its representative of that fact," and "that the said complainant, the Westinghouse Electric & Manufacturing Company, knew that the said Diamond Meter Company was making and conducting that defense." We have seen, however, that the defense of a suit by one not a party is not of itself sufficient to constitute the case *res adjudicata* as to such defending party. *La Croix v. Lyons*, *supra*, and case cited. The opponent must be informed of the fact; the estoppel must be mutual. It will be noted as above that there is no allegation the Catskill Company was authorized to notify complainant that the Diamond Meter Company was defending that case, or to place the Diamond Meter Company in that relation to it, or that the Diamond Company itself notified the complainant it was defending the cause. Moreover, there is no allegation that such notice as was given was conveyed to any officer of the complainant company whose relation was such that notice to him constituted notice to the company. Indeed, all the allegations made are consistent with the fact that the Diamond Company was simply defending the suit—a thing it could do without binding itself by the decree. And the letter of March 21, 1903, is in keeping with that view. It simply states the Diamond Meter Company had defended the suit, and the fact that one of the judges of the appellate court was then informed of that fact rather tends to show that the connection of the Diamond Meter Company had not been disclosed before. In view of the open and unequivocal stand the Diamond Meter Company took in the Illinois case, its sworn answer that the Catskill Case was not *res adjudicata* as to it, and the absence of all specific averment that the complainant was informed of its defense of the Catskill Case, we are of opinion the Diamond Company has not shown on this application that the matters here involved became as to it *res adjudicata* by the decree in such case. Such being the situation, the right of the complainant to an injunction is clear.

In view of the fact that the immediate issue of such injunction might work hardship to innocent users, we will, if desired, hear counsel as to form of decree before entering same.

DANCEL et al. v. GOODYEAR SHOE MACHINERY CO.

(Circuit Court, D. Massachusetts. March 14, 1904.)

No. 1,803.

1. SUBPENA DUCES TECUM—FEDERAL PRACTICE—TAKING DEPOSITIONS DE BENE ESSE.

A federal court has power to issue a subpoena duces tecum to compel the production of books or papers by a witness being examined *de bene esse* within the district, under Rev. St. U. S. § 803 [Comp. St. 1901, p. 661]; but such subpoena is not a matter of right, and may not be issued as such by the clerk, but only on an order of the court, made upon preliminary proof that the documents called for are in the possession of the witness, and are, *prima facie*, competent and material evidence in the case, although the court will not finally determine their materiality or

admissibility until the documents have been produced, and have been brought before it in proceedings to compel the witness to exhibit the same before the examiner.

2. SAME.

A notary public, before whom depositions de bene esse are to be taken, under Rev. St. U. S. § 863 [U. S. Comp. St. 1901, p. 661], has no power to issue a subpoena duces tecum to compel the production of books and papers by a witness.

3. SAME—LIMITATION ON POWER OF COURTS.

A party has no right, and a court no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is an infringement of a fundamental personal right guaranteed by the federal Constitution, and which the courts have always recognized in the exercise of power given them to compel the production of papers.

4. SAME—MATERIALITY OF DOCUMENTS—SUFFICIENCY OF SHOWING.

A general averment in a petition that a large number of books, records, and papers of a defendant, specified, are material and necessary for plaintiff's use in a suit, is not sufficient to authorize the issuance of a subpoena duces tecum to compel their production.

In Equity. Petition for subpoena duces tecum.

Roger Foster, for complainants.

Edwards H. Childs, Elmer P. Howe, and William A. Sargent, for defendant.

COLT, Circuit Judge. This is a petition for an order directing the clerk to issue a subpoena duces tecum under section 863 of the Revised Statutes [U. S. Comp. St. 1901, p. 661]. The material part of the petition is as follows:

"I. Your petitioners reside in the county of Kings and state of New York, and they are the complainants in a certain suit in equity against the Good-year Shoe Machinery Company, of Portland, Maine, otherwise known as the 'United Shoe Machinery Company, of Portland, Maine,' which is now at issue and pending in the Circuit Court of the United States for the Southern District of New York. The testimony of Elmer P. Howe, who is vice president and a director of said defendant, and of Sidney W. Winslow, who is president and a director of said defendant, together with the books and papers described in the prayer of the petition, is and are material and necessary for use in support of the case of the complainants in said suit.

"II. On November 20, 1903, the complainants caused to be duly served on Edwards H. Childs, Esq., solicitor for the defendant in said suit, a notice, in accordance with section 863 of the Revised Statutes of the United States, that the testimony of said Howe and of said Winslow, both of whom reside in the state of Massachusetts, would be taken before George Hogg, a notary public, at his office, No. 87 Milk street, in the city of Boston, county of Suffolk, and state of Massachusetts, on November 27, 1903, beginning at 10:30 a. m. on that day, and continuing from day to day until completed. The clerk for the Circuit Court for the District of Massachusetts has been requested to issue, sign, and seal a subpoena for said witnesses, but he has refused so to do. * * *

"III. Serious injury and damage will be caused to the complainants herein unless the clerk of the Circuit Court of the United States for the District of Massachusetts issues, signs, and seals such a subpoena, naming as a time for the attendance of said witnesses the day and hour to which said notary adjourns the taking of said deposition. No previous application for an order directing the clerk to issue such a subpoena has been made.

¶ 2. See Depositions, vol. 16, Cent. Dig. §§ 128, 127.

"Wherefore your petitioners pray that an order issue directing the clerk of the Circuit Court of the United States for the District of Massachusetts to issue under the seal of said court and to sign and to attest a subpoena directed to Elmer P. Howe, individually and as vice president of the Goodyear Shoe Machinery Company, of Portland, Maine, and to Sidney W. Winslow, individually and as president of the Goodyear Shoe Machinery Company, of Portland, Maine, which corporation is otherwise known as the 'United Shoe Machinery Company, of Portland, Maine,' directing them and each of them to attend before George Hogg, a notary public, of No. 87 Milk street, in the city of Boston, county of Suffolk, and state of Massachusetts at such time as may be appointed by said notary, and so on from day to day until their deposition is completed, then and there to be examined de bene esse in pursuance of the Revised Statutes of the United States, and then and there to testify and give evidence on the part of the complainants in a certain cause hereinbefore described, and directing them and each of them to bring with them and produce at the time and place aforesaid all books of account, minutes of meetings of stockholders, minutes of meetings of directors, minutes of meetings of committees, certificates of shares of stock, stock registers, stock ledgers, contracts and copies of the same, letter books, letters, and other papers of the Goodyear Shoe Machinery Company, of Hartford, Connecticut, and also all books of account, minutes of meetings of stockholders, minutes of meetings of directors, minutes of meetings of committees, certificates of shares of stock, stock registers, stock ledgers, contracts and copies of the same, letter books, letters, and other papers of the Goodyear Shoe Machinery Company, of Portland, Maine, and also all books and papers of the United Shoe Machinery Company that contain any reference to, and all that name, the Goodyear Shoe Machinery Company, of Hartford, Connecticut, and also all books and papers of the United Shoe Machinery Company that contain any reference to, and all that name, the Goodyear Shoe Machinery Company, of Portland, Maine, and all that name and all that refer to any machine manufactured under letters patent number 459,036, and also all such that refer to such letters patent, and that your petitioner may have such other and further relief in the premises as may be just; and your petitioners will ever pray," etc.

Attached to the petition is a copy of the pleadings in the case, also the affidavit of counsel that the allegations in the petition are true to his personal knowledge, and that the petition was not sworn to because the petitioners at the time were outside of the county of New York.

The granting of the petition is opposed on several grounds:

(1) The court has no power under section 863 to issue a subpoena duces tecum to compel the production of books and papers.

(2) If the court has the power, it should be exercised with regard to a reasonable protection of the witness, and only upon the preliminary proof required by section 869 of the Revised Statutes [U. S. Comp. St. 1901, p. 665].

(3) The papers on which this application is made are clearly insufficient respecting the requisite preliminary proof.

The first objection is untenable. The power of the court to order a subpoena duces tecum under section 863 has been unquestioned since the decision of Judge Choate in *United States v. Tilden*, 10 Ben. 566, Fed. Cas. No. 16,522. It has been recognized in this circuit by Judge Lowell in *Davis v. Davis*, 90 Fed. 791. The history of the statute is not repugnant to this construction, and its terms are broad enough to cover it. Convenience and necessity call for such a construction if possible. The only danger lies in an abuse of the power by a loose and unrestricted exercise of it.

The second objection presents the question whether a subpoena duces tecum should issue as of course, or only by order of court, upon preliminary proof that the documents are in possession of the witness and appear to be competent and material evidence in the case. Upon this point the position of the petitioners, as stated in the brief of counsel, is as follows:

"Ever since Judge Choate's opinion, 20 years ago, it has been the uniform practice in the federal courts throughout the country, except possibly in Massachusetts, for subpoenas duces tecum to be issued as of course, usually even without application to the court, when depositions were taken *de bene esse* before a notary in another state under Rev. St. U. S. § 863. Judge Lowell's decision seems to have settled the practice in this circuit; and we submit that it would be unfortunate, tend to mislead litigants and practitioners, and to waste the time of the court by needless motions and applications, if a different rule were to be adopted in this circuit from that followed by other federal courts. Usually the subpoena is not issued even by the clerk in such a case, but is signed and sealed by the notary (Loveland's Federal Forms, No. 23); but since the witnesses have disobeyed that signed and sealed by the notary, as is shown by his certificate, and the clerk has refused to issue one without authority from the court, an order of the court either punishing the witnesses for contempt, or directing an attachment against them, or directing the clerk to issue a subpoena duces tecum, is required."

It is contended in the first place that, since the witnesses have been served with a subpoena duces tecum issued by the notary public, the court may direct a writ of attachment against them for contempt. As the witnesses, however, have not disobeyed any process of this court, it manifestly has no power to punish them for contempt. Further, a notary public has no authority under section 863 to issue a subpoena. The statute says:

"Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court."

The natural and reasonable construction of this language is that, if the witness fails to comply with the notice in writing previously mentioned in the statute, he may be compelled to appear and testify in the same manner as witnesses in court may be compelled; that is, by a subpoena issued by the court of the district in which the testimony is taken. This has been the settled construction since *United States v. Tilden*, where the court said that those words—

"Refer to the instrumentalities then in force in the common practice of the courts for compelling the attendance and the testimony of witnesses, the writ of subpoena and the power to punish disobedience to a lawful order as a contempt. This is the practical construction which these words have received."

It is further contended that it is the universal practice outside of the district of Massachusetts for the clerk of the court to issue a subpoena duces tecum as of course. There is no authority cited which supports this proposition. This will appear from an analysis of the cases upon which the petitioners rely: *United States v. Tilden*, 10 Ben. 566, Fed. Cas. No. 16,522; *Davis v. Davis* (C. C.) 90 Fed. 791; *Bischoffsheim v. Brown* (C. C.) 29 Fed. 341; and *Edison Electric Light Company v. United States Electric Lighting Company* (C. C.) 44 Fed. 294; *Id.*, 45 Fed. 55.

In *United States v. Tilden*, it was decided (1) that the court has power under section 863 to issue a subpoena duces tecum, and (2) that

it has no power under this statute to issue such a subpoena to compel the production of books and papers for the purpose of refreshing the recollection of the witness. Upon the first point the court said:

"I have * * * reached the conclusion that under this section it is competent for the court to issue a subpoena duces tecum to compel the production, upon the examination, of books and papers which would be competent evidence in the cause."

It will be noticed that the court did not hold that it had the power by a subpoena duces tecum to call for the production of any papers, but only those which would be competent evidence in the case. It followed necessarily, from this limitation of the court's power, that a subpoena duces tecum should not issue as of course, but only under some restrictions, such as a prior investigation into the materiality of the evidence called for; and the court so held. This appears from the language of the opinion on the second point, denying the power of the court to compel the witness to produce papers for the purpose of refreshing his memory.

"But it certainly is a startling, and, I believe, a novel, proposition that a merchant, or broker, or banker may be subpoenaed to produce all his books of account and all his business papers during a period of 10 years, as, was substantially attempted in this case, upon a mere possibility that out of this mass of books and papers some might be found whereby he could refresh his memory, if it should, upon his examination, appear that his memory needed refreshing on some point on which he should prove to be able to give testimony competent in the cause. No precedent is produced for this exercise of power, nor has any statute or decision been found or cited which appears to recognize or authorize the compulsory production of books and papers for such a purpose; the same not being relevant or material to the cause. * * * It has been well pointed out that in such examinations, on account of the limited power of the examining magistrate, persons summoned for such examination have less chance of protection against the oppressive and injurious use of this power of the court than upon a trial in court, where all questions arising can be submitted to and decided by the court as they arise; and I am satisfied that the statute in question does not require a construction permitting such a compulsory production of a witness' books and papers. A very strong, if not a controlling, argument in support of this view is to be drawn from the terms of the statute of 1827 (Rev. St. §§ 868, 869 [U. S. Comp. St. 1901, pp. 664, 665]), above referred to. In providing for the regulation of this very matter in examinations under a commission or *dedimus potestatem*, it expressly limits the compulsory production of books and papers to such only as would be, 'if produced, competent and material evidence for the party applying therefor.' This is a legislative declaration of the highest possible character, as it seems to me, that this was as far as the policy of the law goes in the matter of compelling the production of books and papers on the examination of witnesses out of court, and all that substantial justice requires in this direction, having a due regard to the rights, the convenience, and the interests of other persons, as well as of the parties litigant. No reason can well be imagined for supposing that Congress would withhold from this class of examinations under commission, where the commissioners are appointed by the court, and the mode of interrogation is prescribed before the examination under the direction of the court itself, as full an authority to compel the production of books and papers by the witness as is allowed on an examination *de bene esse*, which is subject to less restriction and supervision. This act, therefore, seems to show that Congress understood that this was the limit allowed for the compulsory production of books and papers under the system of examinations *de bene esse* then in force."

This sound reasoning fully covers the point under consideration, and is directly opposed to the petitioners' position.

In *Davis v. Davis* an examination of the record on file in the clerk's office discloses that the subpoena duces tecum was not issued as of course, but only upon petition, supplemented by affidavits and a copy of the principal document referred to. This preliminary proof showed that the papers called for were in the possession of the witness, and that they were competent and material evidence in the case.

In *Bischoffsheim v. Brown* the only point determined was that section 724 of the Revised Statutes [U. S. Comp. St. 1901, p. 583], which relates to the production of documents by the parties in actions at law "on motion," does not apply to suits in equity. In the course of the opinion, Judge Wallace said:

"Parties to suits in equity, as well as in suits at law, are now competent witnesses in the courts of the United States by statute, and may now be examined at the instance of their adversary. As a witness a party can be compelled by a subpoena duces tecum to produce books, documents, and papers in his possession, the same as any other witness. *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201 [Fed. Cas. No. 9,448]. He is bound to obey the writ and be ready to produce the papers in obedience to the summons. Like any other witness, it is his duty to make reasonable search for the papers and documents required, if they are in his possession (3 Chit. Pr. 829); but, before he can be required to exhibit their contents, he is entitled to appeal to the discretion of the court, if any sufficient reason exists to protect him from a disclosure."

This is simply a statement of the rule that a party, like any other witness, may be compelled by subpoena duces tecum to produce books and papers. It has no bearing on the question now before the court.

In *Edison Electric Light Company v. United States Electric Lighting Company* (C. C.) 44 Fed. 294, a subpoena duces tecum had been issued, and the case was heard upon an application for an order to compel the production of the papers described in the subpoena, and the officers of the corporation were adjudged in contempt for failing to obey the writ. The case arose under equity rule 67. The subpoena called for the divisional application of a patent, and letters in relation thereto, in the hands of the complainant. After stating the theory upon which the defendant sought to make proof of these papers, and the argument urged in support of their materiality, Judge Lacombe, in his opinion, said:

"This argument deals, of course, with the materiality of the proposed evidence when produced, and to this motion, which is practically directed to securing its presence in court, the complainant objects that the evidence, if produced, would be immaterial. That question, however, should not be determined upon application to produce the papers. The court should pass upon it with the proposed evidence before it, so that it may act intelligently, and that an exception to its refusal to admit the testimony, should it so refuse, may be of avail to the exceptant upon appeal. If the only objection to admitting these documents in evidence be that they are immaterial, that objection is of no avail in opposition to an application which calls for their production. Without, therefore, finally determining the question as to the materiality of these documents, it is sufficient to say that, in view of the contract relations between Edison and the company, and of the rule of law as to the admissibility of a party's admissions, and in view of the effect accorded to such admissions in the case cited by the defendant (*Giant-Powder Co. v. California, etc., Co.* [C. C.] 4 Fed. 720), and, finally, in view of the contents of the documents as disclosed by the moving papers, there is not found in the objection as to the materiality of the evidence sufficient to warrant the refusal of the officers of the corporation to obey the subpoena duces tecum, and to produce

the documents, which are concededly in the hands of its counsel, subject to its orders, and under its control."

This case came before the court again, and is reported in 45 Fed. 55. After the headnote appears the following memorandum, filed by Judge Lacombe:

"The documents called for by the subpoenas have now been brought into court. In excuse for not delivering them to the examiner, it was urged that some further objection to their presentation in evidence is to be made, which counsel thought should be made, not before the examiner, who sits without power to rule upon objections, but before the court. The motion to punish for contempt is therefore denied. The papers are delivered to the examiner. When any one of them is called for by the defendant, if objection to its exhibition is made by counsel for complainant, the examiner will certify the objection to the court, and send therewith the document itself. Thereupon the court will rule upon the objection."

In the course of his opinion, upon the objection certified by the examiner, the court said:

"The authorities cited by the complainant do not go to the extent of holding that it is only by bill of discovery or similar method that some particular piece of documentary evidence is to be obtained. No doubt, when it is brought into court, the objection that 'it is against conscience and the spirit of Anglo-Saxon laws and liberty' to permit its inspection by the other side, or its introduction in evidence, may be urged, as it has been in this case, before the document is exhibited to any one but the court. But that the process of subpoena duces tecum is a convenient, efficient, and proper method for bringing the paper into court is beyond dispute in this circuit. * * *

"The subpoena (so far as the present objection is concerned) is specific. In this respect the case at bar differs from those cited by complainant's counsel. The defendant is not 'claiming the right to a general inquisitorial examination of all the books, papers, and documents of his adversary, with the view to ascertain if, perchance, something may be found which will possibly aid it'; nor is it asking 'before the hearing to pry into the case of its adversary,' nor 'to see in advance of the trial evidence which the other side are going to produce,' nor 'calling upon its adversary to exhibit for inspection anything and everything in writing under the latter's control, which may assist the defendant'; nor is this an 'unnecessary inquisition into the contents of private papers by one who has no interest in them.' No 'complete disclosure of everything the complainant knows or believes in relation to the matter in question' is sought for, nor is this a 'general fishing excursion.' A particular document, whose existence is well known to both parties, and in fact to the general public, is specifically called for. It is described with a fullness (by date, description, and serial number) which leaves no doubt as to its identity. * * *

"The objection to the materiality of the document called for was considered generally on the former motion. It has now been inspected by the court, and as the result of such inspection it is enough to say that it is sufficiently germane to the issues raised in this case to warrant its offer in proof, so that it may form part of the record (either as admitted or excluded evidence), which is to go to the Supreme Court."

The decisions in the Edison Electric Light Company Cases were, in effect, that the court would not determine finally the question of the materiality of the documents called for by a subpoena duces tecum upon the refusal of the witness to produce them. It did, however, examine this question so far as to decide that:

"There is not found in the objection as to the materiality of the evidence sufficient to warrant the refusal of the officers of the corporation to obey the subpoena duces tecum, and to produce the documents, which are concededly in the hands of its counsel, subject to its orders, and under its control."

It was further held that the only way the court could pass intelligently upon the question of materiality, in a final sense, was by having the evidence before it, and that the proper procedure was for the witness to object to the exhibition of the documents before the examiner, and for the examiner to certify the objection to the court, and send therewith the document, whereupon the court will rule upon the objection.

From this review of the cases relied upon by the petitioners, I find nothing to support or warrant the practice that a party may apply to the clerk for a subpoena duces tecum under section 863 to take testimony *de bene esse* before a notary public, and may, in his discretion, either fill in himself, or ask the clerk to fill in, a direction to the witness to produce before the magistrate whatever books and papers he sees fit to call for, and that the witness is bound to produce them at the time and place named, or render himself liable to punishment for contempt. Such a practice, in my opinion, would be a violation of the spirit, if not of the letter, of the constitutional provision which secures to the individual protection against unwarrantable searches and seizures of his private papers, and of the legislative expressions of Congress as embodied in the statutes relating to this subject, as well as of the general rule, which the courts have ever adhered to, of guarding witnesses against the unnecessary production and inspection of their private papers. It is to be borne in mind, in this connection, that the compulsory production of books and papers in court, where all questions as they arise can be submitted to and decided by the court, is very different from their compulsory production before a notary public under section 863, or an examiner under equity rule 67, where the magistrate has little power to afford protection to the witness. In the latter instance the practice cannot but lead to abuse, oppression, and injustice. The case at bar affords a good illustration of the evils which would result. We have here a subpoena duces tecum, signed by a notary public, directing the two witnesses named to produce before him substantially all the books of every nature of three corporations.

A party undoubtedly has the right to invoke the process of the court to compel the attendance of witnesses and the production of such papers as are material to his case; but neither the right of a party nor the power of the court extends beyond this. A party has no right, and the court has no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is unwarranted, and an infringement upon a fundamental personal right guaranteed by the federal Constitution. The courts have always recognized this protection to the individual, secured by our organic law. Such recognition is seen in the distinction which is made between a subpoena *ad testificandum* and a subpoena *duces tecum*. The former is a process of right, while the latter is addressed to the discretion of the court. Discretion here does not mean that the court has power to refuse the compulsory production of a paper which is material evidence in the case, but that, before compelling its production by a subpoena *duces tecum*, it will sufficiently inquire into the mat-

ter to determine if the evidence appears to be material, and, if not satisfied on this point, will decline to issue the writ.

An important discussion of this subject is found in the report of the trial of Aaron Burr. The counsel for the defendant in that case moved the court for a subpoena duces tecum, directed to the President of the United States, calling for the production of certain papers. Mr. Wirt, in opposing the motion, said:

"The subpoena ad testificandum is a matter of right, and the prisoner might have demanded it from the clerk without the intervention of the court; but here is a motion for a subpoena duces tecum, to compel the President to produce certain papers of state, the materiality of which is not shown. I shall contend, first, sir, that the subpoena duces tecum is not a process of right, that the motion for it is a motion addressed to the discretion of the court, and that the court may award or withhold it as they see fit. In the next place, I shall contend that this discretion of the court should be controlled and determined only by the relevancy and materiality of the papers required."

Mr. Wickham, counsel for the defendant, interrupting Mr. Wirt, said:

"We admit that it is an application to the sound discretion of the court."

Chief Justice Marshall, in deciding the motion, said:

"This is said to be a motion to the discretion of the court. This is true."

In proceeding to discuss the nature of this discretion, the Chief Justice said:

"But the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material to his defense. * * * If it be apparent that the papers are irrelative to the case, or that, for state reasons, they cannot be introduced into the defense, the subpoena duces tecum would be useless. But if this be not apparent, if they may be important in the defense, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country if, in a case of such serious import as this, the accused should be denied the use of them?"

See Robertson's Report of Burr's Trial, vol. 1, pp. 136, 137, 182, 183, 184; Dillon's John Marshall, p. xxxviii, and note. For an instructive review of this general question, see Judge Cooley's Inviolability of Telegraphic Correspondence, 27 Am. Law Reg. 65, and Hitchcock's Inviolability of Telegrams, 2 Am. Bar Ass'n Rep. p. 93.

In all cases where Congress has legislated on this subject, it has recognized the distinction between a subpoena ad testificandum and a subpoena duces tecum, and has carefully restricted the issuance of the latter process.

Section 724 of the Revised Statutes provides that in the trial of actions of law the courts may, "on motion and due notice thereof," require the parties to produce books or writings which contain pertinent evidence "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." Section 868 provides that, when a commission is issued for taking the testimony of a witness, the clerk shall issue a subpoena on application therefor. Section 869 provides that, when either party applies to any judge for a subpoena commanding the witness to produce papers or books in his possession, the judge, "on being satisfied, by the affidavit of the person applying or otherwise" that the paper

is in the witness' possession, and that the same, if produced, would be "competent and material evidence for the party applying therefor," may "order the clerk" to issue the subpoena.

These declarations by Congress are of the highest importance. They indicate the policy which the federal courts should follow in this important matter. Conceding that the courts have power to compel the production of books and papers under section 863, it cannot for a moment be presumed that Congress intended to authorize the exercise of such power, except under regulations and restrictions similar to those imposed by section 869. As was said in *United States v. Tilden*:

"This act, therefore, seems to show that Congress understood that this was the limit allowed for the compulsory production of books and papers under the system of examinations *de bene esse* then in force." 10 Ben. 581.

For these reasons, I am of opinion that the settled practice of this circuit is correct, and that a subpoena duces tecum should not issue, either under section 863 or equity rule 67, except by order of court, upon preliminary proof that the documents called for are in the possession of the witness and are *prima facie* competent and material evidence in the case. The court will not finally determine the question of materiality on such application, but it must be reasonably satisfied that the evidence is relevant and material.

The present application is wholly insufficient respecting the necessary preliminary proof. Upon the mere allegation that the evidence "is material and necessary for use in said suit," it asks that the two witnesses named, who are, respectively, the president and vice president of the defendant corporation, be ordered to produce—

"All books of account, minutes of meetings of stockholders, minutes of meetings of directors, minutes of meetings of committees, certificates of shares of stock, stock registers, stock ledgers, contracts and copies of the same, letter books, letters, and other papers of the Goodyear Shoe Machinery Company, of Hartford, Connecticut, and also all books of account, minutes of meetings of stockholders, minutes of meetings of directors, minutes of meetings of committees, certificates of shares of stock, stock ledgers, stock registers, contracts and copies of the same, letter books, letters, and other papers of the Goodyear Shoe Machinery Company, of Portland, Maine, and also all books and papers of the United Shoe Machinery Company that contain any reference to, and all that name, the Goodyear Shoe Machinery Company, of Hartford, Connecticut, and also all books and papers of the United Shoe Machinery Company that contain any reference to, and all that name, the Goodyear Shoe Machinery Company, of Portland, Maine, and all that name and all that refer to any machine manufactured under letters patent No. 459,036, and also all such that refer to such letters patent."

To compel these witnesses, upon the proof submitted, to bring before the examiner this mass of private books and papers, would be an oppressive, if not an unconstitutional, use of the power of the court, and an abuse of its process.

Petition denied, without prejudice to the filing of another petition in conformity with this opinion.

SWIFT v. UNITED STATES.

(Circuit Court, D. Massachusetts. April 6, 1904.)

No. 856.

1. FEDERAL COURTS—MARSHALS—BAILIFFS—PAY.

Rev. St. § 715 [U. S. Comp. St. 1901, p. 579], authorizes the appointment of bailiffs for the Circuit and District Courts, not exceeding five for each court; and Sundry Civil Appropriation Act March 2, 1895, c. 189, 28 Stat. 958 [U. S. Comp. St. 1901, p. 2590], provided for the pay of bailiffs and criers, not exceeding three bailiffs and one crier "in each court." *Held*, that the words "in each court," in the appropriation act, referred to the Circuit and District Courts mentioned in section 715, and not to occasions when the business of such courts is transacted by one judge holding both courts at the same time and place, and hence the marshal was entitled to allowance for per diem compensation paid to additional bailiffs in excess of three, but not exceeding six, in attendance on the Circuit and District Courts on days when such courts were held by a single judge at the same time.

2. SAME—PAY AS DEPUTY MARSHALS.

Bailiffs are not entitled to pay for attendance on the court for the same days on which they also attended court as deputy marshals, and thereby earned a fee of \$5 each for the marshal, under Rev. St. § 1765 [U. S. Comp. St. 1901, p. 1207], providing that no officer in any branch of the public service shall receive any additional pay, in any form whatever, and for any other service or duty whatsoever, unless authorized by law; the main duties of bailiffs and deputy marshals being the same.

3. SAME.

The restriction of three bailiffs to each court in the sundry civil appropriation bill relates only to the payment of bailiffs from the amounts appropriated for that purpose during the several years in which the restriction was inserted, and did not repeal Rev. St. § 715 [U. S. Comp. St. 1901, p. 579], authorizing five bailiffs for each court; and where, by order of the court, four bailiffs were employed in charge of the jury on two successive Sundays during the trial of a case, the marshal was entitled to an allowance for all four.

4. SAME—SERVING SUBPENAS—EXPENSES.

Where bailiffs were appointed to attend on the juries and "for other necessary purposes," as authorized by Rev. St. § 715, and, it appearing that all deputy marshals were otherwise employed, and certain witnesses were required in court, the marshal authorized the bailiffs to serve the subpoenas, which, under the state laws, any disinterested person might do, the marshal was entitled to the allowance of the expenses of such bailiffs in serving the subpoenas, under Rev. St. § 830, authorizing payment of the marshal's expenses for "contingencies that may accrue in holding the courts."

5. SAME—EXPENSES IN CIVIL CASES.

Where a marshal paid expenses incurred in civil cases out of the appropriations for marshal's fees and expenses, and thereafter the marshal collected the amount from the parties to the suits, and paid the same to the clerks of the courts, who thereupon paid it into the United States Treasury, and, the payments from the appropriation being disallowed, the marshal was again compelled to pay the same into the Treasury of the United States to the credit of the appropriation, he was entitled to recover the amount so paid from the United States.

6. SAME—OFFICERS IN CHARGE OF PRISONERS AND WITNESSES—MEALS.

The expenses paid by a marshal for meals of officers in charge of prisoners and witnesses in custody are allowable under Rev. St. § 830 [U. S. Comp. St. 1901, p. 639], authorizing the payment by the marshal of expenses for "other contingencies which may arise in the courts."

7. SAME—TRIAL OF OFFENDERS—STENOGRAPHERS—EMPLOYMENT—AUTHORITY OF ATTORNEY GENERAL.

A United States attorney on the eve of the trial of an offender requested authority from the Attorney General to employ a stenographer to take the testimony for \$10 per diem if the report was not transcribed, and, if transcribed, 25 cents per folio of 100 words, with no per diem, and, if part transcribed, proportion of per diem deducted. The Attorney General authorized employment at \$10 per diem, or 25 cents per folio if testimony was transcribed. The stenographers rendered a bill for nine per diems, which was paid by the marshal, and thereafter, on request, the stenographers furnished the United States attorney a transcript of the testimony for one whole day and two half days, and rendered a bill therefor containing a credit of \$20 for the per diem compensation for the time of taking the testimony which was so transcribed, which was allowed. *Held*, that a disallowance of \$70 for the per diems spent in taking the evidence not transcribed, on the ground that the Attorney General required the United States attorney to have and pay for transcribing the evidence on the entire trial in case he required a transcript of any of the testimony, was erroneous.

Henry W. Swift, pro se.

Henry P. Moulton, U. S. Atty.

COLT, Circuit Judge. This is a suit by Henry W. Swift, United States Marshal for the District of Massachusetts, to recover from the United States certain disbursements made by him, which, in the settlement of his accounts, were disallowed by the Comptroller. The case was heard on petition, answer, and agreed statement of facts.

The first item was a disallowance of \$54 paid as a per diem compensation for certain additional bailiffs, in excess of three in number, and not exceeding six altogether, who were in attendance upon the Circuit and District Courts on days when only one judge was present, and held both courts at the same time. The disallowance occurred during the quarter ending September 30, 1895. The position of the government is based upon the Comptroller's construction of the following provision in the sundry civil appropriation act of March 2, 1895: "For pay of bailiffs and criers, not exceeding three bailiffs and one crier in each court. * * *" Act March 2, 1895, c. 189, 28 Stat. 958 [U. S. Comp. St. 1901, p. 2590]. In construing this provision, the Comptroller said:

"In my opinion, the words 'in each court,' in the appropriation, do not refer to the Circuit and District Courts when presided over at the same time by the same judge, but refer to cases where different judges are sitting at the same time in different places, and holding either circuit or district courts, or separate divisions of either of those courts, for in such cases each judge is practically holding a separate court. This view seems to accord with the principle established in *United States v. King*, 147 U. S. 676-682 [13 Sup. Ct. 439, 37 L. Ed. 328]." 2 Comp. Dec. 634.

Section 715 of the Revised Statutes [U. S. Comp. St. 1901, p. 579] authorizes the appointment by the marshal of bailiffs for the Circuit and District Courts, not exceeding five for each court. The effect of the foregoing provision in the appropriation acts of 1895 and the years following was to limit the number of bailiffs to three for each court, who should be paid from the appropriation for those years. The words "in each court" manifestly refer to the Circuit and Dis-

strict Courts mentioned in section 715. They may also be held, by construction, to refer to different divisions of the same court, and also to the Circuit Court of Appeals. But there is nothing in this provision to justify the ruling that "each court" has reference to occasions, when the business of the Circuit and District Courts is crowded upon one judge holding both courts at the same time and place. *Puleston v. United States* (D. C.) 88 Fed. 970, 977.

United States v. King, upon which the Comptroller relies, lends no support to his position, but is rather antagonistic to it. That case held that, while a clerk was not entitled to two per diems under sections 828, 831, Rev. St. [U. S. Comp. St. 1901, pp. 639, 640], when the Circuit and District Courts sit at the same time, he was entitled to two per diems when the court sits in different places, since the words "at the same time" in section 831 should, by construction, "be limited to cases where the court sits not only at the same time, but at the same place." 147 U. S. 676, 682, 13 Sup. Ct. 439, 37 L. Ed. 328.

The Comptroller's position is not only unsupported by the statute or by any authority, but the argument or reason on which it rests, that only three bailiffs are necessary under the circumstances, has little force. The duties of bailiffs are not limited to mere attendance upon the sessions of the courts, since section 715 specifically declares that they are to attend upon the grand and other juries, and "for other necessary purposes." The attendance of the bailiffs upon the grand jury, which may be in session for a week or more at different times, or upon the petit jury when they retire to consider their verdict, necessitates their absence from the courtroom at the same time the court remains in session for the transaction of business. If the duties of bailiffs were limited to the maintenance of order in the court while in actual session, there might be some weight in the argument that only three bailiffs are necessary when both courts are held at the same time by one judge.

There is a confused notion underlying the government's position that the claim of six bailiffs to a single per diem each when both courts are held at the same time and place is the same as the claim of three bailiffs to double per diems when both courts are held at the same time and place. The two cases are, however, radically different. While Congress has carefully guarded against the receipt by the same officers of two per diems, it has not by any legislation denied the payment of a single per diem to such officers. The provision in section 715 that, "when both courts are in session at the same time," the bailiffs are only to be paid "for attendance on one court," like the provision in section 831 [U. S. Comp. St. 1901, p. 640], relates to double compensation to the same officers, and has no bearing on the question now under consideration.

The appropriation act of 1895 permits three bailiffs each for the Circuit and District Courts. When three bailiffs attend upon the two courts in obedience to the orders of adjournment and in conformity with their duty, their compensation of \$2 a day should not depend upon the accident of the presence of one or two judges upon the adjourned day. Such a ruling is clearly unjust, and should only be upheld when the statute admits of no other construction.

The position in which the law respecting the payment of bailiffs would stand by the adoption of this ruling of the Comptroller may be illustrated as follows: On Monday, in Boston, the circuit judge holds a session of the Circuit Court, and the District Judge holds a session of the District Court, and each court is adjourned to meet on Tuesday morning at 10 o'clock. On Tuesday the six bailiffs, in obedience to the orders of adjournment, are in attendance upon the courts.

(1) It may happen that no judge is present on this day, and both courts are adjourned to the following day upon the written orders of the judges, under sections 583 and 672 of the Revised Statutes. In such a case the six bailiffs are entitled to their per diems. *United States v. Pitman*, 147 U. S. 669, 13 Sup. Ct. 425, 37 L. Ed. 324; *United States v. McCabe* (C. C.) 122 Fed. 653; 3 Comp. Dec. 522.

(2) It may happen that only the district judge is present on this day, and holds the District Court, and that the Circuit Court is adjourned upon the written order of the judge, under section 672 [U. S. Comp. St. 1901, p. 546]. In that case the six bailiffs are entitled to their per diems.

(3) It may happen that only the district judge is present on this day, and that he first opens the District Court for the transaction of business, then adjourns that court, and then opens the Circuit Court for the transaction of business, and adjourns it. In that case, there being a separate session of each court at different times, the six bailiffs are entitled to their per diems.

(4) Instead, however, of opening and adjourning each court separately, the district judge may open both courts at the same time, and proceed with the transaction of the business in both courts, and at the close of the day adjourn both courts until the following day. Under these circumstances, notwithstanding the six bailiffs are in attendance in obedience to the previous orders of adjournment, and notwithstanding their services may be required for attendance upon the grand jury, or for other necessary purposes, it is maintained that it is the duty of the marshal to inform three of the bailiffs that their services are not necessary, and that, under the law, he cannot pay them for attendance on this day.

A construction of the law which will lead to such results cannot be adopted in the absence of clear and unmistakable legislation by Congress.

The disbursements covered by this item were proper, and should have been allowed in the marshal's account.

The second item was a disallowance of \$848 paid to bailiffs for attendance on court for the same days on which they also attended court as deputy marshals, and thereby earned a fee of \$5 each for the marshal. The disallowance was on the ground that a deputy marshal who represents the marshal in court, and earns for him a per diem fee of \$5, cannot at the same time be allowed payment for services as bailiff. 2 Comp. Dec. 438, 530.

In *United States v. Saunders*, it was held that a clerk in the office of the President of the United States, who was also the clerk of a committee of Congress, was entitled to receive the compensation al-

lowed by law for each office. The court declared that sections 1763, 1764, and 1765 of the Revised Statutes [U. S. Comp. St. 1901, pp. 1205, 1206, 1207] had no application to the case of two distinct offices, each with its own duties and compensation, and that both might be held by the same person at the same time. 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594. In *Preston v. United States* (D. C.) 37 Fed. 417, it was held that, under the rule laid down in *United States v. Saunders*, there was no incompatibility between the offices of crier and messenger of the courts, and that the same person might perform the duties and receive the compensation attached to both offices. In that case it was said the evidence showed that the two duties—messenger and crier—were not only compatible, but were distinct in their character, and that one duty was in no wise connected with or in continuation of the other. In *Dill v. United States* it was held that a marshal is entitled to fees for attendance by deputy at examination before a commissioner, though the deputy was paid as bailiff for attendance the same day upon the District Court and the Circuit Court. The decision in that case was put upon the single ground that similar claims had been uniformly allowed by the accounting officers of the government. 78 Fed. 618. Upon the same ground the Circuit Court of Appeals sustained the decision of the Circuit Court. *United States v. Dill*, 86 Fed. 79, 83, 29 C. C. A. 586. Upon the authority of the foregoing cases, it was held in *Lovering v. United States* that a marshal is entitled to charge for the attendance of a deputy before a United States commissioner, though the same person is paid the same day for attendance as bailiff before the District and Circuit Courts. 117 Fed. 565.

In my opinion, the offices of deputy marshal and bailiff are not so distinct, compatible, and disconnected as to bring them within the principle of *United States v. Saunders*, *supra*, and *Preston v. United States*, *supra*. The bailiffs perform the same duties as deputy marshals, although the latter are clothed by law with some additional powers. The main duties of bailiffs are to attend upon the sessions of the court and upon the juries, and the same duties fall upon the deputy marshals. The services performed by both classes of officers when the court is in session are practically identical. The convenience of the court and the orderly conduct of business requires that the same person shall not fill both offices at the same time. Nor should the same person be permitted to fill both offices on the same day, and thereby obtain additional compensation. There is nothing in the statutes which shows that Congress intended to sanction such a practice. On the contrary, it would seem to conflict with those provisions which forbid double or additional compensation to the same officer. Sections 715, 831, 1765 [U. S. Comp. St. 1901, pp. 579, 640, 1207]. For these reasons, the ruling of the Comptroller as to this item must be affirmed.

The third item was a disallowance of \$4 for the payment of a per diem compensation for one bailiff on two successive Sundays during the first trial of the case of *United States v. Bram*. By order of court, four bailiffs were employed in charge of the jury on those days. This disallowance rests on the theory that under section 715, as mod-

ified by the sundry civil appropriation bill, only three bailiffs can be allowed for each court. This theory is clearly untenable. The restriction of three bailiffs to each court in the sundry civil appropriation bills only relates to the payment of bailiffs from the amounts appropriated for that purpose during the several years in which that restriction was inserted, and does not repeal the provision in section 715, Rev. St. [U. S. Comp. St. 1901, p. 579], which authorizes five bailiffs for each court. *Puleston v. United States* (D. C.) 88 Fed. 970, 977; *United States v. Aldrich*, 58 Fed. 688, 7 C. C. A. 431.

The fourth item was a disallowance of \$36 for expenses of bailiffs in serving subpoenas upon witnesses in cases in which the United States was a party, between July 1, 1896, and June 30, 1897. With respect to this item, it appears that the witnesses were required in court, and that, all the deputy marshals being otherwise employed, the marshal requested and authorized the bailiffs to serve process. In Massachusetts any disinterested person may serve a subpoena. Rev. Laws Mass. c. 175, § 2. By Rev. St. § 715 [U. S. Comp. St. 1901, p. 579], the bailiffs are appointed to attend upon the juries "and for other necessary purposes." Upon the state of facts presented, I think this item fairly comes within the marshal's expenses for "contingencies that may accrue in holding the courts," mentioned in section 830, Rev. St. [U. S. Comp. St. 1901, p. 639]. This item should have been allowed.

The fifth item was a disallowance of \$84.77 for payments made by the marshal for expenses actually incurred in civil cases out of the appropriations for marshal's fees and expenses. Subsequently the marshal collected this amount from the parties to the suits, and turned it over to the clerks of the courts, who thereupon paid it into the Treasury of the United States. The payments from the appropriation were disallowed on the ground that they were paid for expenses in civil cases out of the appropriation in question, when they should have been paid by the parties to the suits; and accordingly the marshal was called upon to pay the amount a second time into the Treasury of the United States, to the credit of the appropriation. It is not denied that the amount was paid by the marshal twice—once to the clerks of the federal courts, and once to the Treasurer of the United States. Under the circumstances, the marshal plainly has a right to recover this sum from the United States, and I do not understand that the government seriously contests this claim. The item is allowed.

The sixth item was a disallowance of \$128.82 for meals of officers in charge of prisoners and witnesses in custody. The expense was incurred during the fiscal year ending June 30, 1898, chiefly for payments for meals of officers during the second trial of *United States v. Bram*. These expenditures were necessary and proper, and come within the provision of section 830, already cited, which authorizes the payment by the marshal of expenses for "other contingencies which may arise in holding the courts." *Campbell v. United States*, 65 Fed. 777, 13 C. C. A. 128; *Donahower v. United States* (C. C.) 77 Fed. 153, 160; *United States v. Dill*, 86 Fed. 79, 29 C. C. A. 586. This item is allowed.

The seventh item was a disallowance of \$70 in the account for the quarter ending December 31, 1898. The amount was paid to Rogers & Jones, stenographers, as per diem compensation for services during the trial of United States v. Jewett. The authority to incur the expense for this service was contained in a letter from the Attorney General to the United States attorney. On the second of December, 1898, the United States attorney sent the following telegram, requesting authority:

"Boston, Dec. 2, 1898.

"Attorney General, Washington, D. C.: Trial of Jewett begins Monday. If verdict guilty case goes to Court of Appeals. Stenographic report of trial necessary. Authority requested to employ stenographer for ten dollars per diem if report not transcribed; if transcribed twenty-five cents folio of one hundred words, no per diem; if part transcribed proportion of per diem deducted.

Boyd B. Jones, U. S. Attorney."

The replying authorization of the Attorney General reads as follows:

"Washington, D. C., Dec. 3, 1898.

"United States Attorney, Boston, Mass.: Employment stenographer case against Jewett authorized at ten dollars per diem or twenty-five cents per folio if testimony transcribed, charge per folio to include necessary carbon copies.

John W. Griggs."

In accordance with this authority, a bill was rendered by the stenographers for nine per diems at \$10 each, and payment was made by the marshal accordingly. Afterwards, upon request, for use in preparing the record for the Circuit Court of Appeals, the stenographers furnished the United States attorney with a transcript of the testimony for one whole day and two half days. The bill rendered for this latter service contained a credit of \$20, the same being the per diem compensation for one whole day and for two half days. This bill was allowed, but the \$70 paid the stenographers as a per diem compensation for work on days when the notes were not transcribed was disallowed. "The disallowance," in the words of the district attorney, "was based upon the theory that the authority of the Attorney General required the United States attorney to have and pay for transcribing the evidence of the entire trial in case he required the transcript of even an hour's testimony, or, in other words, the authority required the United States attorney to incur an expense of about \$70 a day for nine days' transcribing, when such expense for two days and a per diem of \$10 for seven days would answer the required purposes." Upon this state of facts, it is clear that this item should have been allowed.

A decree may be prepared in accordance with this opinion.

ILLINOIS CENT. R. CO. v. CAFFREY et al. BALTIMORE & O. S. W. R.
CO. v. WASSERMAN et al. CLEVELAND, C., C. & ST. L. RY.
CO. v. SAME. LOUISVILLE & N. R. CO. v. SAME.

(Circuit Court, E. D. Missouri, E. D. March 19, 1904.)

Nos. 4,865, 4,878, 4,904, 4,905.

1. INJUNCTION—JURISDICTION OF EQUITY—RESTRAINING BROKERS FROM DEALING IN NONTRANSFERABLE RAILROAD TICKETS.

A court of equity has jurisdiction of a suit by a railroad company, which issues, and has the lawful right to issue, excursion or reduced rate round-trip tickets to passengers, conditioned that they shall not be transferable, to enjoin defendants, who are ticket brokers, from purchasing the unused return portions of such tickets and reselling them to others, to be used in violation of their terms, where it is shown that such action by defendants is in violation of the laws of the United States and of the state, that they are engaged in the ticket brokerage business and have previously bought and resold such tickets, and facts are alleged which make it certain that, unless enjoined, they will continue to do so to a larger extent than before, in fraud of both purchasers and complainants, and to the irreparable injury of complainants, because of the inadequacy of any remedy at law.

2. EQUITY—MULTIFARIOUSNESS OF BILL—JOINDER OF DEFENDANTS.

A bill will not be held demurrable for multifariousness because a large number of persons, having no connection with each other, are joined as defendants, where the cause of action against each is the same, and the joinder will save a multiplicity of suits and promote the convenience of the court and of all parties.

In Equity. On demurrers to bills.

McKeighan & Watts, for plaintiff Illinois Cent. R. Co.

Johnson & Richards and Chas. Claflin Allen, for plaintiff Baltimore & O. S. W. R. Co.

George F. McNulty and Seddon & Holland, for plaintiff Cleveland, C., C. & St. L. Ry. Co.

Bryan & Christie, for plaintiff Louisville & N. R. Co.

Henry W. Bond and Judson & Green, for defendants.

THAYER, Circuit Judge. The above-entitled cases are bills in equity, which were exhibited by the four railroad companies above named against the same defendants, who are engaged in the same business; the object of the complainants being to obtain injunctive relief of the same character against all of the defendants. The defendants have filed demurrers to each of the four bills of complaint, attacking them on the same grounds, and the question to be determined is whether the demurrers shall be overruled or sustained. It becomes necessary, therefore, to state the material allegations of the bills of complaint as briefly as may be done. They contain substantially the same allegations. They aver, in substance, that the several railroad companies are common carriers of passengers, operating lines of railroad radiating from the city of St. Louis, Mo.; that the defendants are ticket brokers, or, as they are sometimes termed, "scalpers," having

offices in the city of St. Louis, where they are engaged in the business of buying and selling railroad tickets, and more especially the unused portions of excursion or special rate tickets, such as the railroads are in the habit of issuing to enable persons to attend conventions, fairs, expositions, etc., at reduced rates of fare for the round trip; that the several railroads make a practice of issuing such tickets, on condition that they shall only be used by the original purchaser, and shall not be transferred to others for the purpose of being used to obtain transportation over the complainants' roads; that the complainants issued a large number of such tickets on the occasion of a musical festival held in the city of St. Louis in June, 1903, and that the defendants advertised to buy, and did in fact buy, the unused portions of large numbers of such tickets, and sold them to others to be used for transportation over the complainants' roads, to their great loss and injury; that an exposition is to be held in the city of St. Louis during the present year, and that complainants contemplate the issuance of a large number of excursion tickets at reduced rates, which will be nontransferable, to enable a large number of persons to visit the exposition and various conventions which will be held in connection therewith; and that by reason of the very large number of persons who will purchase said tickets it will be impracticable and a great public inconvenience to require the original purchasers of such nontransferable tickets to go before a validating agent and identify themselves before using the return coupons. The bills further allege that, besides issuing excursion tickets in the manner aforesaid, they also issue nontransferable mileage tickets and commutation tickets at reduced rates, all of which by their terms are nontransferable; that all such nontransferable reduced rate tickets are issued by the complainants in conformity with the laws of the state of Missouri and the laws of the United States and other states where the complainants' roads are located; that all such tickets are by their express terms and provisions good for the transportation of the original purchasers thereof only, and are void in the hands of any other than the original purchasers, and, if presented by any other than the original purchasers, are liable to be taken up by the train conductor and full fare exacted from the persons who are wrongfully attempting to use them; that the sale by the defendants of all such nontransferable tickets is contrary to the provisions of the laws of the state of Missouri, where the sales are made; that the sale of such tickets to third parties is also in violation of the provisions of the interstate commerce act, when the unused portion of a ticket is sold to a person who contemplates using the same for an interstate journey; that the conduct of the defendants in purchasing and selling such nontransferable tickets is not only in violation of the laws of the state of Missouri and the United States, but is likewise a fraud on the purchaser of the ticket and a fraud on the complainant companies, in that it subjects a person who may have purchased the unused portion of a ticket, in the belief that he has the right to use it, to the liability of being ejected from the complainants' trains, and in that the conductors and agents of the complainants are liable to be deceived, and to permit persons who have bought nontransferable tickets to ride thereon, thus depriving the complainants of a rate of fare which they are justly entitled to exact.

The bills further aver that the defendants have been accustomed to buy and sell the return coupons of nontransferable tickets, and all forms of mileage, commutation, and excursion tickets, such as are sold at reduced rates and are not transferable, to persons whom they know will use the tickets so bought to secure a passage over the complainants' roads, by falsely impersonating the original purchasers of said tickets, and that the defendants have not only repeatedly sold such tickets with full knowledge of their character, and that they were not transferable, but propose to continue in future to purchase and sell such tickets, thereby continuing to defraud the complainants by deceiving their conductors and other employes, and that such unlawful and fraudulent conduct on the part of the defendants operates as a continuous loss to complainants and inflicts irreparable injury. There are some other averments in the bills of a like character, but the allegations already recited in substance will serve sufficiently to explain their scope and purport.

The sufficiency of the bills of complaint is challenged on two grounds, namely, want of equity and multifariousness. Respecting the first of these defenses, it is to be observed that, when a court of equity is asked to enjoin the commission of a threatened act in the nature of a tort, the first inquiry is whether the act, if committed, will constitute a legal wrong; that is to say, whether it is so far wrongful that an action at law will lie to recover the damages thereby occasioned to the complaining party, or whether the threatened act belongs to the class to which the phrase "*damnum absque injuria*" may be applied. *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 918, 28 C. C. A. 99. In the case at bar it does not seem to be seriously urged that the bills of complaint do not show that a legal wrong is threatened. If such a plea was urged by the defendants, it would have to be overruled. The complaining parties have the right to sell round-trip and commutation tickets over their respective roads at reduced rates, on condition that they shall only be good in the hands of the original purchasers and shall not be transferred. Contracts of this sort between a carrier and its passengers are lawful. *Mosher v. St. Louis, Iron Mountain & Southern Railway Co.*, 127 U. S., 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Boylan v. Hot Springs Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290. The statute law of the state of Missouri also expressly authorizes the sale of such tickets. *Vide Rev. St. Mo.* 1899, § 1127. Now the bills show that the defendants have been interfering with the exercise of this right, are doing so at the present time, and that they threaten to do so in the future. They further show that such interference with the exercise of the right in question is productive of great loss and damage, amounting almost to a deprivation of the right. The defendants make a practice of soliciting the holders of such tickets to sell the unused portions thereof, and, having purchased them, they openly resell them to third parties, to be used in violation of the provisions thereof. The number of tickets thus sold is so great that it will be practically impossible for the complainants to adopt any regulations for the management of their business that will prevent the wrongful and fraudulent use of such tickets. It can hardly be supposed that they will be able to devise any means that will enable conductors in

charge of their trains to determine whether a person presenting such a ticket is the rightful holder thereof and is entitled to use it, where thousands of such tickets are sold. The result is that the acts complained of may compel the complainants to abandon the issuance of such excursion and commutation tickets altogether, at a great loss to themselves and to the detriment of the traveling public. Besides, the actions of the defendants doubtless operate, on some occasions, as a fraud on the person to whom they sell the unused portions of nontransferable tickets, since some of the purchasers are probably led to buy them in the belief that they may lawfully use them. The court is of opinion that acts of this kind, entailing such consequences, constitute a legal wrong, and that they fall within the reach of a court of equity. The defendants are preventing the complainants from exercising a right which the law confers, or, at least, they are preventing the complainants from transacting their business in a perfectly lawful way, unless they take the chances of sustaining a great loss which seems to be almost certain to ensue. If an individual prevents another from having that free access from his premises to a public thoroughfare to which he is by law entitled, by placing any obstruction in front of his premises, a wrong is committed on account of which the law will afford redress. There is little perceivable difference between an injury of that character and the wrong complained of in the bills, whereby the complaining companies are practically prevented from transacting their business in a way that they are entitled to transact it. The court concludes, therefore, that the allegations of the bills, all of which are confessed by the demurrer, disclose a legal wrong within the preventive jurisdiction of a court of equity, and several other courts have reached the same conclusion. *Nashville, C. & St. Louis Railway Co. v. McConnell* (C. C.) 82 Fed. 65; *Schubach v. McDonald*, Judge (decided by the Supreme Court of Missouri, but not yet officially reported) 78 S. W. 1020, and cases there cited. See, also, *Railroad v. Kinner*, 47 Ohio Law Bul., 294; *Pennsylvania Railroad Co. v. Beekman*, 30 Wash. Law Rep. 715.

In support of the contention that the bills of complaint do not state a case of equitable cognizance, it is said that they do not disclose a real controversy, but merely seek to have the court lay down a rule of action for the future guidance of the defendants, and for the violation of which the defendants may be punished, not in the usual way, but by proceedings for contempt. The same may be said of every other application for injunctive relief. Every order of injunction, when granted, prescribes a rule of action, in that it forbids the party to whom it is addressed to do certain acts in the future. It is true that no court can restrain one from doing a given act, no matter how wrongful it may be, unless the act has been threatened, nor unless it appears that there is imminent danger that it will be done. It may be conceded that it is not the function of courts of equity to make laws, or to command people not to do a given act, when they have not threatened to do it or given evidence of such an intention. But when one has manifested his purpose to commit a legal wrong, and the act is of such a nature that the injured party cannot obtain adequate redress in a court of law, then a court of equity may inter-

vene. The bills of complaint show very clearly that the defendants intend to do as they have heretofore done; that is, buy the unused portions of nontransferable tickets and resell them to third parties to be used. This is their principal business, out of which they derive most profit, and it is plain that they intend to follow this calling, and to buy and sell unused portions of such nontransferable excursion and commutation tickets as the complainants now sell, or may have occasion to sell in the future, for the accommodation of the public. Of the imminence of the threatened wrong there can be no doubt. There is just as little doubt that acts of this nature will be committed so frequently, and that they will be so difficult to establish by proof, and, if so established in a court of law, will require the prosecution of so many actions, that the remedy at law will prove to be inadequate. It is also manifest that the loss to be apprehended as a natural result of the threatened wrong will be great and irreparable. The defendants are doubtless entitled to act as ticket brokers; that is to say, they are entitled to sell any tickets which the complainants or other railroad companies empower them to sell. So they may buy or sell the unused portions of such tickets as are sold by railroad companies without any limitation as to the persons by whom they may be used. But when they engage in the business of buying tickets that are not transferable, and by so doing interfere with the complainants' business and subject them to loss and expense, and assist others to perpetrate a fraud on the complainants, they are engaged in an unlawful calling, productive of injury to others, and acts of that nature can be rightfully enjoined. *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 919, 28 C. C. A. 99, and cases there cited; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *Kinner v. Lake Shore & M. S. Ry. Co.* (Ohio) 69 N. E. 614; *Schubach v. McDonald* (Mo.) 78 S. W. 1020; *National Telegraphic News Co. v. Western Union Tel. Co.*, 56 C. C. A. 198, 119 Fed. 294, 60 L. R. A. 805; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. Indeed, it would be a misfortune if courts of equity were powerless to redress grievances of that kind.

The contention that the several bills of complaint are multifarious rests upon a more substantial foundation, perhaps, than the other contention that they are without equity. Nevertheless this contention is in the nature of a technical defense, because it does not challenge the complainants' right to relief against the respective defendants, but merely asserts that the relief should be sought against them separately. Twenty-seven persons are named as defendants in these bills. Some of them are transacting business as partners, while 6 appear to be doing business together as a corporation. There are between 15 and 20 defendants (treating those who are engaged in business as copartners or under a corporate name collectively) who are engaged in the same unlawful business separately, and as it is not alleged that there is any community of interest in the profits of the business, or that they have entered into a combination or conspiracy, the contention is that they must be proceeded against separately. One of the bills, and perhaps all, contains the allegation that all of these defendants have been joined because their business

is identical and to prevent a multiplicity of actions. On the hearing of the demurrers most of the defendants were represented by the same counsel, the other defendants not appearing, and they make the same defense, namely, that the allegations of the bills afford no ground for equitable relief. It is manifest, therefore, that if separate actions are brought by each complainant against the several defendants, each complainant must bring 15 or 20 suits, and that about 75 bills must be filed by the four complainants, each of which will involve the same questions and present a common point for litigation. It is not probable that, if that number of actions were instituted, there would be more than one trial, since the decision of one case would determine the others, and it will not be presumed that counsel for the defendants expect that the court would permit its time to be needlessly consumed by the formal trial of each action. Under these circumstances, should the plea of multifariousness be sustained, and the complainants required to file the number of suits above stated?

In a recent decision (*Hale v. Allinson*, 188 U. S. 56, 77, 23 Sup. Ct. 244, 47 L. Ed. 380) Mr. Justice Peckham, after considering the question of multifariousness and the various conflicting decisions on that subject, said that when the question arose—

"Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits, and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be decided, and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."

In *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 55, 64, it was said, in substance, that there is no fatal misjoinder of causes of action in a bill in equity, when the bill presents a common point of litigation, and the decree made thereon will affect the whole subject-matter and settle the rights of all parties to the suit.

Looking at the question above proposed from the standpoint of convenience, as may be done, it is manifest that it should be answered in the negative. It is too plain for serious controversy that the convenience of all parties, including the defendants and the court in which the cases are pending, will be subserved by allowing the actions to proceed against the defendants collectively. Nor is it perceived that the substantial rights of any of the defendants will be jeopardized by so doing. It is not suggested that they have separate defenses to make, and, even if a separate defense does exist in favor of any defendant, it can be urged with the same facility and effect in the present suits as if such defendant was sued separately, and probably at less cost. Indeed, the court feels persuaded that the plea of multifariousness is urged mainly to delay a final hearing, rather than to enable the defendants to make a defense on the merits, which they can better make if they are sued separately. It may be conceded that persons ought not to be called upon to make a defense to actions

against third parties, when the cause of action is one with which they have no concern, and where they are in the attitude of idle spectators of the controversy; but where the cause of action is one in which they have an immediate interest, because a like cause of action exists against themselves, to which they make the same defense as others will make, and by joining them with others the convenience of everybody, including the court, is subserved, and the rights of everyone may be safeguarded and valuable time saved, no reason is perceived why they may not be joined, there being no hard and fast rule of law which forbids. Such is the case at bar. The defendants have a common interest in the questions to be litigated, and it is desirable that they should be heard and determined in a single trial.

The demurrers to the respective bills are accordingly overruled.

MOHL v. LAMAR CANAL CO. et al.

(Circuit Court, D. Colorado. March 14, 1904.)

No. 4,448.

1. WATERS—APPROPRIATION FOR IRRIGATION—NATURE OF RIGHT.

One who diverts water from a flowing stream for a beneficial purpose may have the use of it so long as he conforms to the law regulating such matters, but he has no contract with or grant from the government, federal or state, in respect to his privilege.

2. SAME—FEDERAL STATUTE.

Rev. St. U. S. § 2339 [U. S. Comp. St. 1901, p. 1487], providing that whenever, by priority of possession, rights to the use of water for mining, agricultural, or other purposes have accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, does not create rights, but is a recognition by Congress of a pre-existing right of possession, constituting a valid claim to its continuance.

3. SAME—JURISDICTION OF FEDERAL COURTS—IMPAIRMENT OF CONTRACT.

Two canal companies in Colorado constructed irrigation ditches appropriating water from the Arkansas river. The second to commence the work first recorded its plat, in compliance with Act Colo. Feb. 11, 1881, which, under said act, gave it priority of right; but in subsequent litigation between the parties the Supreme Court of the state held such act and the amendment thereto of April 20, 1887, unconstitutional and void, because not legally enacted. *Held*, that the compliance with said act by the second company, while it was recognized as the law of the state, did not give such company any contract rights with the state, or under the laws of the United States, which entitled it or the owner of a water right thereunder to invoke the jurisdiction of a federal court on the ground that it had a vested contract right to priority in the use of the water of the river, which was impaired by the state decision; nor do such facts authorize the federal court to review or reverse such decision, which, as a construction of the Constitution of the state, is conclusive.

¶ 3. Jurisdiction of federal courts in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7.

In Equity. On demurrer to bill.

Rogers, Shafroth & Gregg, for complainant.
Clarence F. Mead, for respondents.

HALLETT, District Judge. The bill charges that complainant bought from the Amity Land Company, October 1, 1895, a tract of land in Prowers county, and one water right in the Amity Canal for irrigating the land. The Amity Canal was begun February 21, 1887, and was constructed pursuant to section 2339, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1437], and acts of Assembly of the state of Colorado approved February 11, 1881 (3d Sess., p. 161), and an amendment of that act approved April 20, 1887 (6th Sess., p. 314). These acts of Assembly are set out in the bill. March 30, 1887, a plat of the Amity Canal was filed in the office of the county clerk and recorder, as required by the act of 1881, claiming an appropriation of 850 cubic feet per second of time of the waters of the Arkansas river. Complainant then gives the history of the Home Ranch Ditch, which was begun November 4, 1886, and not recorded pursuant to the act of Assembly of 1881 until December 3, 1887. The Home Ranch Ditch was acquired by the respondent the Lamar Canal Company, and was an important factor in the controversy which arose between the Amity Canal Company and the Lamar Canal Company concerning their respective appropriations of the waters of the Arkansas river. Complainant further charges that the acts of 1881 and 1887 were universally accepted, and in 1887, when the Amity Canal was begun, a custom and practice prevailed of recording appropriations as required by the act of 1881. Reference is then made to certain acts of Assembly of the state of Colorado, under which the relative rights of appropriators of water for irrigating lands could be determined in district courts of the state, and the charge is made that in some proceedings under such acts the acts of 1881 and 1887 respecting the record of titles were recognized and enforced. November 24, 1893, the Lamar Canal Company, respondent in this suit, brought suit against the Amity Land & Irrigation Company and others to determine the rights of takers of water in District No. 67, where their respective canals were located. In that suit respondent claimed that the Home Ranch Ditch was begun November 4, 1886, and that maps and plats of that ditch were filed as required by the acts of February 11, 1881, and of April 20, 1887. In that suit the Amity Land & Irrigation Company, which then owned the Amity Canal, appeared and claimed that the Amity Canal was begun February 21, 1887, and a plat thereof was filed March 30, 1887, as required by the acts of 1881 and 1887. After further proceedings in the district court, a decree was entered July 1, 1895, in which the acts of 1881 and 1887 were recognized as valid and effectual, and the appropriation of the Home Ranch Ditch was postponed to that of the Amity Canal because of the earlier record of the latter under the acts of 1881 and 1887. The case was taken to the Supreme Court, and the result is stated in the seventeenth paragraph of the bill as follows:

That from the decree of said district court the said Lamar Canal Company took an appeal to the Supreme Court of the state of Colorado, and on

the 17th day of July, 1899, said Supreme Court held said statutes of 1881 and 1887 unconstitutional, because the title thereof was not in compliance with section 21, art. 5, of the Constitution of the state of Colorado, and remanded said proceedings to said district court of Bent county for further proceedings in accordance with said opinion.

Other averments are made to show the quantity of water allowed to the Amity Canal in times of scarcity, which is not sufficient for all its customers. If augmented by the appropriation of the Home Ranch Ditch, which was 72.09 cubic feet of water per second of time, complainant and other shareholders in the Amity Canal would be much better supplied.

The prayer of the bill is that complainant be given the water to which he is entitled in priority and preference to the respondent the Lamar Canal Company.

In the first paragraph of his brief, counsel for complainant states his case in this language:

The theory upon which the plaintiff claims that the facts set forth in the bill constitute a right of action is that the title to the use of water for irrigation from the natural streams of the arid region is derelgued from the general government by virtue of its original ownership and control of said streams, and that one who, in appropriating water, complies with the acts of Congress concerning the use of said streams, and the laws, customs, and usages of the state in which the appropriation is made which regulate or prescribe the manner of making appropriations and acquiring priority of right to the water, thereby establishes certain contract rights, which cannot be impaired either by subsequent legislation or judicial action. Said acts of Congress, and the laws, customs, and usages of Colorado prevailing at the time the appropriation set out in the bill was made, therefore enter into a statement of the plaintiff's cause of action; they being in fact elements of a contract, the impairment of which by the defendants it is sought to prevent in this action.

And on page 7 is this further statement:

In this discussion we start with the proposition that, under the acts of Congress of 1866 [Act July 26, 1866, 14 Stat. 251] and 1870 [Act July 9, 1870, 16 Stat. 217], the said statutes of 1881 and 1887, the plaintiff, by reason of the appropriation of water theretofore made through the Amity Canal, and his purchase of an interest therein, obtained the benefit of a contract, which would be impaired if the decision of the Supreme Court in the adjudication proceedings in District 67 is to prevail.

I am unable to perceive an element of contract with the United States or with the state of Colorado in the whole course of the bill. The waters of flowing streams are *publici juris*—the gift of God to all His creatures. Blackstone (book 2, p. 14) has the following:

But after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water.

A paragraph from Kent's Commentaries often quoted by the courts is a clear statement of the common law:

Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprie-

tors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. "*Aqua currit et debet currere ut currere solebat.*" Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty which arises consists in the application. 3 Kent's Commentaries, 439, side paging.

To the same effect is section 5 of article 16 of the state Constitution, which declares that the water of every natural stream is the property of the public.

The act of Congress of 1866 is, in terms, a recognition of local customs and laws in the mining states and territories, which authorized the diversion of water for mining and agricultural purposes. *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452.

In *Broder v. Water Company*, 101 U. S. 274, 25 L. Ed. 790, the meaning and effect of the act is perspicuously stated:

It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.

The local customs and laws thus sanctioned and approved by the act of 1866 enlarged the common law in respect to the use which could be made of water, but they held nothing in the way of granting a right by the general government or the state government.

Probably the act gave the right of way for constructing ditches over the public lands to be used in conveying water as declared in the *Broder Case*, but it does not appear that the Amity Canal, or any part of it, is located on government land, or was so located when it was built.

Section 6 of article 16 of the state Constitution reads as follows:

The right to divert unappropriated waters of any natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right, as between those using the water for the same purpose.

I do not see that it means more than the act of Congress of 1866. In the language of the Supreme Court, it is a "recognition of a pre-existing right of possession," rather than the establishment of a new one.

One who diverts water from a flowing stream for a beneficial purpose may have the use of it so long as he conforms to the law regulating such matters, but he has no contract with or grant from the government, federal or state, in respect to his privilege.

Turning from the idea of complainant's counsel that he stands upon a contract with the federal government, and with the state government, to his further argument that this court may and should review the decision of the Supreme Court in the appropriation suit, reported in 26 Colo. 370, 58 Pac. 600, 77 Am. St. Rep. 261 (*Lamar Canal Co. v. Amity Land & Irrigation Co.*), not much need to be said on the subject. In this aspect of his case, complainant, as a citizen of Minnesota, invites the court to consider and determine the validity of the recording acts of 1881 and 1887, notwithstanding the decision of the Supreme Court of the state declaring those acts to be invalid. The familiar rule which commits to the courts of the state the interpretation of its Constitution and laws precludes all discussion of the subject. Here and elsewhere, in all courts and in all forms of proceeding, the decision of the Supreme Court setting aside the acts of 1881 and 1887 is conclusive upon all parties in interest. Whether complainant was a party to the appropriation suit is not material to the question. The Supreme Court may review and reverse its decisions, but no other court has authority of that character.

The demurrer to the bill is sustained, and the bill dismissed, at complainant's costs.

THE TRESCO.

(District Court, E. D. Pennsylvania. March 19, 1904.)

No. 67.

1. SHIPPING—DISCHARGE—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK.

Where a wire cable used in discharging a ship was carefully examined before the work was begun, and no defect was discovered, and the only sign of danger, consisting of strands or ends of wire sticking out from the splice, was observed solely by libellant and other workmen after the work of discharging the vessel had been in progress for 30 hours, but was not communicated or brought to the knowledge of any officer of the ship, and no request was made to have the defect remedied, libellant assumed the risk thereof.

2. SAME—NEGLIGENCE—INSPECTION.

A ship had received a new cable, of foreign manufacture, from a sister ship. It had been used but once before, when it was inspected by the ship's officer before being used in discharging the cargo in question. The cable was bound around an iron thimble or eye, and the end, after surrounding the eye, was woven into the body of the rope, and the splice covered with tarred spun yarn. The cable had a capacity of 10 tons, and was used in lifting buckets of ore weighing between 1,800 and 2,000 pounds. Work was begun with the cable, which lifted the buckets safely for 30 hours after its first inspection, and no sign of weakness appeared until two or three hours before the splice pulled out by reason of which plaintiff was injured. *Held*, that the ship was not negligent in its inspection of the cable, in failing to take off the yarn and examine the splice.

3. SAME—"RES IPSA LOQUITUR."

Where a laborer engaged in discharging a ship was injured by the pulling out of a cable splice, the happening of the accident was not sufficient to raise a presumption of negligence, under the maxim of "*Res ipsa loquitur*."

In Admiralty.

Joseph Hill Brinton, for libelant.

Convers & Kirlin, Henry R. Edmunds, and John M. Woolsey, for claimant.

J. B. McPHERSON, District Judge. Early in December, 1902, a cargo of iron ore was being unloaded from the steamship Tresco, lying in the port of Philadelphia, by Morris Boney, a master stevedore. The ship supplied a wire rope, $2\frac{3}{4}$ inches in circumference, and steam for the winch. The libelant was a laborer in Boney's employ, and was at work in No. 3 hold, helping to load the large iron buckets that were used in hoisting the ore. Unloading had begun about 4 o'clock in the afternoon of the day before the libelant was injured, and the work was being prosecuted without intermission. About 11 o'clock at night, as one of the buckets, full of ore—the combined weight being from 1,800 to 2,000 pounds—was being drawn up from the hold, the wire rope, to which the bucket was attached by a chain and shackle, gave way. The bucket was overturned in its fall, and part of its contents was thrown against the libelant, thus doing the injuries complained of. The rope was bent around an iron thimble or eye, and the end, after surrounding the eye, was woven into the body of the rope; the splice extending about a foot above the top of the eye. So much of the rope as surrounded the eye, as well as the splice itself, was served with tarred spun yarn, which covered the splice completely. The accident happened by the pulling out of the splice, and the libel complains of its condition in the following language:

"That the said wire cable was supplied by the respondents for the uses to which it was applied, and was known by them to be in an old, weak, defective, and unsuitable condition for the said purposes; that the fall aforesaid had on a prior occasion parted, and had been defectively spliced by the respondents and at the time aforesaid again parted at the place of said splicing."

There was no evidence, however, of a previous parting of the rope, and upon the hearing the libelant shifted his ground without amending the libel—although his failure to amend is not complained of—and relied upon the respondent's failure to inspect the rope properly before the work of unloading began. Upon this point the facts are as follows: The rope was brought to New York from the other side of the Atlantic—there is no evidence by whom it was made, or in what country—and was delivered to the Tresco in August by a sister ship belonging to the same owner. It was then new, and was used only once by the respondent before the accident in question. Upon that occasion it was employed in discharging a cargo at Baltimore, and there is no evidence that it proved insufficient or showed any signs of weakness there. Before the laborers began to take out the ore in Philadelphia, the first mate of the Tresco examined the rope carefully, and nothing was found to indicate that it was unsafe. The serving covered the splice, and was not removed, since there was no external sign to suggest that the rope might be unable to do its work. A wire rope of this size should lift at least 10 tons. Several times after the hoisting began, the mate again examined the

rope—the last inspection being about 4 o'clock in the afternoon preceding the accident—and found nothing that should have put him on his guard. The libelant and one of his witnesses testified that some time after this hour—apparently about 8 or 9 o'clock—they noticed strands or ends of wire sticking out from the splice, but they did not report this fact to any one, and went on with the work as usual; the libelant explaining his failure to speak of the matter by saying, "I didn't, because I thought it was spliced in a decent way, and tucked in so it would not part."

These being the facts, I am unable to see upon what ground the libelant can recover. The testimony goes to prove that the only sign of danger—assuming the appearance of the strands, or ends, to be such a sign—was observed by the libelant and other workmen alone, and that they did not communicate their knowledge to any officer of the ship, and ask to have the defect remedied. Perhaps they did not know themselves that danger was indicated, and, if this is true, the case is one of unfortunate but unavoidable accident, for which neither the libelant nor the ship is to blame. But if they did know or suspect that the condition of the rope might be unsatisfactory, and continued to work without objection and without asking to have the defect made right, they took the risk of injury, and recovery cannot be allowed. Upon the other question, also—failure to inspect properly—I think the libelant's case has not been made out. No doubt, the accident shows that the rope must have been defectively spliced. Indeed, one witness testified, as an expert, that the rope had not been spliced at all, but that the end had been bent around the eye, and then merely tied to the body of the rope with tarred yarn. This opinion was based upon an examination of the end after the accident, and seems to me to be incredible. Such a fastening could not have been mistaken for a splice; its shape would differ noticeably; and, as all the other witnesses on both sides speak of the rope as spliced, I can entertain no doubt upon the subject. But the work had evidently not been thoroughly done. The accident establishes that fact, for a good splice is as strong as any other part of a rope, and, as already stated, a wire rope of this size should bear a strain of at least 10 tons. But, although the break may prove that the manufacturer was negligent, it does not prove the negligence of the ship at all. The ship's duty was simply proper inspection, and the libelant was bound to prove that this duty had been neglected. Here I think he failed completely. There was nothing to put the ship on notice that the splice was probably unsafe. The rope was new; it had been used only once in discharging cargo, and had then proved efficient; and no outward sign indicated weakness. Under such circumstances, I do not think that the mate was bound to take off the serving and examine the naked wire with minuteness. And, even if he had done this, it may well be doubted whether anything suspicious would have been disclosed, for the rope lifted the buckets safely for 30 hours after the first inspection, and no sign of weakness appeared until, at the earliest, two or three hours before it parted.

The legal rules which govern cases of this kind are well known. This is not a situation that calls for the application of the maxim,

"*Res ipsa loquitur*," and therefore no presumption of negligence arises from the mere happening of the injury. The burden of proof is on the libellant to offer evidence from which the inference of the ship's negligence may be satisfactorily drawn, and negligence consists in the failure to perform the duty of proper inspection. I am satisfied that there was no such failure here, and therefore that on both the grounds already stated the libellant must be denied the right to recover. *Neptune Steam Navigation Co. v. Borkman*, 118 Fed. 420, 55 C. C. A. 548, is clearly distinguishable from the present case. There the fall that parted was rusted, and had been made from an old hawser. The court held that such a fall was not within the class of appliances to which the rule concerning latent defects applies. But the rope now in question was new, apparently in good condition, and had been safely used only a short time before. The duty of the employer is thus laid down in *The France*, 59 Fed. 479, 8 C. C. A. 185:

"An employer does not undertake absolutely with his employes for the sufficiency or safety of the appliances furnished for their work. He does undertake to use all reasonable care and prudence to provide them with appliances reasonably safe and suitable. His obligation towards them is satisfied by the exercise of a reasonable diligence in this behalf. Before he can be made responsible for an injury to an employe inflicted by an appliance adequate and suitable, ordinarily, for the work to be performed with it, there must be satisfactory evidence that it was defective at the time, and that he knew, or ought to have known, of the defect. The decision in the court below proceeded upon the ground that negligence was to be presumed from the circumstances of the accident. In his opinion the learned judge said:

"The evidence does not show anything out of the usual course that should cause the handle of the ash bag to break while it was hoisting up. Its weak and insufficient condition must be inferred from its breaking under such circumstances. I cannot regard the general testimony that the bag was sound and sufficient as overcoming that fact."

"The presumption of negligence is often raised by the circumstances of an accident, and it may be a legitimate presumption that an appliance which gives out while it is being used for its proper purpose in a careful manner is defective or unfit. How far that presumption may go, in an action by an employe against an employer, to shift the burden of proof from the former to the latter, must depend upon the circumstances of the particular case. The mere fact that the appliance is shown to have been defective is not enough to do so. It must appear that the defect was an obvious one, or such as to be discoverable by the exercise of reasonable care."

This language is pertinent to the present controversy. See, also, *The Dago* (C. C.) 31 Fed. 574, and *Westinghouse Elec. Co. v. Heimlich* (C. C. A.) 127 Fed. 93—a very recent decision of the Court of Appeals for the Sixth Circuit.

A decree may be entered dismissing the libel.

REGINA v. DUNLOP S. S. CO., Limited.

(District Court, E. D. Pennsylvania. March 26, 1904.)

No. 1.

1. SHIPPING—INJURY OF STEVEDORE—LIABILITY OF SHIP.

Where a ship in port had been for some days in the hands of contracting stevedores, who had discharged her, and were also to reload her, the vessel is not liable for the death of a stevedore, who came on board, with others, to assist in loading, and fell through a hatchway, the cover to which had been replaced by the discharging stevedores, and, so far as appeared, was in the condition they left it, and where the evidence did not establish any defect in any part of the hatch covering, but that the negligence, if any, was in the manner in which it had been replaced by the discharging stevedores.

2. WRONGFUL DEATH—ACTION FOR DAMAGES—CONTRIBUTORY NEGLIGENCE.

Deceased, a stevedore, was engaged, with others, in removing a hatch cover on a ship preparatory to loading cargo. There was an athwartship beam across the center of the hatchway, having cleats on the sides, on which rested the ends of fore-and-afters, upon which were placed the sectional covers. The covers had been removed from one-half the hatchway, and deceased was directing the removal of the center fore-and-after on that side by means of a fall and tackle operated by a winch. When the winch began to hoist, the outer end of the piece was raised first, causing it to bind, and deceased, who was standing on the covers of the other section, signaled the winchman to apply more power; the result being that the fore-and-after came out with a jump, causing the athwartship beam to spring outward sufficiently to permit the other half of the cover, on which deceased stood, to fall into the hold, whereby he was killed. *Held*, that he was clearly guilty of negligence in standing where he was, without necessity, while the extra power was applied, which precluded a recovery for his death under the Pennsylvania statute; the settled law of the state being that contributory negligence defeats a recovery thereunder.

In Admiralty. Action for death of stevedore.

John A. Toomey, for libellant.

Convers & Kirlin and John M. Woolsey, for respondent.

J. B. McPHERSON, District Judge. The libellant is the widow of Vincenzo Regina, a laboring stevedore, who, was killed on December 21, 1902, by a fall into the hold of the British steamship Queen Eleanor. The vessel had arrived at Philadelphia from Japan early in the month, and, having discharged a cargo of jute at Girard Point, was lying at Point Breeze, in the Schuylkill river, about to be loaded with case oil for her outward voyage. Her inward cargo had been discharged by Murphy & Co., contracting stevedores, by whom, also, the oil was to be put on board. The stevedores who discharged the cargo were not the same who were employed to load and stow the oil, and Regina had not been upon the ship while she was lying at Girard Point. He had, therefore, not been present when the stevedores closed No. 1 hatch after all the jute had been taken out. Nothing more remained for them to do, except to whitewash and otherwise prepare the holds to receive the outward cargo. This occupied three or four days after the hatch was closed; but, while the wooden covers were probably taken off during this interval, in order to admit the light, the athwart-

ship beam and the fore-and-afters do not seem to have been disturbed. The relevant facts concerning the covering of the hatch are thus stated in the brief of libellant's proctors:

"No. 1 hatch was located at the fore end of the ship, at the after part of the forecastle, being 16 feet in length by 14 feet in width, and was surrounded by a coaming about 2½ feet high. An athwartship iron beam, ¾ of an inch thick, 4 feet deep in the center, narrowing to 3 feet on the sides, extended across the whole width of the middle of the hatch. This beam fitted into angle iron slots riveted on the sides of the hatch coaming, with lips on top to prevent it from dropping. On each side of the beam, and on the fore and aft ends of the hatch coamings, three cleats were riveted, one in the center and one on each side, at an equal distance between the center of the beam and the sides of the hatch. The cleats in the center received the center fore-and-afters, which were of iron 8¼ inches deep by ¾ of an inch thick, and those on the side the smaller fore-and-afters. The center fore-and-afters had a ridge of iron on top 3 inches wide, and their rest on the bottom of the cleats was only 1½ inches. The 16 wooden hatch covers, 7 feet by 2 feet, extending from the center fore-and-afters, rested in rabbets on the center fore-and-afters and in the hatch coamings. The hatch thus made up was divided by the athwartship beam into a fore and aft section, each containing a center and two side fore-and-afters. When in proper condition the ends of all the fore-and-afters were marked with the letters 'P' or 'S,' and numbers to indicate on which side of the hatch they belonged. They would not fit in any other place."

The negligence charged against the ship is:

"(1) In not properly fitting and securing the said cross-beam of hatch No. 1, so that it would not spring from its position when removing the hatch.

"(2) In not properly repairing, securing, and fitting the cross-beam, fore-and-afters, strong-backs, and coverings of said hatch, which the owners and masters of said steamship knew to be unsafe and dangerous to all who had occasion to move them.

"(3) In not warning the said stevedores of the dangerous and defective condition of the said hatch No. 1."

To support these averments some testimony was taken, which, if it is all competent and is to be accepted as controlling, is said to prove the following facts (I quote again from the libellant's brief):

"Previous to coming to Point Breeze the vessel had discharged her inward cargo at Girard Point, upon the completion of which several of the stevedores started to close up the hatch. They attempted to put in the center fore-and-afters of No. 1 hatch, but were unable to do so. These fore-and-afters were so large that they would not fit, and the marks which should have been made on them to indicate where the ends were to be fitted had been obliterated. The stevedores being unable to put them in place, the mate of the ship called the ship's carpenter to fit them in. By the carpenter's directions the stevedores lifted the fore-and-afters of both sections to the places designated by him. He then took a sledgehammer, and after considerable hammering he finally forced them into the cleats, saying: 'We will have to put them in any way. * * * I will make them go in.' The stevedores took no part in this forcing process, nor were the fore-and-afters disturbed by them in any way until the vessel came around to Point Breeze to take in her outward cargo. The stevedores who discharged the vessel were ordinary laboring men, while those employed with Regina to load the cargo were skilled men working under different foremen, and did not come aboard until five or six days after the others had left.

"The marks on all of the fore-and-afters of all of the hatches had become obliterated and the hatch covers needed renewing. The ship's carpenter had been engaged for a long time in restoring them; that is, while the vessel had been making a voyage from New York to Japan and return, stopping at several ports. At the time the vessel was discharging at Girard Point he was

engaged in marking the fore-and-afters belonging to No. 2 hatch. The renewal of the wooden covers of No. 1 hatch had been nearly completed, but the obliterated marks of the fore-and-afters had not yet been restored.

"The mate knew that No. 1 hatch was dangerous, and when Regina fell into the hold said: 'I told you men to be careful about these No. 1 hatches.' As a matter of fact, although he knew that the hatch was out of order, he gave no notice of it to any of the stevedores. On the contrary, he denied that the hatches were out of order at the time, and maintained that none of the ship's crew touched them while the vessel was in Philadelphia."

I am by no means satisfied, however, that these are the facts, nor that there was anything wrong with the hatch. On the contrary, I think the decided weight of the evidence shows that the athwartship beam, the fore-and-afters, and the wooden covers of the hatch were all in good order, properly constructed, and fitting snugly into their appropriate places. In my opinion, the accident was in part due to the carelessness of the discharging stevedores in failing to put the side fore-and-afters into place, thus leaving the hatch covers to be supported entirely by the coaming and by the center fore-and-afters. It is no doubt a common practice among stevedores not to use the side fore-and-afters while the vessel is in port. To put them in requires more trouble to be taken twice a day, and, rather than do the additional work, the men accept the chance that nothing will happen. It seems to me to be proved that the accident in question occurred in the following manner: When the stevedores came to work at 7 o'clock in the morning, the side fore-and-afters were lying upon the deck, close to the hatch, so that the men had notice of the fact that they were not in use. They asked the mate for a wire forestay, which seems to have been taken down before the vessel came into port, to which a block and fall might be attached to be used in uncovering the hatch. The mate refused the request, as he did not believe the stay to be rigid enough to be used with safety; but in some way that is not explained in the testimony the stay was obtained, and the block and fall were attached. The wooden covers of the after section of the hatch had been taken off, and Regina, who was standing on the covers of the forward section, fastened the fall around the center fore-and-after of the after section, but probably at some point aft the middle. When the winch began to hoist, the after end of the fore-and-after was lifted first, its forward end was thereby pushed into the narrow slot in the athwartship beam in which it rested, and was jammed there sufficiently tight to pull the beam out of line far enough to disengage the after end of the forward fore-and-after, and thus to precipitate Regina and most of the covers of the forward section of the hatch into the hold. The jerk of the wire stay may have contributed to the result. The libellant's witnesses testify that the fore-and-after stuck tight, and that Regina signaled to the winchman to apply more power; the result being that the fore-and-after came out with a jump. If the side fore-and-afters had been in place, the probability is, I think, that the covers would still have had sufficient support, and the accident would not have happened. That they were not in place was not the fault of the ship. Regina's employers had complete control of the work of opening and closing the hatches, and the facts do not disclose any duty on the part of the ship to oversee, or interfere with, their method of carrying out their

contract. There being no negligence on the part of the ship, the libellant is not entitled to recover.

But there is another ground, also, on which recovery must be denied, namely, the contributory negligence of the decedent. The right of action depends entirely on the Pennsylvania acts of 1851 (sections 18 and 19; P. L. 674) and of 1855 (P. L. 309); and I think it is well settled that in such a case the right can only be enforced subject to the limitations that are imposed upon it by the legislature and by the courts of the state. *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The Canary* (C. C.) 22 Fed. 532; *The A. W. Thompson* (D. C.) 39 Fed. 115. It is so well known that in the courts of Pennsylvania the contributory negligence of the decedent defeats the right of recovery, even although the defendant may have been also negligent, that no citation of authority is needed. In the case under consideration, it seems to me to be a point beyond serious controversy that the decedent was negligent in standing on the covers of the hatch while the fore-and-after was being removed. If he had stepped down upon the deck, as he directed a fellow workman to do just before the accident, he would have been perfectly safe; but he chose to stay upon the hatch, and to take the risk that something might go wrong. An unusually similar case, *The State of Maryland v. Westoll* (D. C.) 106 Fed. 233, was decided in the district of Maryland a few years ago, and I shall take the liberty of adopting a part of Judge Morris' very apposite opinion as my own. On page 236, he speaks of the hatch and the accident as follows:

"This was a large opening, the covers of which were sustained by a framework of heavy beams and rods, made so as to be readily taken apart or assembled together, and necessarily constructed so that, when all were fitted together, every part helped to sustain and keep in place every other part. It was this structure which the stevedores were engaged in taking apart with the aid of the power of the steam winch. The testimony for the respondents in this case shows that there is always risk in a man standing upon one portion of such a structure when the other portions are being pulled out by a winch, and some contracting stevedores testify that they do not allow their men ever to do it, if they see them. Undoubtedly it is done, but it is known to be attended with danger; and in a recent case of a quite similar accident I held, upon the testimony then before me, that it was negligence in a seaman to do this very same thing. The danger is so obvious that it scarcely needs explanation from persons having special knowledge.

"It is a peculiarity of this case that there was a warning to Dombroska of a special danger in his remaining standing on the hatch covers. When the first pull of the steam winch failed to lift the fore-and-after, it was plain it was held by something, and it was to be supposed, when he called for extra power sufficient to pull the beam out, there would be a recoil. There were several things which would account for the fore-and-after not lifting. One would be that it was too long, and had been forced in between the two cross-beams on which it rested; another would be that it was too long, and the end bound against the end of the fore-and-after on which Dombroska was standing; another would be that the fall of the tackle was pulling on it in such direction that it was not being lifted up perpendicularly, but being pulled against the forward cross-beam. From any of these conditions it would result that if, by extra power, the fore-and-after was heaved up, the adjoining structure would be disturbed. If the fore-and-after resisted the pull because it was too long for that place, and had been forced down, then the cross-beam would spring out from the adjoining fore-and-after resting upon it; if it was because the end had caught against the end of the adjoining fore-and-after, then that fore-and-after would be lifted up out of place; and, if it was because the pull from the fall was not in the line in which it could be lifted,

then some adjoining cross-beam was sure to be more or less disturbed, and the stability of the hatch covers endangered. These dangers are not the result of secret defects, but perfectly apparent when an extra strain is necessary to pull out any hatch beam, which should come out without any more resistance than its own weight. This obvious danger should surely suggest to a man standing on the adjacent hatch cover, over an opening 30 feet deep, that he was assuming a great needless risk in remaining there. Granting that, although it is dangerous to stand on the hatch covers at any time when the fore-and-afters and cross-beams are being lifted out, stevedores and seamen do it because they are in the habit of taking such risks, and shipowners know they take the risk, and should, therefore, be the more careful to protect them, still I think it clearly a different thing when the man sees right before him that the beam will not come out, and he himself calls for extra steam power to heave it out. If he stands then in the place of danger, he does so in spite of a clear warning; and when Dombroska saw that the fore-and-after, for some reason, was not coming out as it should, he had full opportunity to step back before calling for more steam, and, if he had done so, he would have been out of danger. He had the warning, and he had the opportunity to avoid the danger which his own order produced. The proximate cause of his fatal fall was, not that the cross-beam was misplaced, and the fore-and-after forced into the socket, for that did not affect the safety of the structure; but the immediate cause was that, in taking the structure apart, he stood in a place of danger, and applied an extra strain of the steam winch, calculated to make the structure dangerous to stand on."

For both these reasons, the libellant's right to recover must be denied. A decree may be entered dismissing the libel.

THE COVINGTON.

(District Court, S. D. New York. March 22, 1904.)

1. TOWAGE—LOSS OF BARGE IN HEAVY WEATHER—EXERCISE OF JUDGMENT BY MASTER.

When the master of a tug exercises his judgment, in good faith, to proceed with his tow, it will not be deemed a fault chargeable to the tug if it turns out badly, especially where it appears doubtful if a barge which is lost in bad weather was in proper condition for towing.

2. SAME—LIABILITY OF TUG—EVIDENCE CONSIDERED.

An ocean tug held not in fault for the loss of a barge in tow by sinking off the coast of New Jersey in heavy weather, where, as shown by the government weather records at different stations along the Atlantic Coast, the weather was favorable when the tug left Hampton Roads for New York with three coal barges in tow, and did not become such as to endanger seaworthy barges until about the time of the accident, two days later, when it was too late to turn back to seek a harbor, and the best course seemed to be to proceed, which the master did; and where it further appeared from the evidence that the barge, which was a converted ship, was not as well adapted to withstand a storm as modern barges.

In Admiralty. Suit against tug to recover for the loss of a tow.

James J. Macklin, for libellant.

Butler, Notman, Joline & Mynderse and Frederick M. Brown, for claimant.

¶ 1. See Towage, vol. 45, Cent. Dig. § 13.

ADAMS, District Judge. This action was brought by Charles McWilliams, owner of the barge Mindoro, against the tug Covington, to recover the value of the barge, which was sunk at sea by reason of weather conditions, about 8 miles off Barnegat, New Jersey, on the 8th day of April, 1902, while in tow of the tug, bound from Hampton Roads, Virginia, to Providence, Rhode Island, by way of New York.

The two consisted of three barges, loaded with coal, made up tandem, the first barge being the Kentucky, belonging to the claimant, 225 fathoms from the tug; the next, the Mindoro, the subject of this action, 200 fathoms from the Kentucky, and the last, the Mystic Bell, 200 fathoms from the Mindoro, abandoned in the storm.

The controversy arises with respect to the state of the weather when the tow started from Hampton Roads, on Sunday the 6th day of April, about 9:30 o'clock A. M. and when it passed the Delaware Breakwater between 1 and 2 o'clock P. M., Monday the 7th.

The libel alleges fault on the part of the tug as follows:

"(1) In starting out with said tow from Hampton Roads while the weather indications were unfavorable.

(2) In continuing on and not returning and making a harbor, or otherwise protecting her said tow, when it was or should have been manifest to those in charge of said tug of the near approach of a violent storm.

(3) In not putting into the Delaware Breakwater which she could have done in perfect safety when in that vicinity for harbor.

(4) In that those in charge of said steam tug were incompetent."

The answer alleges that when the start was made, about 9:30 o'clock A. M., the 6th, the sea was calm, a slight wind from the south and east prevailed and the weather was in all respects favorable; that when the tow passed abreast of the entrance to the Delaware Breakwater, light winds and favorable weather prevailed but that shortly before daylight on the 8th of April, when the tow was nearing a point opposite Barnegat, the wind freshened, coming from the north-east, and the indications of weather became somewhat threatening, although not sufficiently so to justify an ordinarily prudent navigator in seeking a port of refuge, which then was New York; that it would have been imprudent, in any event, to turn back and make for the Breakwater, as the barges were ill adapted to withstand high seas from the stern, from which quarter the seas would have come in a course to the Breakwater; that, therefore, the voyage was continued without indications of serious danger until 7 o'clock A. M., although for the previous hour, the tug and tow had been laboring heavily in a high sea and strong east north-east gale, when the bow of the Mindoro was observed to rise out of the sea and immediately thereafter she sank stern foremost; that the tug, therefore, anchored the Kentucky, dropped the towing hawser and proceeded to the assistance of the other barges, but when she reached where the Mindoro had been, nothing remained but wreckage; that the tug then rescued the crew and stood by to give any possible assistance to the Mystic Bell but that it was found impossible to take her in tow and after her crew were rescued, she became a total loss.

The answer further alleges that the loss of the Mindoro happened, notwithstanding all due care and prudence on the part of the Covington and those in charge of her, and notwithstanding all possible efforts to

avert the same and was the result of inevitable accident, caused by perils of the seas, or was due to the inherent weakness, rottenness and unseaworthiness of the Mindoro in not being able to withstand the storm to which she was subjected on the morning of the 8th of April.

The preponderance of the testimony tends strongly to support the averments of the answer. It appears that the Mindoro was a converted ship and though apparently in good seaworthy condition, was not as well able to withstand a storm as a modern barge, such as the Kentucky was. At the time of starting, the weather was not such as to make it negligent to proceed, nor was it so when passing the entrance to the Breakwater, though one of the tows that started with the Covington went in there and remained until the storm was over, but the seeking of the shelter was testified to be due to the condition of one of the barges, which had rolled so that her masts went over her side and she was hampered by the wreckage. This was apparently owing to the qualities of the barge, rather than bad weather, but in any event, the question of going on was one of judgment and it is too well settled to admit of much discussion, that when the master of a tug exercises his judgment in good faith to proceed, it will not be deemed a fault chargeable to the vessel if it turns out badly—*The W. E. Gladwish*, 29 Fed. Cas. 585; *The James P. Donaldson* (D. C.) 19 Fed. 264; *The Allie & Evie* (D. C.) 24 Fed. 745; *The Frederick E. Ives* (D. C.) 25 Fed. 447; *The Packer* (C. C.) 28 Fed. 156; *The Wilhelm* (D. C.) 47 Fed. 89; *Id.* (C. C.) 52 Fed. 602; *The Battler* (D. C.) 62 Fed. 602; *The Hercules*, 73 Fed. 255, 19 C. C. A. 496; *The E. Luckenback* (D. C.) 109 Fed. 487; *Id.*, 113 Fed. 1017, 51 C. C. A. 589; *The Czarina* (D. C.) 112 Fed. 541.

Moreover, the Government Weather Records, which are always considered in cases of this kind, have been furnished from Norfolk, Virginia, Cape May and Atlantic City, New Jersey, and New York City. They offer persuasive evidence that the weather was favorable for proceeding, both at starting and when passing the entrance to the Breakwater.

Those from Norfolk show that on the 6th, the wind was from the south, with a velocity of 8 miles in the early morning, and 6 miles at midnight, the highest being 30 miles from the north-west for a few minutes about 6:25 P. M. On the 7th, the wind changed from the south-west in the morning to east at midnight, with a velocity of 5 miles in the early morning and 15 miles at midnight, the highest being 18 miles from the south-east for a few minutes about 1:13 P. M. On the 8th, the wind changed from 8 miles from the south in the early morning to 11 miles from the south-west at midnight, the highest being 36 miles from the south-west for a few minutes about 3:40 P. M. On the 9th, the wind changed from 10 miles from south-west in the early morning to 10 miles from the west at midnight, the highest being 26 miles from the north-west for a few minutes at 10:02 A. M.

At Cape May, on the 6th, the wind changed from 3 miles in the early morning to 7 miles at midnight, the highest velocity being 26 miles from the south for a few minutes about 5:35 P. M. On the 7th, the wind changed from 8 miles in the early morning to 16 miles at midnight, the highest velocity being 20 miles per hour for a few minutes about

11:56 P. M. On the 8th, the wind changed from 18 miles in the early morning to 4 miles at midnight, the highest velocity being 30 miles from the north-east for a few minutes about 11 o'clock A. M. On the 9th, the wind changed from 6 miles in the early morning to 9 miles at midnight, the highest velocity being 13 miles at 9:30 P. M.

At Atlantic City, on the 6th, the wind changed from 4 miles from the west, in the early morning to 8 miles, from the same direction, at midnight, the highest velocity being 34 miles from the south for a few minutes about 7:12 P. M. On the 7th, the wind changed from 9 miles from the west, in the early morning to 13 miles, from the south-west, at midnight, the highest velocity being 18 miles from the north-east for a few minutes about 7:50 P. M. On the 8th, the wind changed from 13 miles, from the north-east in the early morning, to 9 miles from the south, at midnight, the highest velocity being 43 miles from the east for a few minutes about 10:55 A. M. On the 9th, the wind changed from 7 miles from the south-east, in the early morning, to 3 miles from the west at midnight, the highest velocity being 12 miles from the south-west for a few minutes about 3:37 P. M.

At New York, on the 6th, the wind changed from 7 miles from the west, in the early morning, to 17 miles from the north-west, at midnight, the highest velocity being 36 miles from the south-east for a few minutes about 9:45 P. M. On the 7th, the wind changed from 14 miles from the east, in the early morning, to 19 miles from the north-east, at midnight, the highest velocity being 30 miles from the north-east for a few minutes about 1:40 P. M. On the 8th, the wind changed from 17 miles from the north-east, in the early morning, to 9 miles from the south-east, at midnight, the highest velocity being 52 miles from the north-east for a few minutes about 2:52 P. M. On the 9th, the wind changed from 11 miles from the east in the early morning, to 4 miles from the south-east at midnight, the highest velocity being 17 miles from the south-east for a few minutes about 5:45 P. M.

There did not appear to be any real danger from the weather to seaworthy barges until about the time of the accident. If a sheltered harbor had been then available, it would doubtless have been prudent to seek it but it was too late to turn back and the best course seemed to be to go on.

I do not find that any of the allegations of fault are sustained and the libel should be dismissed.

In re WALTERS.

(Circuit Court, S. D. New York. February 2, 1904.)

1. CRIMINAL LAW—FEDERAL PRISONERS—SENTENCE—PLACE OF EXECUTION.

Under Rev. St. U. S. § 5541 [U. S. Comp. St. 1901, p. 3721], providing that, in every case where any person convicted of an offense against the United States is sentenced to imprisonment for a longer period than a year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district in which the court is held, the use of which is allowed by the State Legislature for that purpose, the Circuit Court of the United States sitting in New York, in which relator was convicted on two different occasions and sen-

tenced to terms exceeding one year, was authorized to direct that his earlier sentence should be executed at the Erie County Penitentiary, and his later sentence at Sing Sing Prison.

2. SAME—CREDITS FOR GOOD BEHAVIOR—STATUTES.

Since Laws N. Y. 1886, p. 28, c. 21, provides a full scheme for giving credits, to prisoners confined in its state prisons, for good behavior, and is therefore made applicable to federal prisoners confined therein by Rev. St. U. S. § 5544 [U. S. Comp. St. 1901, p. 3721], Act Cong. June 21, 1902, c. 1140, 32 Stat. 397 [U. S. Comp. St. Supp. 1903, p. 448], providing a scheme of credits for federal prisoners, does not apply to such prisoners confined in the state prisons of New York who were sentenced before its enactment.

3. SAME—GOOD TIME—FORFEITURE.

Where, at the time of relator's sentence for a federal offense, to be served in a New York penitentiary, he was subject to Laws N. Y. 1886, p. 28, c. 21, providing a scheme of credits for good behavior for all prisoners so confined, and he was discharged a year and ten months before the expiration of his sentence by reason of credits earned under such act, such discharge was conditional on his nonconviction of a felony before the entire period of his sentence had expired, as provided by section 14 thereof; and on his being so convicted, and again sentenced to imprisonment in a New York prison, the authorities in charge thereof were authorized to detain him for a period equal to the amount of good time so previously earned, in addition to his subsequent sentence.

John Cunneen, Atty. Gen., and Henry L. Burnett, U. S. Atty.
John J. Halligan, for the relator.

THOMAS, District Judge. The relator, Walters, was sentenced by the United States Circuit Court on March 13, 1899, for a term of seven years, and to pay a fine of \$2,500. It was directed that the sentence should be executed in Sing Sing Prison, and that he should stand committed until the fine was paid. He has served for such time that, aside from the payment of the fine, he would be entitled to a discharge on account of commutations allowed by the statute of the state, if it were not for the act of the state of New York passed February 23, 1886 (Laws 1886, p. 28, c. 21), which, as contended, requires that the defendant serve a further time equal to the commutation received upon a former sentence in an action in the same federal court. The act fixes the commutation that may be earned by "every convict confined in any state prison or penitentiary in this state" (section 1). It requires that, "on any day not later than the twentieth day of each month, the agent and warden of each of the state prisons * * * shall forward to the Governor a report * * * of any convict or convicts who may be discharged the following month by reason of the commutation of his or her sentence * * * in the manner hereinafter provided"; and directs that the report shall, among other things, state "the amount of commutation recommended, and the date for discharge from the prison * * * if allowed" (section 4). The statute (section 6) provides for the formulation, by the Superintendent of State Prisons, of rules governing the allowance or disallowance of commutations, and for the change of such rules by the same officer, and for furnishing a copy of such rules "to every convict entitled to the benefits of this act." The seventh section of the act provides that, "for the purpose of applying the rules * * * for the allowance or

disallowance of commutation for the good conduct of any convict, a board shall be constituted in each of the prisons and penitentiaries of this state, to consist of the agent and warden in each of the state prisons and the principal keeper and the physician therein; and the warden or superintendent in each of the penitentiaries of this state, the deputy or principal keeper and the physician therein, or of the persons acting in their stead"; and that "this board shall meet once in each month before the date fixed for the transmission of their report to the Governor, as hereinbefore provided, and proceed to determine the amount of commutation which they shall recommend to be allowed to any convict, which shall not in any case exceed the amount fixed by this act"; and that "they shall have full discretion to recommend the withholding the allowance of commutation for good conduct, or a part thereof, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned." The eighth section provides:

"In all cases, however, when the board shall recommend the withholding of the allowance of the whole or any part of commutation for good conduct, they shall forward with their report to the Governor the reasons in writing for such disallowance and the Governor may, in his discretion, decrease or increase the amount of commutation as recommended by the said board, but he shall not increase the same beyond the amount fixed by this act."

Sections 13, 14, 16, and 17 provide:

"Sec. 13. The Governor, upon the receipt of the report recommending the allowance of commutation of sentences of convicts for good conduct, as provided for in this act, may, in his discretion, allow the same and place the names of all those convicts whom he may determine to commute upon one warrant, and direct the same to the agent and warden of the state prison, or the warden or superintendent of the penitentiary wherein such convicts may be confined, who shall thereupon proceed to execute such warrant by discharging the convicts mentioned therein on the date fixed for their discharge.

"Sec. 14. The Governor shall, in commuting the sentences of convicts as provided for in this act, annex a condition to the effect that if any convict so commuted shall, during the period between the date of his or her discharge, by reason of such commutation and the date of the expiration of the full term for which he or she was sentenced, be convicted of any felony, he or she shall, in addition to the penalty which may be imposed for such felony committed in the interval as aforesaid, be compelled to serve in the prison or penitentiary in which he or she may be confined for the felony for which he or she is so convicted, the remainder of the term without commutation which he or she would have been compelled to serve but for the commutation of his or her sentence as provided for in this act."

"Sec. 16. Upon the receipt of any convict in any prison or penitentiary in this state who shall be entitled to the benefits of this act, the provisions of the same shall be read to him or her, and the meaning of the same shall be fully explained to him or her by the clerk of the prison or penitentiary.

"Sec. 17. Upon the discharge of any convict by reason of commutation of sentence for good conduct, the provisions of sections fourteen and fifteen of this act shall be read to, and their nature fully explained to him or her by the clerk of the prison or penitentiary."

In the present case Joseph Walters was sentenced to Erie County Penitentiary on May 9, 1893, by the Circuit Court of the United States, for the term of six years, and was discharged on July 13, 1897, having earned a commutation, for good conduct, of one year and ten months. Within a year and ten months after such discharge he was convicted of the felony for which he is now serving sentence. The authorities

at Sing Sing Prison detain him for the purpose of serving the time for which he received commutation of his earlier sentence. The only question is whether such detention is justified by the act of 1886.

The court was authorized to direct that relator's earlier sentence should be executed at the Erie County Penitentiary, and his later sentence at Sing Sing Prison (Rev. St. U. S. § 5541 [U. S. Comp. St. 1901, p. 3721]), and he thereupon became in all respects "subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated; and, while so confined therein, was "exclusively under the control of the officers having charge of the same, under the laws of such state or territory." Rev. St. § 5539 [U. S. Comp. St. 1901, p. 3720]. Sections 5543 and 5544 [U. S. Comp. St. 1901, p. 3721] provide:

"Sec. 5543. All prisoners who have been, or may be, convicted of any offense against the laws of the United States, and confined in any state jail or penitentiary in execution of the judgment upon such conviction, who so conduct themselves that no charge for misconduct is sustained against them, shall have a deduction of one month in each year made for the term of their sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such jail or penitentiary, with the approval of the Attorney General.

"Sec. 5544. The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but, in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any state for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary."

Act Cong. March 3, 1875, c. 145, § 1, 18 Stat. 479 [U. S. Comp. St. 1901, p. 3722], provides:

"That all prisoners who have been, or shall hereafter be, convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any state or territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison or penitentiary of such deduction shall be entered on the warrant of commitment: provided, that, if during the term of imprisonment the prisoner shall commit any offense for which he shall be convicted by a jury, all remissions theretofore made shall be thereby annulled."

Act June 21, 1902, c. 1140, 32 Stat. 397 [U. S. Comp. St. Supp. 1903, p. 448], provides:

"Section 1. That each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any state or territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence, to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail: Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon a sentence of not less than five years and less than ten years,

eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated.

"Sec. 2. That in the case of convicts in any United States penitentiary, the Attorney General shall have the power to restore to any such convict who has heretofore or may hereafter forfeit any good time by violating any existing law or prison regulation such portion of lost good time as may be proper, in his judgment, upon recommendations and evidence submitted to him by the warden in charge. Restoration, in the case of the United States convicts confined in state and territorial institutions, shall be regulated in accordance with the rules governing such institutions, respectively.

"Sec. 3. That this act shall take effect and be in force from and after thirty days from the date of its approval, and shall apply only to sentences imposed by courts subsequent to the time that this act takes effect, as hereinbefore provided. Prisoners serving under any sentence imposed prior to such time shall be entitled and receive the commutation heretofore allowed under existing laws. Such existing laws are hereby repealed as to all sentences imposed subsequent to the time when this act takes effect."

The last act is not applicable, as it does not affect persons sentenced before its enactment. Inasmuch as the act of the state of New York of 1886 does provide a full scheme for giving credits for good behavior, it is made applicable by section 5544, Rev. St. The relator was released from the Erie County Penitentiary solely through the force of the state act. Without the benefit of such act, he must have remained for the longer period of 1 year and 10 months. But he received such commutation conditionally. It was not an absolute discharge. There was no law for an absolute discharge. The good behavior must have been earned pursuant to the rules established by the superintendent. Report thereon to the Governor of the state was required, and action by the Governor was required to grant or to confirm the commutation; and the Governor had no power to grant it except upon the condition that, if relator was convicted of a felony before the expiration of the 1 year and 10 months, he should serve for a like time in connection with the immediate sentence for his later offense. There is no logical escape from this conclusion, and it is supported by the decision in *Re Willis* (C. C.) 83 Fed. 148. It is unimportant that in the *Willis* Case the first imprisonment was upon a judgment of the state court, while the second sentence was pursuant to a sentence in the federal court; nor is it important in this case that both sentences are from the federal court. In neither case could the prisoner earn or receive commutation except under the statute of 1886, and that, too, upon the condition subsequent which he violated, and which must result in his detention until he shall have fulfilled the requirement following such breach, as commanded by the law of the state. In *re Raymond* (D. C.) 110 Fed. 155.

The writ is dismissed.

DAILEY v. CITY OF NEW YORK et al.

(District Court, S. D. New York. March 2, 1904.)

1. ADMIRALTY JURISDICTION—MARITIME TORTS—PLACE OF INJURY.

The city of New York was engaged in filling up Riker's Island in East River, embankments and cribwork having been constructed around the outside, leaving a gap through which the tide ebbed and flowed, and through which tugs and scows passed into the interior, carrying material for filling. A scow, having been so towed in, was left until the tide ebbed, when she settled on a projection in the bottom and was injured. *Held*, that the injury occurred in navigable water, and that an action to recover damages therefor was within the jurisdiction of a court of admiralty.

2. SAME—BREACH OF MARITIME CONTRACT.

A suit to recover for an injury to a scow from a charterer, whose duty it was to exercise ordinary care to return her to the owner in good condition, arises out of a maritime contract, and is within the admiralty jurisdiction, irrespective of the place of the injury.

3. SHIPPING—LIABILITY OF CHARTERER FOR INJURY OF SCOW—NEGLIGENCE.

Libellant hired a scow to the city to be employed in carrying material for filling in a submerged island. After being towed by a tug to the place where it was desired to unload her, the tide receding, she settled on a projection on the bottom and was injured. *Held*, that the injury was due to negligence chargeable to the charterer, which directed the movement of the scow and selected the place where she was to lie for unloading, and not to the libellant, who, although knowing the general character of the work in which she was to be used, had no knowledge of the condition of the bottom, and no control over her movements.

In Admiralty. Action for injury to a scow while under charter.

Alexander & Ash, for libellant.

John J. Delany and E. Crosby Kindleberger, for city of New York.
Hyland & Zabriskie, for Joseph Borro.

ADAMS, District Judge. The libellant, Margaret Dailey, in December, 1902, was the owner of the scow Bill, which she chartered to the city, for use in the department of Street Cleaning, for the purpose of transporting and removing ashes, street sweepings and refuse material. The charter was a verbal one, not for any specific period, and liable to be terminated at any time by either party. The scow's crew consisted of one man, whose duty it was to look after the owner's interest.

The city at the time was engaged in filling up Riker's Island, in the East River, and was delivering street sweepings etc. to the contractors employed in that work. The scow was loaded at a dump in the East River and towed to Riker's Island. On the 13th of December, she was towed, in connection with several other scows, through a gap left for the purpose, in the embankments and crib work, forming the outside of the island, by the tug Rescue, which was in the employ of the Moran Towing Line, and not in the employ of either of the respondents, so far as the evidence satisfactorily discloses. She was taken in at about high water. Upon the recession of the tide, she took the ground and lying upon a hump, which permitted her to

¶ 2. See Admiralty, vol. 1, Cent. Dig. § 154.

sag at each end, she was twisted and injured. The action was brought to recover the resulting damage, amounting, it is said, to \$368.

On the trial, a question of jurisdiction was raised by the respondent Borro and joined in by the city, it being urged that admiralty could not take cognizance of the injury, because the accident did not happen on public navigable waters. Since the trial, the city has withdrawn any objection as to the jurisdiction, on the ground that the hiring of the scow was maritime in its character and would justify the exercise of the court's jurisdiction without regard to the question of the navigability of the waters. The point, however, is still insisted upon by the respondent Borro, who cites *The Arkansas* (D. C.) 17 Fed. 384, and *Leovy v. United States*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914. These authorities, however, do not sustain the contention that there was an absence of jurisdiction here.

The *Arkansas* was a case of collision, which happened during an extraordinary flood, between the respondents' steamer and a depot building, erected upon the bank of the Mississippi River. It was held, that there was no jurisdiction to compel the steamer to pay the damages, because the injury complained of was done to a land structure, though the vessel was floated there by the water. This is in conformity with the general principle that where an injury is done upon land, though it originated upon the water, the damage is not a subject of admiralty jurisdiction. *The Plymouth*, 3 Wall. 20, 18 L. Ed. 125; *Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S. 406, 411, 21 Sup. Ct. 831, 45 L. Ed. 1155.

Leovy v. United States, was a criminal prosecution for building a dam across an alleged navigable stream of the United States, under the Act of September 13, 1890, making it unlawful to build such structure upon any navigable waters of the United States, without the permission of the Secretary of War, which had not been obtained. Certain evidence as to the navigability of the waters in question, was submitted to the jury, which found that the waters were navigable.

The court said (page 627, 177 U. S., and page 799, 20 Sup. Ct., 44 L. Ed. 914):

"As respects navigation through Red Pass, there was some evidence, on the part of the government, that small luggers or yawls, chiefly used by fishermen to carry oysters to and from their beds, sometimes went through this pass; but it was not shown that passengers were ever carried through it, or that freight destined to any other State than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it.

"The evidence on the part of the defendants showed that for many years these crevasses or passes have been steadily growing shallower and narrower, and that at the time of closing Red Pass few of the smallest craft attempted to pass through it, and that the so-called mouth, or end of Red Pass next the Gulf, had closed up and become a mere marsh. The trifling use that was made of that pass was restricted to the river end of the crevasse."

It was held that the finding of the jury was not binding upon the court, as the evidence was inadequate to sustain it, and that the defendant should have been acquitted.

It is obvious that this authority does not touch the question under consideration, which involves one of jurisdiction in case of a marine tort.

The waters in this case, were the waters of the East River, and at the time of the accident were still subject to the ebb and flow of the tide. They were navigable in fact, at the time of this injury, although the work in progress tended to create land where the water originally prevailed. Vessels of various kinds, including steam tugs plied in and out of the enclosure, which remained open for the purpose of the ingress and egress of such vessels during the work, besides being for the larger part separated from regular navigable waters by crib work only. There cannot, in my judgment, be any doubt of the navigability of the water in question at the time of the accident. It is too well settled to admit of discussion, that the fact of the boat having taken ground, with the recession of the tide, does not oust the admiralty jurisdiction.

Jurisdiction is sustainable upon the ground, also, that a maritime duty was imposed upon the respondent by reason of the nature of the contracts, which related to a vessel and required her return to the owners. Jurisdiction attaches in case of a maritime contract, irrespective of the question whether it is to be performed on land or water. *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90; *Wortman v. Griffith*, 3 Blatchf. 528, Fed. Cas. No. 18,057; *The Fifeshire* (D. C.) 11 Fed. 743; *The Vidal Sala* (D. C.) 12 Fed. 207; *Florez v. The Scotia* (D. C.) 35 Fed. 916; *The Ella* (D. C.) 48 Fed. 569; *Norwich & N. Y. Transp. Co. v. New York Balance Dock Co.* (D. C.) 22 Fed. 672.

On the merits, the questions upon which liability turns are, (1) was the accident due to negligence and (2) if so, whose negligence was it. The libellant contends that both of the respondents are liable in such respects.

The city contends that the libellant was the negligent party, (a) in that by reason of doing work in the vicinity, she knew, or should have known, the condition of the place, and because the scow had been through the gap and her master had an opportunity to judge what the scow would encounter in delivering her load; (b) that, in any event, the city is not liable because if there were any negligence, it was the negligence of the respondent Borro, who would be required, under the analogy of the 59th Rule, to respond directly to the libellant for his damages.

The respondent Borro, makes a similar contention with respect to the negligence, if there were any, being the libellant's, and further urges that no negligence has been shown on his part, as he had no part in selecting the locality where the scow was injured but was merely employed to do the unloading.

The question is not without difficulty, and while numerous authorities have been cited, my attention has not been called to any case in point. It is quite evident that the principles which govern wharfage cases do not apply, because here there was no implied guaranty that the place where the boat was invited was safe for her to remain and negligence can not, in this case, be imputed by reason of such an accident happening. Nevertheless, the accident was due to negligence, because the hump of earth, or whatever the vessel rested upon, made the place unfit for the boat to lie upon while unloading.

I do not consider that the libellant should be held responsible in any way for what happened. She had no control over the scow, it being in charge of the city, which directed its movements. Moreover, neither the agents of the libellant, who were doing work in the vicinity, but on the outside of the crib work, nor the master on board, had any notice of the condition of the bottom where the scow was to lie, nor any reason to believe that it would be unsafe for a scow in her good condition.

The city's agents, however, should have known of the danger they were subjecting the scow to in sending her to the place she was made to lie, and it was sufficient to establish negligence against the city, under the circumstances of the work being in general charge of and done for its benefit. It is evident there would have been no difficulty in ascertaining the dangerous character of the place, which was such as to cause the scow to drop at both ends with the falling of the tide. The city was guilty of the sin of omission. Moreover, it was its primary duty, as bailee, to take ordinary care of the scow, so that she could be returned to the owner in the same condition as received, ordinary wear and tear excepted. *The Barnstable*, 181 U. S. 464, 468, 21 Sup. Ct. 684, 45 L. Ed. 963. The exercise of ordinary care would have prevented the vessel from receiving the injury from an obstruction on the bottom by which she sustained a dangerous twisting. The four other scows towed to the place, and lying near this one, two ahead and two astern, were not injured. The bottom was bare at low water and it is obvious that some examination of the place where she was to lie would have revealed its dangerous nature.

The remaining question is, was the respondent Borro responsible for or did he participate in the negligence. It appears that he was one of the contractors to fill in the island and was working independently of supervision by the city. He was apparently in charge of this part of the work and it was his duty to unload the scows. The libel alleges that he was at the time the "servant, agent and employee" of the city. This is denied by Borro. The proof does not show just what his relations were to the work. His legal connection with the work has not been made plain and I do not find sufficient testimony to establish a charge of negligence against him. The libellant urges that Borro being the employer of the tug which placed the scow, negligence can be imputed to him for what happened, but even such relation has not been established. Moreover, it does not certainly appear that the tug was in fault. There does not seem to be any doubt about the city's responsibility, especially in view of its relation to the scow, and I consider it more just to let damages rest with it, than to seek, through imperfect sources, for another party to be made liable, in whole or in part.

Decree for the libellant against the city, with an order of reference. Libel dismissed as to Borro.

SPERRY & HUTCHINSON CO. v. MECHANICS' CLOTHING CO.

(Circuit Court, D. Rhode Island. February 16, 1904.)

No. 2,651.

1. INJUNCTION—GROUNDS—INTERFERENCE WITH CONTRACT.

Complainant company issued trading stamps, which it sold to merchants under a contract that they should be given out to customers as a special discount for cash, one stamp for each 10 cents worth of goods purchased. The contract provided that the stamps when so issued would be redeemed by complainant in goods when presented in books containing 990 stamps each, that they should only be given out in the manner prescribed, and that the property in and title to the stamps should remain in complainant. It also issued advertising books to the public, which did not give the terms of the contracts with merchants, or state the requirement that the stamps must be presented in books, but represented that each stamp was redeemable, nor did the stamps show such condition on their face. *Held*, that the title to the stamps while they remained in the hands of the merchant was a limited one, and he acquired no right to dispose of them otherwise than according to the contract, and that complainant was entitled to an injunction to restrain a defendant from unlawfully interfering with its contracts by inducing merchants to sell the stamps in violation thereof, and by selling the stamps so purchased to other merchants having no contracts with complainant, defendant having full knowledge of the terms of such contracts.

2. SAME—FRAUDULENT INTERFERENCE WITH COMPLAINANT'S BUSINESS.

Defendants, having obtained quantities of such stamps, in part by purchase from merchants, and in part from customers of such merchants to whom they had been regularly issued, gave them out to their own customers in such quantities as they chose. They also advertised that they had special arrangements with complainant by which they were authorized to give double the usual number of stamps with purchases from their store, and offered to redeem any of complainant's stamps either in goods or in cash, whereas in fact they had no contract with complainant. *Held*, that such manner of advertising was a fraud upon complainant, and entitled it to an injunction restraining the same, as well as the use of the stamps by defendants, in so far as they were acquired by purchase from merchants in violation of their contracts; and that as there was no way of distinguishing between the stamps so acquired, and those obtained from customers of merchants having contracts with complainant who issued them in accordance with the contract, the injunction would be extended to all.

In Equity. On motion for preliminary injunction.

W. Benson Crisp, John S. Murdock, and Tillinghast & Murdock, for complainant.

Edward D. Bassett, for defendant.

BROWN, District Judge. This is a petition for a preliminary injunction to restrain the defendants Landesman and Heller, copartners doing business under the firm name of the Mechanics' Clothing Company, from issuing, selling, or disposing of certain "green trading stamps." The complainant, a corporation, is engaged in what may be described as the "trading stamp business." It issues to merchants coupons, in the form of adhesive stamps, which are given by the merchant to his customers as a special discount or inducement for payment in cash. The complainant enters into a special contract with the merchant as to the title and use of the trading stamp. The company agrees to advertise the business of the merchant, and to distribute to

the public books descriptive of the trading stamp business; to maintain a store for the purpose of redeeming stamps issued by the merchant; and to keep on exhibition in said store goods with which to redeem the stamps, "when presented in the above-mentioned books and in lots of 990 stamps collected in the general way." It also appears that the complainant's trading stamps have been extensively advertised by newspapers, placards, and posters. The merchant agrees to receive "a sufficient number of trading stamps, to be supplied, as a discount for cash trade, to all persons who may call for them," and to give out said stamps, one for each 10 cents represented in a purchase, 10 stamps for one dollar, etc. He agrees not to dispose of the stamps in any other way, to pay the complainant a fixed price per hundred for the use of all stamps disposed of, and to display signs which read, "We give trading stamps." It is also agreed "that the property in and title to said stamps remains with the" company. The advertising book, or subscriber's book, issued to the public, does not inform the public of the terms of the agreement between the company and the merchant; for, while in the contract the company agrees to redeem stamps when presented in books in lots of 990 stamps in a book, it is advertised to the public that every single trading stamp is redeemable, that various articles can be procured for a smaller number than 990 stamps, that certain articles "will be exchanged for 990 green trading stamps, or one filled book," and that other articles "will be exchanged for 1980 green trading stamps, or two filled books." The public is not informed that stamps are redeemable only when presented in books.

It is the contention of the complainant that the trading stamp remains its property even after it has gone into the hands of a customer and has been received by him as a discount for a cash purchase. Upon the proofs, I find that the title to the stamps, while they are in the hands of the merchant, is a limited one, and that he acquires no right to dispose of them otherwise than according to the contract. It follows that merchants who should sell the stamps or dispose of them not in the way prescribed, would violate the contract with the company.

The complainant has introduced evidence that the defendants had in their possession stamps which could only have been acquired by the defendants from merchants who had disposed of them in a manner not authorized by the contract. There is also evidence tending to show that the defendants have solicited merchants, under contract with the complainant, to purchase trading stamps, and have sold trading stamps to such merchants. The evidence is sufficient to show that the defendants have full knowledge of the character of the contract between the merchant and the company, and that they have deliberately sought to induce merchants to break these contracts, to the detriment of the complainant. That the complainant is entitled to an injunction to restrain the defendants from such unlawful interference with its contracts seems to be well established. In *Exchange Telegraph Co. v. Gregory*, L. R. 1 Q. B. 147, it was said:

"It is not, as I understand the law, every procuring of a breach of contract that would give a right of action. The nature of the contract broken must be considered."

It hardly can be doubted that the complainant's business will be greatly damaged by the breach of its contracts. These contracts are generally uniform in requiring but one stamp to be given for each 10 cents of a purchase, and, if persons are enabled to issue stamps on better terms than those authorized by the contracts, there is an impairment of the value of the trading stamps to each merchant, and a lessening of his willingness to procure them from the complainant. The defendants clearly have been guilty of fraud upon the complainant by advertising in the newspapers in a manner which would tend to induce the public, as well as the merchants who were under contract with the complainant, to believe that the defendants had been authorized by the complainant to give more than the usual number of trading stamps. They have simulated the form of the complainant's advertisements, and have copied certain expressions in a manner tending to aid the deception. Also, they have issued a notice:

"By special arrangement with the company, the Mechanics' will give double the usual number of green trading stamps on all purchases all the year around." "The Mechanics' is the only store in Providence authorized to give double the usual number of green trading stamps in all departments, every day in the week, every week in the year."

These advertisements have been repeated, the first in evidence appearing December 4, 1903, and the last in evidence on January 27, 1904. The defendants have also used the special signs of the complainant in their windows, and have exhibited, in connection with their advertisements, large numbers of trading stamps. They have also issued, in a conspicuous advertisement, a "Notice to collectors of S. & H. green trading stamps. S. & H. green trading stamps are as good as gold. In order to notify the public that green trading stamps are as good as gold, we have this day made special arrangements to redeem all green trading stamps for spot cash." Offers are also made to exchange them for articles supplied by the defendants. The defendants were in no way authorized by the complainant either to issue or to redeem its trading stamps, and had made no contract with the complainant. The natural effect of these advertisements would be to convey to the public and to merchants a false impression that the defendants were acting under the authority of the complainant, both in issuing its stamps in double quantities, and in redeeming them in cash for the purpose of showing that they were as good as gold. It surely is contrary to equity that, after this course of fraudulent advertising to the public, the defendants now should be permitted to reap the fruits of their fraud, or to issue trading stamps in fulfillment of their fraudulent representations.

The only difficulty in the case arises from the fact that a very considerable proportion of the stamps in the possession of the defendants has been procured from customers. The defendants contend that a full, legal title to these stamps passed to the customers, that the title was transferable, and that one who has the legal title may use them for advertising purposes in such way as he sees fit without infringing upon any legal right of the complainant, since the complainant's advertising scheme is not property entitled to legal protection. I cannot accept the complainant's contention that the defendants cannot acquire

from any collector of the stamps any title to the stamps of the complainant, or any right to the use thereof. The company contends that the only right which a collector of the stamps acquires is that which is secured to him by a merchant under contract with the complainant. This, I think, is erroneous. The stamp, on its face, is a mere token, which conveys no information of the uses to which it can be put. The public is informed of those uses by the advertisements of the complainant. The information conveyed to the public by the complainant is that these stamps are redeemable for goods exhibited in its stores, and upon these goods a value is placed. It is not true that these stamps are a mere gratuity to the collector. The required consideration is that he shall obtain these stamps by making cash payments to one of a designated number of merchants. He obtains such rights as are promised to him by the complainant. There is no evidence that he is in any way informed, or put upon inquiry, as to the specific contract between the merchant and the company. After advertising to the public that the stamps were redeemable, that every one was redeemable, the complainant surely would have no right to impose upon a person who had collected 900 stamps an obligation to collect 90 more before he could redeem them. Upon the complainant's own showing it is not true that the stamps are redeemable only when presented in subscribers' books; and if it were the practice of the company to impose upon the public a condition of this character, the complainant would have no standing in a court of equity.

There is no contention, however, that the complainant does not perform the promise which it makes to the public. A collector of the stamps is doubtless a holder for value, and there appears to be no reason why he cannot transfer a stamp, with his rights of redemption, to any person and upon such terms as he may see fit. The value of the stamp resides in the complainant's promise of ultimate redemption. Though the stamp passes through many hands before it is presented for redemption, the complainant's obligation to redeem is not affected. It is, of course, desirable, from a business point of view, that only merchants who procure stamps from the complainant should issue them as advertisements; but, as any merchant may give to customers premiums in the form of goods or car tickets, it is difficult to see how he can be restrained from giving also these stamps, though they were issued by the complainant.

Such part of the bill as relates to the doctrine of trade-marks, so far as it has been made to appear, is entirely irrelevant. The stamps issued are actually the stamps made by the complainant, and they are put forth as such. No express restriction upon the use of the stamp is conveyed to the public. The complainant has not succeeded in directly informing the collector that he cannot use the stamps for advertising purposes. The argument under point 4 of the complainant's brief, therefore, I deem unsound in fact and in law. Even if a collector of the stamps is put upon inquiry, the answer to the inquiry would be found in the advertisements, issued by the complainant, that each stamp is redeemable; and, even if the defendants were put upon inquiry, they were entitled to rely upon such information as was contained in the complainant's public advertisements, though they had

specific knowledge of the contract between the merchant and the company. It would appear that the company has done more than it was required to do, and has bound itself to the public to redeem the stamps, whether presented in books or otherwise. If we should accept the complainant's contention that the public has no other rights than those set forth in the contract between the merchant and the company, the result would be to dismiss the bill.

If there is any ground for holding that a trading stamp once issued cannot again be used by its owner as an advertisement, it is only that suggested in the case of *National Telephone News Co. et al. v. Western Union Telegraph Co.*, 119 Fed. 294, 56 C. C. A. 108, 60 L. R. A. 805, in which, in rendering the opinion of the Circuit Court of Appeals for the Seventh Circuit, Judge Grosscup said:

"In short, the law being clearly inadequate to that purpose, equity should see to it that the one who is served, and the one who serves, each gets what the engagement between them calls for; and that neither, to the injury of the other, shall appropriate more."

It may, perhaps, be argued that the repeated use of a trading stamp for advertising purposes is so inconsistent with the understanding between collector and company, and so destructive to the business of advertising in this way, that it should be restrained. I should hesitate to grant a preliminary injunction on such doubtful and debatable grounds. But it is unnecessary to consider what are the limits of the doctrine of the case last cited, and how far the principles applied in that case are applicable here. This may be reserved to final hearing.

The complainant clearly is entitled to an injunction on the ground of unfair and fraudulent interference with its contracts and with its property. While it may be that the defendants have a clear legal title to many of the stamps which they have collected, and even the right to use them for advertising purposes, it surely is against conscience that they should use them in connection with their fraudulent advertisements, or as a part of their present fraudulent scheme and unwarranted attack upon the business of the complainant. By being deprived temporarily of the use of their stamps for such fraudulent purposes, they are not deprived of any lawful right, nor are they deprived of any lawful rights in losing any trade advantage from a notoriety arising from their fraudulent acts. As, from the nature of the case, the complainant can hardly be required at this time to make proof of exactly what proportion of the stamps was acquired legally and what illegally, as it is hardly practicable to determine just what proportion of the stamps have been acquired by the use of fraudulent statements, and as this confusion is the result of the defendants' own acts, the defendants must suffer the usual consequences to wrongdoers who have confused their own property with that of others, and must bear the burden of such delay as is essential to the orderly ascertainment of the legal and equitable rights of both parties.

A draft decree for a preliminary injunction may be presented accordingly.

GADONNEX v. NEW ORLEANS RY. CO.

(Circuit Court, E. D. Louisiana. January 8, 1904.)

No. 13,168.

1. PLEADING—DEFENSE OF CONTRIBUTORY NEGLIGENCE—MOTION TO MAKE ANSWER MORE SPECIFIC.

Under the rule of the federal courts that contributory negligence is a matter of special defense, the facts constituting such negligence must be set out, and, where the answer contains only a general averment, a motion will lie to require it to be made more specific, when under the practice of the state in which the court is sitting, as in Louisiana, such motion would lie as to any matter of special defense.

At Law. On motion to require answer to be made more specific.

Lapeyre, Monroe & Breazeale, for plaintiff.

Dart & Kernan, for defendant.

PARLANGE, District Judge. It is well settled—no citation of authorities on the point being necessary—that, in the federal courts, contributory negligence is a matter of defense. The contrary doctrine prevails in the courts of the state of Louisiana.

There is no reason why a defendant setting up such a special defense in a federal court sitting in this state should not be required to make it as distinct and specific as the plaintiff's demand is required to be made. On the issue raised by such a special defense, the defendant holds the affirmative, and stands in the attitude of a plaintiff quoad the special defense. If it be but just and fair that the plaintiff be required to distinctly inform the defendant as to his demand, it is equally just and fair that the defendant, who introduces an issue into the cause as a matter of special defense, should inform the plaintiff of the act or acts upon which reliance is placed in support of that defense. This question has been clearly and fully passed upon by Circuit Judge Simonton in *McInerney v. Virginia-Carolina Chemical Co.*, 118 Fed. 653. In volume 5, p. 12, *Ency. of Plead. & Prac.* verbis "Contributory Negligence," it is said:

"In those states where it is incumbent on the defendant to plead contributory negligence specially, and where the defense cannot be made under a general denial, the trend of the authorities is that a general averment that the plaintiff was guilty of negligence which contributed to the injury, and that he could have avoided all damage by the exercise of proper care, is not sufficient. The acts and defaults constituting such contributory negligence should be averred."

Specially see the cases in the notes. At page 14 of the same volume of the same work, it is said:

"If the defendant, in specially pleading contributory negligence, does not state the particulars in which the plaintiff was negligent, he may be compelled, on motion, to make his answer more definite and certain; and that, although he would have been permitted to make the defense of contributory negligence under the general denial."

See, also, the note to *King v. Oregon Short Line Co.*, in 59 L. R. A., at page 277.

The plaintiff's motion that the defendant's answer be made more specific concerning the defense of contributory negligence must be granted.

On Reargument.

(February 23, 1904.)

This matter has been carefully reargued before me, briefs have been filed, and I have re-examined the matter de novo. The question is: Must a defendant in a personal injury case, brought in a federal court sitting in Louisiana, who wishes to charge the plaintiff with contributory negligence, state the acts which he relies upon to substantiate the charge, if, seasonably and before trial, he is called upon by the plaintiff to do so? Evidently the matter is one which, even in a federal court, is governed by the procedure of the state in which the court is sitting. Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684]. This is distinctly conceded in *Canadian Pacific Ry. Co. v. Clark* (Second Circuit) 73 Fed., at page 81, 20 C. C. A. 452, a case much relied upon by the defendant's learned counsel at the reargument and in his brief. The jurisprudence of the Supreme Court of Louisiana is that the plaintiff must prove, as part of his case, that he was not guilty of contributory negligence, while the opposite rule governs in the federal courts.

The question under consideration is therefore to be solved by determining in what manner contributory negligence would be required to be pleaded in a state court of Louisiana, if the Supreme Court of Louisiana were to reverse its present jurisprudence, and to align itself with the Supreme Court of the United States and the other courts which hold that contributory negligence is a defense. I do not see how the least difficulty or doubt could arise in determining that matter. It results clearly, from numerous decisions of the Supreme Court of Louisiana, that one of the basic rules of the Louisiana procedure is that a defendant who, in stating his defense, is not satisfied with a denial of his adversary's averments, but wishes, as a matter of special defense, to introduce a new issue not raised by his adversary, must, if he is seasonably required to do so, plead the special defense clearly and distinctly. This doctrine is so well settled that I deem a citation of Louisiana authorities unnecessary. Obviously, this is required as a matter of fairness to the adversary, so that he may have an opportunity to meet the new issue; and it is also required in order that the court may judge for itself whether the defense is or is not a mere erroneous conclusion of the pleader.

It is perfectly plain that the defense of contributory negligence introduces new matter into the controversy, and as to such new matter the defendant is in the attitude of a plaintiff, who is called upon to give his opponent fair notice of the acts upon which he relies. And it cannot be doubted that contributory negligence, while not a pure plea in confession and avoidance, is in the nature of such a plea. It does not judicially admit the plaintiff's negligence, but, as was very clearly and aptly said by Circuit Judge Simonton in *McInerney v. Virginia, etc., Co.*, 118 Fed., at pages 654 and 655:

"It is an affirmative defense in the nature of a plea of confession and avoidance. This defense goes farther than a general denial. Under the defense

of a general denial, the plaintiff must prove that the negligence of the defendant was the proximate cause of the injury. And the defendant can introduce any evidence contradicting that. He may show that his conduct in no wise contributed to the injury, and may go farther, and show that the injury was caused wholly by the act of the plaintiff. But, where he sets up the defense of contributory negligence, he in effect says: 'It may be true that I was negligent, but at the same time I can show that you also were negligent, and so, notwithstanding my negligence, you cannot recover.' In other words, by inserting this defense, he introduces new matter—other facts which, if they do not justify him, debar the plaintiff. And under the rule of Code pleading he must set out concisely these facts from which the legal conclusion can be drawn. Before the plaintiff can recover, he must set out, as well as prove, the specific acts of defendant by which negligence will appear; and so, when defendant relies for his defense on the contemporaneous negligence of plaintiff, he must set out the facts—the specific acts of plaintiff by which his negligence will appear."

Neither the conclusion reached in the case of *Canadian Pacific Ry. Co. v. Clark*, supra, nor anything that was said in the main opinion in that case, militates in any manner against my view of the matter in hand. The *Clark* Case was an action on the case under common-law pleadings, and the court admits that the rule which it announces might be different under Code pleading. The general issue at common law and the general denial under Code pleading are not equivalents. There are defenses of which a defendant may avail himself under the general issue which he would not be allowed to make under the general denial. *Ency. Pl. & Prac.* verbiis "Trespass on the Case," vol. 21, p. 921; *Id.* verbiis "Answers in Code Pleading," vol. 1, p. 816, and cases cited in the notes; also, *Walker v. Flint*, 11 Fed. 31.

But with much that was said in the concurring opinion in the *Clark* Case, 74 Fed. 362, 20 C. C. A. 447, I cannot agree, notwithstanding my great respect for the opinions of the learned judge who wrote the latter opinion. A case is supposed where, until the trial, the defendant has no knowledge whatever warranting a belief sufficient to authorize him to plead the plaintiff's contributory negligence—the knowledge, locked up in the plaintiff's breast, being only obtained at the trial under the stress of cross-examination; and it is stated that it would be unjust to deprive the defendant of a meritorious defense merely because he had not and could not have learned of it until the trial. But no such injustice could be inflicted, because it is well settled that the defendant, even if he has not pleaded contributory negligence, can avail himself—without the necessity of an amendment, and without right, on the plaintiff's part, to a delay—of the plaintiff's contributory negligence appearing from the plaintiff's own case. *Washington & Georgetown Rd. v. Harmon*, 147 U. S. 580, 581, 13 Sup. Ct. 557, 37 L. Ed. 284; *Indianapolis R. R. Co. v. Horst*, 93 U. S. 298, 299, 23 L. Ed. 898; *Chicago G. W. Ry. Co. v. Price* (Eighth Circuit) 97 Fed. 430, 38 C. C. A. 239; *McMurtry v. L., N. O. & T. Ry. Co.*, 67 Miss. 607, 7 South. 401; *Enc. Plead. & Prac.*, verbiis "Contributory Negligence," vol. 5, p. 13, text and cases there cited.

Benefit, and not hardship, results to the defendant from the view of the matter in hand which seems to me to be the logical and correct view. He is given an advantageous position. He is permitted to elicit evidence by legitimate cross-examination of his adversary. Not so with one who wishes to sue for a killing occurring on the track of

a railroad company, or in some other accidental manner, under circumstances which preclude him from knowing the facts of the accident. He cannot sue without alleging fault and the facts constituting the fault, and he is afforded no opportunity to elicit evidence from the opposite party. If a defendant is not satisfied with the advantage and benefit given him of obtaining, if he can, evidence from his adversary, even when contributory negligence has not been pleaded, but wishes, in addition, to set up independently an affirmative defense, why should he be permitted to do so without alleging facts? Either he knows the facts, or he does not. If he knows them, he must state them, and not attempt, by withholding them, to surprise his adversary. If he does not know the facts, he should not be allowed to set up an unfounded issue. Excepting only the general denial, which is understood to be in most cases but a call on the plaintiff to prove his averments, I do not know of any substantial pleading which a litigant should be allowed to make without at least some bona fide belief that it can be substantiated by proof.

I am confirmed in the conclusion heretofore reached by me on the original hearing.

UNITED STATES v. NORTHERN SECURITIES CO. et al.

(Circuit Court, S. D. Minnesota. April 19, 1904.)

1. EQUITY—INTERVENTION AFTER DECREE—GROUNDS FOR GRANTING LEAVE.

Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication which is likely to arise.

2. SAME.

In a suit by the United States the Northern Securities Company was adjudged an illegal combination in restraint of interstate trade and commerce, in violation of the federal anti-trust law, on the ground that it was organized for the purpose of acquiring, holding, and voting a majority of the stock of each of two railroad companies whose lines were parallel and naturally competing, thus placing such roads under a common control and preventing competition. The railroad companies were also made parties defendant, and a decree was entered enjoining the Securities Company from voting the stock held by it in either company, and enjoining such companies from paying it dividends on such stock. Such decree was wholly prohibitory, and on appeal was in all things affirmed by the Supreme Court of the United States. *Held*, that a stockholder of the Northern Securities Company would not be granted leave to intervene after such affirmation for the purpose of obtaining further orders of the court directing the manner in which such company should distribute the stock of the railroad companies among its own stockholders, or to raise issues of fact as to the legality of a proposed method of distribution adopted by its directors, the rights of stockholders in that respect as between themselves being a matter which could properly be litigated and determined in independent suits, and the question whether the proposed action was illegal or in violation of the spirit and purpose of the decree being one which could only be raised in the instant suit by the United States.

3. SAME—RIGHT OF INTERVENTION—PROPERTY IN CUSTODIA LEGIS.

The suit having been one in personam for the sole purpose of preventing the accomplishment of the illegal purpose of the combination, and the

court having deliberately refrained from embodying in its decree any direction as to the disposition by the Northern Securities Company of the stock of the railroad companies which it held, such stock was not placed by the suit in custodia legis, so as to entitle a stockholder of the Securities Company to intervene for the protection of any right therein.

4. SAME—SUIT BY UNITED STATES—INTERVENTION BY PRIVATE INDIVIDUALS TO OBTAIN MODIFICATION OF DECREE.

Where the court, in a suit brought by the United States in behalf of the public to restrain an alleged combination in violation of the anti-trust law, deliberately refused to award a mandatory injunction prayed for in the bill, making the provisions of its decree prohibitory only, after such decree has been affirmed on appeal and accepted as satisfactory by the government the court will not permit an intervention by private individuals, over the objection of the Attorney General, for the purpose of obtaining a modification of the decree by incorporating therein the same mandatory provision which was refused to the complainant.

On petition by Edward H. Harriman and Winslow S. Pierce, as trustees, and the Oregon Short Line Railroad Company, for leave to intervene after decree. The Continental Securities Company was permitted to intervene for the purpose of objecting to the petition.

William D. Guthrie, R. S. Lovett, Maxwell Evarts, and John N. Baldwin, for petitioners.

Elihu Root, John G. Johnson, Frank B. Kellogg, and C. A. Severance, opposed.

Jas. Hamilton Lewis, for Continental Securities Co.

Before SANBORN, THAYER, VAN DEVANTER, and HOOK, Circuit Judges.

THAYER, Circuit Judge. This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene pro interesse suo in the case of the United States v. The Northern Securities Company and others. The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed lately by the Supreme Court of the United States. 24 Sup. Ct. 436, 48 L. Ed. —.

The petitioners recite as the grounds of their application that Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, are the registered owners of \$82,491,871 in par value of the stock of the Northern Securities Company, which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that company to the extent of 99 per cent., and are about to submit the scheme for approval to the stockholders of the company; that the plan so proposed contemplates that the stockholders of the Securities Company shall surrender 99 per cent. of the stock of that company which they respectively hold, each stockholder receiving in exchange \$39.27 in stock of the Northern Pacific Railway Company and \$30.17 in preferred stock of the Great Northern Railway Company, for each share of the Securities stock so surrendered; that the petitioners, Harriman and Pierce, are able to return the shares of stock in the Securities Company which they originally received from that company in exchange for Northern

Pacific stock, and as they verily believe that the proposed plan of distribution, if carried out, will vest a majority of the stock of the Great Northern and the Northern Pacific Railway Companies in the same individuals who co-operated in forming the Securities Company, and would continue the common management of the two competing railway companies and render the decree of this court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise.

The principal ground, as it seems, on which the petitioners, Harri-man and Pierce, base their application to intervene, is that it is necessary to the due enforcement that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders. It is undoubtedly true that a supplemental bill may be filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given. *Root v. Woolworth*, 150 U. S. 401-411, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Minnesota Company v. St. Paul Company*, 2 Wall. 609, 17 L. Ed. 886. But we fail to perceive that further orders are necessary in the case at hand to insure the due execution of the decree according to its terms. The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential.

In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade.

The government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless com-

modity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject-matter of an independent suit between the parties immediately interested.

It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned, or to exclude other methods of disposition of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company, and that the petitioners should be permitted to intervene and obtain further order to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its records which tend to show that the proposed plan of distribution will not have the effect last mentioned, but will lead to a very wide distribution of the stock, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be entitled to litigate and with witnesses and evidence after leave to intervene had been granted, and we decline to consider them or the affidavits and excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone.

The United States is the complainant in this case. It is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way.

The United States, speaking by its attorney general, says that it "neither admits nor denies the allegations of the petition, but objects to the proposed intervention. This case was heard before this court on bill, answer, and testimony, and a final decree was entered enjoining the defendants as therein recited. Upon appeal by defendants to the Supreme Court of the United States the decree of this court was affirmed in every particular, the effect of which was to end and close the case. The United States stands on the decree as affirmed, and submits that the court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the United States it is to be presumed that the government is disposed to permit the stockholders of the Securities Company to formulate some plan for the equitable distribution of the stock of the two railway companies, if they can do so, which will not be in violation of the law, feeling confident of its ability to dissolve any future combination in restraint of interstate commerce should one in fact result from any scheme that may be devised for the disposition of the stock of the two companies, and preferring to challenge the validity of any such combination by an independent bill, rather than by any future proceedings in this case.

It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company was placed in *custodia legis* by the filing of the government bill in this case; that it has never been released from such custody, although a final decree has been entered; and that on this ground the petitioners who assert a right to have particular shares of the Northern Pacific Railway Company returned to them are entitled to intervene. This argument does not impress us favorably. It may be conceded that, so long as property remains actually in judicial custody, any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. In *re Howard*, 9 Wall. 175, 184, 19 L. Ed. 634, and cases cited; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559. It is a well settled doctrine that when a court has acquired the custody of property persons who assert an interest therein have a right to apply to the court for relief, and, as a general rule, cannot obtain relief elsewhere. This court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing. It did not assume to direct what should be

done with the stock in question when it enjoined the Securities Company from voting it and the railway companies from paying dividends thereon to the Securities Company. Nor was the bill which was filed by the government one that placed the stock in judicial custody when it was filed. It was proceeding strictly in personam, which prayed the court to enjoin the use of the stock for the accomplishment of certain unlawful objects, and the relief granted was confined to that end. The intervention cannot be allowed on the ground last stated.

Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action, and if it so happens that the decree of this court in favor of the government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed, or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to these principles of law and equity which any court having general common law and equity powers is competent to enforce.

Leave to intervene is denied.

THE MARCUS HOOK.

(District Court, S. D. New York. March 3, 1904.)

1. SALVAGE—AMOUNT OF AWARD—SERVICES RENDERED INSIDE DELAWARE BREAKWATER.

A salvage award of \$600 made to two tugs for timely and meritorious services rendered in towing to a place of safety a barge which had been anchored inside the old Delaware Breakwater, but was dragging her anchor and drifting toward the cape; the barge and cargo being of the value of \$30,000 to \$35,000, and the service lasting only about an hour.

In Admiralty. Suit to recover salvage.

Robinson, Biddle & Ward, for libellant.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by Frank L. Neall, owner, as trustee, of the steamtugs Juno and Sommers N. Smith, against the barge Marcus Hook and her cargo of oil, for salvage services rendered on the 16th of September, 1903, in the Delaware Breakwater. The barge was towed there by the tug Ivanhoe from Philadelphia, en route to New York, and anchored inside of the Old Breakwater. The answer alleges:

"Third. The claimant admits that at about 4 A. M. of September 16th, 1903, while the barge was lying at anchor in the Old Delaware Breakwater, a hurricane of unusual force arose, being at first from E N E and later shifting to W N W with an ebb tide; that at first the barge began drifting toward the

¶ 1. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

shore, but subsequently about 7:30 A. M., her anchor again failing to hold her, she began to draw slowly seawards heading out between the point of Cape Henlopen and the end of the Old Breakwater; that the barge was without motive power and her captain hoisted a signal of distress to which the tug Juno responded; that the Juno's hawser was made fast and about 8 A. M. the Juno began towing the barge back to the place where she had originally been anchored, but before she had reached there, the tug Ivanhoe, which had towed the barge to the Breakwater and was lying there, came alongside, took the barge away from the Juno and anchored her in a place of safety near the Stone Pile."

This is accepted by the libellant as a correct statement, so far as it goes, of the occurrence, excepting that part which avers that the barge was heading out between the point of Cape Henlopen and the end of the Old Breakwater. In this respect, the testimony indicates that the libellant's contention that the barge would eventually have gone ashore on the cape, if nothing had interfered to prevent, is correct.

It is admitted that some salvage is due but it is contended that \$250 will be ample remuneration as the service was of a low order and it did not amount to much more than towage. The libellant, on the other hand, asks for an award of the full amount of the bond, which is \$5,000.

The testimony shows that the services were timely and meritorious but of short duration, probably not exceeding an hour on the part of the tugs, and not attended with any serious peril until the Ivanhoe attempted to take the barge away from the salvors, in doing which she created some danger to the Juno, by pulling the barge in a different direction from that she was being towed by the Juno, so that the latter was obliged to cut her hawser to avoid the risk of being overturned. The danger, however, was averted by such act and it would not have been incurred, if the Juno had not been too assiduous in holding on to what she deemed her prize. She might have resigned it in the beginning of the Ivanhoe's attempt, without prejudice to the salvage claim. There was very little damage to the hawser.

The services consisted of the Juno's making fast to the barge and towing her from an impending danger of drifting on the shore, while the Smith stood by to aid, if it should become necessary. The danger to the barge, however, was not as great as the libellant seeks to make out. The anchor was still holding to some extent and the barge was drifting very gradually when the Juno reached her. The Ivanhoe was slow in getting her anchor up, probably on account of the severe weather, but doubtless would have overtaken the barge before she actually touched the ground, which was a half to three fourths of a mile distant when the Juno arrested the drift and the barge was still at some distance from the shore when the Ivanhoe started to her aid. It would only have required a few minutes for the latter to have reached the barge.

The barge was worth between \$20,000 and \$25,000 and the cargo was worth about \$11,000. The Juno was an old but serviceable tug and worth about \$8,000.

I consider that an award of \$600 will be ample to meet the requirements of the case. A decree for that amount may be entered.

KING et al. v. EIDMAN.

(Circuit Court, S. D. New York. October 28, 1903.)

1. INTERNAL REVENUE—LEGACY TAX—CONSANGUINITY.

A legacy to a son-in-law of the testator is subject to tax under the fifth clause of section 29 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2306], as one to a stranger in blood.

Action to Recover Legacy Tax Paid.

Chas. Duane Baker, Asst. U. S. Atty., for the demurrer.

J. G. K. & F. L. Lee, opposed.

WALLACE, Circuit Judge. Unless a son-in-law is a blood relation of his father-in-law, the legacy tax in controversy was correctly assessed. The complaint does not allege that there was any degree of lineal or collateral consanguinity between the testator and his son-in-law. The question seems too plain for serious discussion.

Demurrer sustained, with costs.

THE FRANK S. HALL.**THE BERMUDA.**

(District Court, E. D. Pennsylvania. March 10, 1904.)

No. 50.

1. COLLISION—VALUE OF SCHOONER—FINDING OF COMMISSIONER.

The finding of a commissioner as to the value of a schooner sunk in collision confirmed.

In Admiralty. Suit for collision. On exceptions to report of commissioner.

See (D. C.) 116 Fed. 559; 128 Fed. 816.

Flanders & Pugh, for libellant.

John F. Lewis, for respondent.

J. B. McPHERSON, District Judge. There is no dispute concerning the measure of damages that ought to be applied in this case. It is the market value of the schooner at the time she was sunk, the whole controversy being a dispute of fact concerning what that value was. The libellant declares that the vessel was worth \$8,000, while the respondent's position is that \$1,800 to \$2,000 would be an ample allowance. The evidence ranges from \$1,000 to \$2,000, and the commissioner has found the value to be \$3,000, with which finding I do not see my way to disagree. He has heard the witnesses—or nearly all of them—has given the testimony very careful consideration, and I adopt his report as the opinion of the court.

The exceptions are dismissed, and the clerk is directed to enter the decree recommended by the commissioner.

THE FRANK S. HALL

THE BERMUDA.

(District Court, E. D. Pennsylvania. March 21, 1904.)

No. 50.

1. COLLISION—DIVISION OF DAMAGES—COSTS.

Where the damages resulting from collision are divided because both vessels were found in fault, the costs may properly be considered as a part of such damages, and also divided, unless in exceptional cases.

In Admiralty. Suit for collision. On motion to divide costs.

See 116 Fed. 559; 128 Fed. 815.

Flanders & Pugh, for libellant.

John F. Lewis and Francis C. Adler, for respondent.

J. B. McPHERSON, District Judge. As is well known, when a collision is due to the fault of both vessels the damages are equally divided, whether one vessel or both have been injured, and I see no reason why, in the ordinary case, the costs should not be divided according to the same rule. They may be fairly regarded as part of the damages, for they are incurred in the effort to discover who is liable for the injury, and are therefore a sufficiently direct result of the collision. The injury done to each party is increased by the sum that he is compelled to expend in litigating the suit, and in my opinion the aggregate of the sums thus expended should be borne equally by the parties. An exceptional case may require exceptional treatment, but I am aware of nothing in the present controversy that should move the discretion of the court in favor of either litigant. Judge Butler's thoroughly satisfactory opinion in *The Pennsylvania* (D. C.) 15 Fed. 814, a case decided in this district, affirmed on appeal in (C. C.) 24 Fed. 296, relieves me from the necessity of discussing the subject further. See, also, *The America*, 92 U. S. 432, 23 L. Ed. 724; *The Mary Patten*, 2 Low. 196, Fed. Cas. No. 9,223; *The Hercules* (C. C.) 20 Fed. 205; *Union Ice Co. v. Crowell*, 55 Fed. 87, 5 C. C. A. 49; *The Horace B. Parker*, 76 Fed. 238, 22 C. C. A. 418; and *The Edward Luckenback* (D. C.) 94 Fed. 544.

¶ 1. See *Collision*, vol. 10, Cent. Dig. § 308.

BOARD OF COM'RS OF HENDERSON COUNTY, N. C., v. TRAVELERS' INS. CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 501.

1. COUNTY REFUNDING BONDS—CONSTITUTIONALITY OF STATUTE—CREATING NEW INDEBTEDNESS.

Act N. C. Feb. 2, 1893 (Pub. Acts 1893, p. 69, c. 70), authorized Henderson county to issue bonds to refund a former issue made in 1874 in aid of a railroad, and provided that such bonds should be deemed a continuation of the liability created by the former issue, and should not "be taken, construed, deemed nor held as the creation of a new debt nor liability." Held that, under the law of the state as determined by its Supreme Court prior to its passage, such act did not provide for the creation of an indebtedness, assuming the original bonds to have been valid, and did not, therefore, come within article 2, § 14, of the state Constitution, requiring bills for acts creating or authorizing a state, county, or municipal indebtedness to be read three several times in each house on different days, and the yeas and nays on the second and third readings to be entered on the journals.

2. COUNTIES—AUTHORITY TO SUBSCRIBE TO RAILROAD STOCK.

The fact that, after the passage of an act authorizing counties through which a railroad was projected to subscribe to the stock of the company, such company was consolidated with another, as permitted by the laws of the state, and the name was changed, did not deprive a county of the power to thereafter make a valid subscription to the stock of the company under the new name, nor invalidate bonds issued in payment of such subscription.

3. CONSTITUTIONAL LAW—PROVISIONS OPERATING PROSPECTIVELY ONLY—MANNER OF PASSING STATUTES.

Article 2, § 14, of the Constitution of North Carolina adopted in 1868, requiring acts creating or authorizing state, county, or municipal debts to be passed in a specified manner by the Legislature, did not supersede prior legislation nor affect the validity of acts previously passed, nor did it render invalid county bonds issued thereafter under authority given by an act previously passed without such specified formalities.

4. FEDERAL COURTS—FOLLOWING STATE DECISIONS—VESTED CONTRACT RIGHTS.

County bonds, which were authorized and valid when issued under the law of the state as declared by its Supreme Court in previous decisions, will not be declared invalid in the hands of bona fide holders by a federal court because the state court has since reversed its former rulings.

5. MUNICIPAL BONDS—VALIDITY—ESTOPPEL BY RECITALS.

Where there was statutory authority for a county to issue negotiable bonds, and it has issued such bonds, which have passed into the hands of bona fide purchasers for value, the county is estopped by recitals therein that they were issued in all respects in conformity to the statutes authorizing the same.

6. STATUTES—VALIDITY OF ENACTMENT—RECITALS OF LEGISLATIVE JOURNALS.

Where the recitals in legislative journals relating the passage of a bill show that such bill was introduced and referred to a committee, and that

¶ 4. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

¶ 5. Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.

See *Counties*, vol. 13, Cent. Dig. § 291; *Municipal Corporations*, vol. 36, Cent. Dig. § 1974.

it subsequently passed its second and third readings by a recorded vote, and the act was ratified by the presiding officers, who certified that it had passed three readings, it sufficiently appears that it had a first reading.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

H. S. Henderson and O. V. T. Blythe, for plaintiff in error.

Charles Price, Victor S. Bryant, and J. Crawford Biggs (William Bro Smith and R. B. Boone, on the briefs), for defendant in error.

Before SIMONTON, Circuit Judge, and MORRIS and McDOWELL, District Judges.

SIMONTON, Circuit Judge. This case comes up on writ of error to the Circuit Court of the United States for the Western District of North Carolina. The cause below was heard by the court without the aid of a jury. Judgment was entered for the plaintiff below. The defendant sued out the writ of error, and the cause comes before this court on the errors assigned.

The pleadings are voluminous, and their substance will appear in this opinion. The Travelers' Insurance Company, a corporation of the state of Connecticut, brought this action against the board of county commissioners of Henderson county, N. C., as the owner and holder of coupons of the value of \$5,580, cut from the bonds of the denomination of \$1,000, issued by the defendant, 62 of which were held by plaintiff. These 62 bonds were part of an issue of 97 bonds of said defendant on or about 1st July, 1895. In each of the bonds, and as part thereof, is the following recital:

"This bond is one of a series of ninety-seven bonds of like date, tenor, amount and effect as this, numbered consecutively from 1 to 97, both inclusive, said bonds being issued pursuant to, and in accordance with, the power and authority given to the Board of Commissioners of Henderson County by an act of the General Assembly of the State of North Carolina, entitled 'An act to authorize the Commissioners of Henderson County to issue bonds,' ratified the 2nd day of February, 1893, and in accordance with the provisions of an act, amendatory thereof, ratified March 13th, 1895. It is hereby certified that no provision of the Constitution or of the laws of North Carolina is in any wise violated by the issue of said bonds, and it is further certified and declared that all acts, requirements and conditions precedent or otherwise to the issue of said bonds have been duly and fully complied with; that the said bonds are in all respects legal, and that the public faith and credit of the said county of Henderson is hereby pledged for the payment and redemption of the same, and all interest coupons thereon as the same respectively fall due."

The coupons on said bonds had been duly paid semiannually from January 1, 1896, to January 1, 1901. Thereafter payment was refused. Plaintiff avers that it is the bona fide purchaser for value before maturity, in open market, of these bonds. The defendant filed its answer, denying the validity of these bonds, averring that they were unlawfully issued. On this question the case turns.

The issue of 97 bonds, of 62 of which plaintiff below is the holder, was made under the authority of an act of the Legislature of North Carolina, ratified February 2, 1893 (Pub. Acts 1893, p. 69, c. 70), entitled "An act to authorize the commissioners of Henderson county to

issue bonds." This act recites that the county of Henderson, by order of her board of commissioners, had entered, in pursuance of law, in the year 1874, an ordinance authorizing an election, by votes of the county, on the question of issuing bonds in aid of the Greenville & French Broad Railroad Company, afterwards called the Spartanburg & Asheville Railroad; that the election was held, and subscription authorized and bonds issued in aid of said railroad to the sum of \$100,000, interest at the rate of 7 per cent., payable semiannually, the bonds to mature on 1st July, 1895; and that it was desired to fund said bonds in accordance with law. The act then goes on and authorizes the issue of bonds for that purpose, not exceeding \$100,000, payable in 30 years, interest not exceeding 7 per cent. per annum. The second section (page 70) is as follows:

"That the bonds in this act provided for, being intended to be deemed and held a continuation of the liability of Henderson county, created by the provisions of the law, order and election above recited, which authorized the issue of the bonds in aid of the aforesaid railroad, the same shall not be taken, construed, deemed nor held as the creation of a new debt nor liability, but as a continuation of the said debt now existing."

The fifth section (page 70) authorizes the levy of a tax to pay the interest as it accrues.

It is contended that the bonds issued under this act were invalid, because it was not passed in compliance with section 14, art. 2, of the Constitution of North Carolina, which is in these words:

"No law shall be passed to raise money on the credit of the state or to pledge the faith of the state directly or indirectly for the payment of any debt or to impose any tax upon the people of the state, or to allow counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall be on three different days and agreed to by each house respectively and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

This act of February 2, 1893, was not passed in this way. Does this make the bond issue of 1895 invalid? We must keep in mind that "the rights of the holders of county bonds are determined in the federal courts by the law of the state as it was declared by the state court to be at the time the bonds were made and put on the market." *Wilkes Co. v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. These were bonds to refund a debt. An issue of bonds to refund a debt is not the creation of a new debt. It is simply a change of form, renewing and extending a debt already existing. *City of Pierre v. Dunscomb*, 106 Fed. 617, 45 C. C. A. 499; *Rollins & Long v. County Commissioners*, 49 U. S. App. 411, 80 Fed. 692, 26 C. C. A. 91; *Hughes Co. v. Livingston*, 104 Fed. 306, 43 C. C. A. 553. This doctrine has been recognized by the courts in North Carolina. In *Blanton v. Commissioners of McDowell Co.*, 101 N. C. 532, 8 S. E. 162, *Smith, C. J.*, for the court, says:

"It is perfectly manifest that in the issue of the new bonds in the place of those that had matured, it was not intended to surrender any security which the creditor had for the debt by a novation of the one for the other, but to maintain the indebtedness as essentially one and the same in the different forms assumed. * * * The mere renewed recognition of a subsisting lia-

bility in the issue of a new bond, declared in the very act which authorizes the issue 'to be a continuation of the liability' resting upon the county, cannot, upon any sound reasoning, be deemed the creation of a new debt in the sense of its falling under the restrictions applicable to new contracts of indebtedness, with the deprivation of the pre-existent means of enforcing performance by the levy of the necessary taxes."

This case concerned bonds issued to refund other bonds issued in aid of the Western North Carolina Railroad. So, also, in *Broadfoot v. Fayetteville*, 128 N. C. 529, 39 S. E. 20, it was held that funding bonds created no new indebtedness or liability when the rate of interest was not increased. And in *Smathers v. County Commissioners of Madison County*, 125 N. C. 487, 34 S. E. 554, it was held that bonds could be issued to fund necessary expenses of the county, and that they did not come within the provisions of section 14, art. 2, of the Constitution. If, therefore, the original issue of bonds, for the funding of which the act in question provided, was valid, then this act cannot be said to have been passed in violation of this section 14, art. 2, of the Constitution.

Were the bonds originally issued a valid debt on Henderson county? On February 13, 1855 (Priv. Laws 1854-55, p. 269, c. 229), the Legislature of North Carolina passed an act to incorporate the Greenville & French Broad Railroad Company. The first section of the act declared that for the purpose of establishing a communication by railroad from some of the railroads now built or in course of construction in South Carolina along the French Broad valley, across the western part of this state, so as to effect a direct communication between one of said roads in South Carolina and the East Tennessee & Virginia Railroad in East Tennessee, the formation of said company is hereby authorized, which, when formed, shall have corporate existence in each of the states aforesaid, and have all the rights, privileges, and immunities hereafter granted. Then follow 27 other sections, defining and declaring the rights and powers of said company, and a last section, declaring it to be a public act. On February 2, 1857 (Priv. Laws 1856-57, p. 72, c. 77), this act was amended so as to authorize said company to construct the northern portion of said road, extending from Asheville, or some convenient point within two miles thereof, to the state of Tennessee. On February 16, 1859 (Priv. Laws 1858-59, p. 212, c. 166), this act was further amended so as to authorize any of the counties through which said road is intended to pass to subscribe to the capital stock of said company any sum or sums that may be determined on by the court of pleas and quarter sessions of said county, a majority of the justices of the peace of said county being present, and approved by a majority of the lawfully qualified voters of such county, to be ascertained as thereafter provided. Then follow directions how the vote of the people shall be had. The third section authorizes the court, if the majority of the voters of the county approve the subscription, to issue bonds bearing interest not exceeding 7 per cent. per annum, and to levy a tax to meet the interest as it accrues, and to liquidate the principal as it falls due, as they shall judge expedient. No action was taken under this last amendment until 21st July, 1873, when the county commissioners of Henderson county, by

an order reciting that they are acting under this amendment of 1858-59, recommended to the voters of Henderson county that they authorize a subscription to the capital stock of this company, then and thenceforward known as the "Spartanburg & Asheville Railroad Company." The election was held on 7th August, 1873, and the result of the vote was in favor of the subscription. Thereupon the board directed their chairman to make the subscription, and the bonds were issued to the extent of \$100,000, bearing interest at 7 per cent. per annum, the bonds being payable 1st July, 1895, and each reciting that it was issued in aid of the Spartanburg & Asheville Railroad Company. It is true that the bonds were to be issued as a subscription to the Greenville & French Broad Railroad Company. This company afterward consolidated with a railroad in South Carolina, and the name of the consolidated company became the Spartanburg & Asheville Railroad Company. The statutes of North Carolina (chapter 138, p. 186, Pub. Laws 1871-72) authorized a consolidation of this character, and, among other things, provided (section 61) that on such consolidation "all stock subscriptions and other things in action belonging to either of said corporations shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed." The consolidation is admitted in the agreed statement of facts in the record. The statute of North Carolina is in accord with the general law. *County of Livingston v. The Bank*, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. Ed. 359; *Scotland County v. Thomas*, 94 U. S. 688, 24 L. Ed. 219. The railroad passed through Henderson county. Under a Constitution of the state of North Carolina adopted in 1868, a board of county commissioners was established in each county, which took the place of and succeeded to all the powers and duties of the court of pleas and quarter sessions. *Belo v. Commissioners of Forsythe*, 76 N. C. 489; *Wilkes County v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. At the time of the passage of the amendment of 1858-59 there was no constitutional provision limiting and qualifying the power of the Legislature in the passage of an act like this. Unless the act was repealed or superseded, it remained in full force and effect when in 1873 the election was ordered and in pursuance thereof the bonds were issued. There is no act on the statute book repealing this amendment in terms.

But it is said that this act was repealed by article 2, § 14, of the Constitution of North Carolina adopted in 1868, and set out supra. It will be noticed that the language of this section of the Constitution is in the future. No law "shall" be passed, etc. The courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no doubt that such was the intention of the Legislature. *Chew Heong v. United States*, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871. The Supreme Court of the United States has held that a change in a state Constitution, relating to municipal subscriptions, is not retroactive so as to have any controlling application to laws in existence when the Constitution was adopted. It does not destroy a vested right of a corporation to receive bonds of a municipal corporation although they are not issued. *Dallas Co. v. Mc-*

Kenzie, 110 U. S. 686, 4 Sup. Ct. 184, 28 L. Ed. 285; County of Ray v. Vansycle, 96 U. S. 675, 24 L. Ed. 800; County of Schuyler v. Thomas, 98 U. S. 169, 25 L. Ed. 88. In the County of Scotland v. Thomas, 94 U. S. 688, 24 L. Ed. 219, the court construed a section of the Constitution of Missouri in these words:

"The General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless," etc.

As to this the court says:

"This provision, it will be observed, is against the Legislature authorizing municipal subscriptions or aid to private corporations. It does not purport to take away any authority already granted. It only limits the power of the Legislature in granting such authority for the time to come."

The Constitution of 1868 (article 4, § 19) declared the laws of North Carolina not repugnant to this Constitution or the Constitution of the United States shall be in force until legally changed, unless inconsistent with the provisions of this Constitution.

There are two cases in the Supreme Court of North Carolina which tend to show that this section 14, art. 2, of the Constitution, was not intended to supersede previous legislation. The convention which adopted the Constitution had, previous to its adoption, passed an ordinance on 9th March, 1868, authorizing a subscription in aid of the Northwestern North Carolina Railroad Company by the county of Forsythe. The election under that ordinance took place 4th April, 1868. The Constitution was ratified April 24, 1868. The subscription pursuant to the election was made in June, 1878. The validity of the subscriptions and of the bonds was tested in Hill v. Commissioners of Forsythe County, 67 N. C. 367, and they were sustained. Thus the Constitution was held not to have superseded the previous legislation. The same point was decided in Belo v. Commissioners of Forsythe County, 76 N. C. 489. These cases were decided in 1872 and 1877, respectively, and were not questioned at the time of the issue of the bonds for which the bonds in this suit were funded.

It is contended, however, that the act of 1858-59 conflicts with the Constitution in that it provides that the stock subscription must be authorized by a majority of the qualified voters, whereas the act required a majority of the votes cast. It is admitted, however, that the original bonds were voted for by a majority of the qualified voters. In Wood v. Oxford, 97 N. C. 228, 2 S. E. 653, Rigsbee v. Town of Durham, 98 N. C. 81, 3 S. E. 749, and Rigsbee v. Durham, 99 N. C. 341, 6 S. E. 64, it is decided that, if the fact appear that the subscription was voted for by a majority of the qualified voters, the defect in the law is cured.

It is also said that the act was repealed by Battle's Revisal. This revisal was approved by Act Feb. 20, 1873. In section 8 of the revisal (page 862, c. 121) it is provided:

"No act of a private or local nature; no act containing a grant of corporate privileges or imposing duties on any particular county inconsistent with the general provisions of law, shall be construed to be repealed by the second section of this chapter."

Again, the repeal is to be of force from and after 1st January, 1874. The election in Henderson county was provided for 21st July, 1873, was held August, 1873, and subscription made November, 1873. So rights had accrued.

It would seem, therefore, that the validity of the original issue of bonds can be sustained under the amendment of 1858-59. In addition to this, the authority to make the subscription to this railroad can be found in section 2, c. 171, p. 417, of the Public Laws of North Carolina, brought forward as section 1997 of the Code of North Carolina 1883, as follows:

"The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company and whether in bonds, money or other property, and thereupon the board shall order an election to be held on a notice not less than thirty days for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company. Provided that the counties, in the manner aforesaid, shall subscribe from time to time such amounts either in bonds or money as they may think proper."

The record shows, by extract from the minutes of the county commissioners of Henderson county, that on 21st July, 1873, they unanimously resolved to recommend to the qualified voters of Henderson county the subscription of \$100,000, in county bonds and coupons attached, to the capital stock of the Greenville & French Broad Railroad Company, for which an annual tax was to be levied, the bonds to mature at the end of 20 years, and to bear 7 per cent. interest. The board of county commissioners ordered that the question of subscription be submitted to the vote of the people of the county. The election was regularly held, the subscription approved by the people, and the subscription made. The conditions of the subscription were that no bonds be issued until all the stock of the road was subscribed; that the whole subscription be expended for work and labor done in Henderson county, and not elsewhere; that no bonds be issued until the road is let out and in progress of construction in said county; that the road should run through the town of Hendersonville, and a depot be located within the corporate limits; and that the bonds be issued as the exigencies of the case required.

Certain cases decided by the Supreme Court of North Carolina recently have held that neither this act of the Legislature, nor the sections of the Code in which it was incorporated, authorized subscriptions of this character. But the Supreme Court of the United States, and this court in *Wilkes County v. Coler*, 180 U. S. 531, 21 Sup. Ct. 458, 45 L. Ed. 642, *Stanley County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126, and *Commissioners v. Coler*, 113 Fed. 705, 51 C. C. A. 379, and *Id.*, 113 Fed. 725, 51 C. C. A. 399, have held that these later decisions do not control the validity of bonds issued

prior to their rendition which were valid under previous decisions of North Carolina of force when they were issued. These recent cases above referred to are *Wilkes County v. Call*, 123 N. C. 308, 31 S. E. 481; *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711; *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539. The reason is obvious. The federal courts sustained the subscriptions made under decisions of the Supreme Court of North Carolina unreversed and in force at their date. It was held that the contracts made under these circumstances could not be invalidated by subsequent decisions. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Folsom v. Ninety-Six*, 159 U. S. 624, 16 Sup. Ct. 174, 40 L. Ed. 278.

We lay no stress upon the case of *Henderson County v. Williams*, decided very recently in the superior court of Henderson county, N. C., holding these bonds invalid. No bondholder was a party to this suit. It was wholly between county officers, and cannot be treated as *res judicata*. The same rule applies to the original bonds issued by Henderson county, to refund which the bonds in question in this case were issued. These original bonds each bear this statement:

"The Commissioners of the County of Henderson regularly represent the body of the county aforesaid, having made a corporate subscription to the capital stock of the Spartanburg & Asheville Railroad Company, which stock, with the dividends accruing thereon, is in the hands of trustees for the holders of said bonds and pledged for the payment of the said bonds and having ascertained the sense of the qualified voters thereof to favor a corporate subscription to the capital stock of the said railroad company by an election duly held for that purpose, having caused these bonds to be issued to meet the instalments due upon the county subscription to said company, and the whole is done under the authority conferred and in conformity with the Constitution of the State of North Carolina, and by the authority of the acts of the General Assembly of said State."

These recitals are conclusive, constituting an estoppel in pais upon the county which issued them. *Moran v. Miami Co.*, 2 Black, 722, 17 L. Ed. 342. "Where bonds of a county on their face import a compliance with the law under which they were issued, the purchasers are not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them, and the county is estopped to deny, as against bona fide purchasers, that such conditions have been complied with." *Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208, followed by a long line of decisions down to *Northern Bank of Toledo v. Porter Township*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258. The only duty of a bona fide holder is to see that there is legislative authority to issue the bonds. *Douglas County v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79.

It is objected that the act of the session of 1868-69, ratified April 10, 1869, was not passed in conformity with the Constitution. The parts of the journals of the two houses are in the record. These journals show that on the second and third readings of the bill the ayes and nays were taken and recorded as required by the Constitution. But it is said that the journals do not show that the bill had a first reading. The bill was entitled "A bill to authorize the sev-

eral counties in the state to subscribe to stock in railroad companies." This is the copy of the House journal:

"Mr. Malone introduced a bill to authorize the several counties in the state to subscribe to stock in railroad companies, February 17, 1869, referred to committee on counties and townships."

On February 27, 1869, on motion of Mr. Malone, the rules were suspended, this bill taken up, and passed its second reading by aye and nay vote recorded. On March 1, 1869, on motion of Mr. Malone, the rules were suspended, and this bill taken up and passed its third and final reading by a recorded aye and nay vote. The Senate Journal, 4th March, 1869, shows that this bill was received from the House, read a first time, and referred. It was reported favorably on 6th March, and passed its second reading on 13th March, by a recorded aye and nay vote. On 29th March, 1869, it passed its third reading by a recorded aye and nay vote. No one having even a slight acquaintance with parliamentary proceedings but knows that, when a bill is introduced and referred, it must have had at least one reading. Beside this, this act was duly ratified, and the certificate of the presiding officers shows that it has had three readings in each house. The journal shows that it has had a second reading. The conclusion is inevitable that it must have had a first reading. In *Black v. Commissioners*, 129 N. C. 126, 39 S. E. 819, the court says:

"As to the manner of its passage, it appears that the ayes and nays were duly entered on the journals upon the second and third readings, on two several days in each house, as required by Const. art. 2, § 14. The ratification is conclusive evidence that it was read three several times in each house." *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. Rep. 801.

It is gravely contended by the counsel for plaintiff in error that, when this journal states that the rules were suspended, it is meant that the rules were suspended which required a full reading of the bill. There is nothing to sustain this assumption. The journal states that thereafter the bill received a second reading. The presumption that bodies like a legislature have followed the law always exists. The contrary must be proved.

When it is considered that the original bonds were issued in 1875; that their coupons were regularly paid for 20 years; that the bonds were called in and funded in the bonds in question in this suit, the coupons of which were paid regularly until 1st January, 1901; that the money derived from the sale of the bonds was expended in work and labor done in Henderson county; that this road was completed through that county and its county seat, Hendersonville, putting this remote mountain village and county in touch with the world; and that this town and county have been enjoying all these advantages for over 30 years—we can see no merit in the defense. The language of Mr. Justice Peckham in *Tulare District v. Shepard*, 22 Sup. Ct. 534, 46 L. Ed. 773, is not inappropriate:

"In the case of *Douglas County v. Bolles*, 94 U. S. 104 [24 L. Ed. 46], this court said: 'Common honesty demands that a debt thus incurred should be paid.' That statement has lost no force by the lapse of time, and we think

it applies in its full strength in this case. Unless there is some settled rule of law which prevents recovery in this action, the judgment under review should be affirmed."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

LEVIN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1904.)

No. 1,969.

1. CONSTITUTION—CONSTRUCTION—NATURALIZATION—STATE COURTS MAY GRANT.

Under the congressional authority to establish a uniform rule of naturalization, granted by section 8 of article 1 of the Constitution, the Congress may lawfully empower courts of the states to admit qualified aliens to citizenship, and the courts of the states may legally exercise this power without legislative authority or permission from the states which created them.

2. SAME—CONSTRUCTION BY CONTEMPORANEOUS INTERPRETATION—LONG ACQUIESCENCE AND PRACTICE CONCLUSIVE.

The contemporaneous construction of a provision of the Constitution by those who framed it, the concurrence of statesmen, legislators, and judges in that construction, and the acquiescence and uninterrupted practice of all the departments of the government in the same interpretation for more than 100 years, conclusively determine the meaning and effect of the provision, and place it beyond the realm of doubt or debate.

3. SAME—AUTHORITY OF CONGRESS TO GRANT JUDICIAL POWER.

The judicial power granted by section 1, art. 3, of the Constitution, is the power to try the 10 classes of cases specified in section 2 of that article. *Chisholm v. Georgia*, 2 Dall. 475, 1 L. Ed. 440.

These sections do not prohibit the Congress from vesting judicial power in other cases in courts or magistrates of the states or in executive officers, where the exercise of such power by them is a necessary or appropriate means by which to use the powers granted by the Constitution to the legislative department or to the executive department of the government.

4. NATURALIZATION—COURTS HAVING COMMON-LAW JURISDICTION DEFINED.

Courts having common-law jurisdiction, within the meaning of that term in section 2165, Rev. St. [U. S. Comp. St. 1901, p. 1329], are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or courts which are governed by the principles, rules, and usages of the common law in the determination of some of the causes of which they have jurisdiction. The term is used to distinguish courts which have some common-law jurisdiction from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law.

It is not indispensable that a court should have all common-law jurisdiction to qualify it to naturalize aliens under this section. It is sufficient that it has some.

5. SAME—ST. LOUIS COURT OF APPEALS.

The St. Louis Court of Appeals has common-law jurisdiction, and is empowered to admit qualified aliens to citizenship, because it has common-law jurisdiction to issue, hear, and determine writs of habeas corpus, quo warranto, mandamus, and certiorari, and in the determination of actions at law it is generally governed by the principles, rules, and usages of the common law.

(Syllabus by the Court.)

In Error to the District Court of the United States for the Eastern District of Missouri.

Walter D. Coles, for plaintiff in error.

Bert. D. Nortoni (David P. Dyer and Horace L. Dyer, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. Nathan Levin was indicted, tried, convicted, and sentenced to imprisonment for the term of five years by the United States District Court for the Eastern District of Missouri, for aiding, abetting, counseling, advising, and procuring aliens who were not entitled to naturalization to obtain certificates of citizenship from the St. Louis Court of Appeals by means of fraud and false statements, in violation of sections 5425 and 5427 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3669, 3670]. He challenges the judgment against him upon the ground that these acts constituted no offense, because the St. Louis Court of Appeals had no jurisdiction to naturalize qualified aliens.

By section 2165 of the Revised Statutes [U. S. Comp. St. 1901, p. 1329], "a court of record of any of the states having common law jurisdiction and a seal and clerk" is expressly authorized by the Congress to naturalize qualified aliens, and to issue to them certificates of citizenship. The Constitution of the United States provides that the Congress shall have power "to establish a uniform rule of naturalization * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof" (article I, § 8), and that "this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding" (article 6). The constitutional grant of power to do an act or to attain an end is an implied grant of plenary authority to select and use the appropriate means to accomplish the purpose contemplated. *McCulloch v. Maryland*, 4 Wheat. 316, 413, 422, 4 L. Ed. 579; *Prigg v. Pennsylvania*, 16 Pet. 536, 618, 619, 10 L. Ed. 1060. A thoughtful reading of these clauses of the Constitution, in the light of the familiar canon of construction to which reference has been made, suggests no lack of authority in the legislative department of the nation to grant, or in the courts of the states to accept and to exercise, the power to naturalize aliens bestowed upon them by the act of Congress.

Counsel for the plaintiff in error, however, contends with much cogency and ingenuity that a court of a state has no jurisdiction to admit aliens to citizenship (1) because Congress had no power under the Constitution to grant this authority to such a court; and (2) because, if it had that power, a court of common-law jurisdiction created by a state has no authority to accept or to exercise this power in the absence of legislative permission so to do from the state which established it. His argument in support of his first position runs in this

way: The Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish" (article 3, § 1), and that "the judicial power shall extend to all cases" specified in article 3, § 2. Congress has no authority to grant any portion of this judicial power of the nation to any other courts than those created under these sections of the Constitution. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328-330, 4 L. Ed. 97; *Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19. The admission of aliens to citizenship is a judicial function. It is the exercise of judicial power. *Spratt v. Spratt*, 4 Pet. 393, 407, 7 L. Ed. 171. Therefore the Congress has no power to grant to a court of a state the judicial power to admit aliens to citizenship, and section 2165 and all other acts of Congress which by their terms bestowed this authority upon state courts are unconstitutional and void. In support of his second proposition he argues that a court of a state derives all its powers from the political entity which creates it; that, while such a court may perform judicial functions permitted by national legislation in cases in which the general power to discharge these functions is granted or allowed to it by the legislation of the state which creates it, no new or additional authority can be conferred upon it by the laws of the nation, and none can be exercised by it unless it is granted by the state laws which create the court, and vest and define its jurisdiction, and, inasmuch as the legislation of the state of Missouri has never granted to any court of that state the power or the permission to naturalize aliens in accordance with the laws of the United States, none of the courts of that state may lawfully exercise this authority. To sustain this argument he cites the decisions of the Supreme Court to the effect that where jurisdiction may be conferred upon the national courts by Congress, and that jurisdiction is not made exclusive, the state courts may exercise it if by the Constitution and laws of their state they are competent to take it (*Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19; *Clafin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833); the cases in which state courts have declined to sustain actions for fines, penalties, or forfeitures imposed by acts of Congress for the violation of national legislation (*U. S. v. Lathrop*, 17 Johns. 4, 8-10; *Ely v. Peck*, 7 Conn. 239, 244); and the case of *Ex parte Knowles*, 5 Cal. 300, in which the Supreme Court of that state held that, while Congress had no power to confer jurisdiction upon the courts of a state to admit aliens to citizenship, yet such courts might exercise that power in cases where its existence was recognized by the legislation of the state which established it.

These propositions and arguments of the counsel for the plaintiff in error are plausible and cogent. They might well have challenged debate—possibly they might have changed the course of legislation and of action—if they had been presented to the Supreme Court 100 years ago. At this late day, however, after the courts of the states have for more than a century, with the uniform acquiescence and consent of all the departments of the national government and of the state governments, exercised this authority to naturalize aliens granted to them by the acts of Congress, there is one answer which is equally fatal to both the propositions which counsel for the plaintiff in error here pre-

sents. It is that the contemporaneous interpretation of the provisions of the Constitution relative to this subject by those who framed it, the concurrence of statesmen, legislators, and judges in that construction, the acquiescence and uninterrupted practice of all the departments of the government in the same interpretation for more than 100 years, conclusively determine their meaning and effect, and place them beyond the realm of doubt or question. *Stuart v. Laird*, 1 Cranch, 298, 308, 2 L. Ed. 115; *Cohens v. Virginia*, 6 Wheat. 265, 419, 5 L. Ed. 257; *Prigg v. Pennsylvania*, 16 Pet. 539, 620, 621, 10 L. Ed. 1060; *Ex parte Gist*, 26 Ala. 156, 164; *Dean v. Borchsenius*, 30 Wis. 237. In the year 1790 the Congress passed the first act to establish a uniform rule of naturalization. That act empowered any common-law court of record in any one of the states to admit aliens to citizenship upon their compliance with the terms of the law, but gave no such authority to any court of the United States. 1 Stat. 103. Many of the statesmen who sat in the convention which framed the Constitution were members of the Congress which passed this law. This act of Congress is therefore a contemporary interpretation—a practical exposition of the meaning and effect—of the grant to Congress of the power to establish a uniform rule of naturalization by the very men who, as the representatives of the people of the United States, gave this authority to the legislative department of the national government. From the day when this act gave the courts of the states the power to issue certificates of citizenship to qualified aliens to the present moment, through all the legislation and judicial action of more than a century, that grant to the state courts has been maintained undisturbed, and the power thus bestowed has been exercised by the courts of the states with the uninterrupted acquiescence of the legislative, executive, and judicial departments of the nation and of the states. 1 Stat. 414; Act April 14, 1802, c. 28, 2 Stat. 153, 155; Rev. St. § 2165; U. S. Comp. St. p. 1329; *Clafin v. Houseman*, 93 U. S. 130, 140, 23 L. Ed. 833; *Robertson v. Baldwin*, 165 U. S. 275, 279, 17 Sup. Ct. 326, 41 L. Ed. 715. This contemporaneous, continuous, and uniform affirmation of the constitutionality of the grant to the state courts of this power to naturalize aliens, and this uninterrupted practice of the state courts to exercise the power thus bestowed upon them, are too long-continued, too strong, too obstinate, to be controlled or shaken now. It is too late to question the constitutionality of the devolution of this authority upon the courts of the states, or their jurisdiction to exercise it. Those issues have been settled by prescription and practice, and they are no longer open to debate or question.

Nor are the conclusions which contemporaneous construction, time, and practice have adopted without cogent reasons to support them. While it is true that Mr. Justice Story, speaking for the Supreme Court, declared in 1816, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328–333, 4 L. Ed. 97, that the Congress could not vest any portion of the judicial power of the nation in courts which it did not itself ordain and establish, and this statement has since been repeated, the fact is that he was then thinking and speaking of the judicial power granted by section 1, and defined by section 2, of article 3 of the Constitution. The better opinion now is that the judicial power granted by the former

section, which may be vested in the national courts only, is defined in the latter section; that it necessarily extends only to the trial of "all cases in law and equity arising under this Constitution," and to the trial of the other nine classes of cases named in section 2, and specified by Chief Justice Jay in his opinion in *Chisholm v. Georgia*, 2 Dall. 419, 475, 1 L. Ed. 440 (*Ex parte Gist*, 26 Ala. 156, 162; *Clafin v. Houseman*, 93 U. S. 130, 139, 23 L. Ed. 833; *Robertson v. Baldwin*, 165 U. S. 275, 279, 17 Sup. Ct. 326, 41 L. Ed. 715); and that these sections neither expressly nor impliedly prohibit the Congress from conferring judicial power upon other courts, or upon executive or other officers, in other cases, where, in its opinion, the devolution of such power is either necessary or convenient in the execution of the authority granted to the legislative or to the executive department of the government through the Constitution. Thus the authority granted to territorial courts to hear and determine controversies arising in the territories of the United States is judicial power. But it is not a part of that judicial power granted by section 1, and defined by section 2, of article 3 of the Constitution. Nevertheless, under the constitutional grant to Congress of power to "make all needful rules and regulations respecting the territory * * * belonging to the United States" (article 4, § 3), that body may create territorial courts not contemplated or authorized by article 3 of the Constitution, and may confer upon them plenary judicial power, because the establishment of such courts and the bestowal of such authority constitute appropriate means by which to exercise the congressional power to make needful rules respecting the territory belonging to the United States. *American Ins. Co. v. Canter*, 1 Pet. 511, 544, 7 L. Ed. 242; *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659; *McAllister v. U. S.*, 141 U. S. 174, 184, 188, 11 Sup. Ct. 949, 35 L. Ed. 693. Of the same nature is the judicial power conferred upon the Secretary of the Interior, the Commissioner of the General Land Office, and his subordinate officers, to hear and determine claims to the public lands of the nation (*U. S. v. Winona & St. Peter R. Co.*, 67 Fed. 948, 957, 15 C. C. A. 96, 104); that bestowed upon justices of the peace and other magistrates of the states by Act Sept. 24, 1789, c. 20, § 33, 1 Stat. 91, to arrest and commit or bail persons charged with a violation of the criminal laws of the United States (*Ex parte Gist*, 26 Ala. 156, 164); that conferred upon the state courts to hear and determine suits by or against corporations and officers created by the nation (*Bank of the United States v. Deveaux*, 5 Cranch, 61, 3 L. Ed. 38; *Clafin v. Houseman*, 93 U. S. 135, 23 L. Ed. 833); that given to magistrates of any county, city, or town corporate to hear, determine, and certify the claims of owners of fugitive slaves under Act Feb. 12, 1793, c. 7, 1 Stat. 302, § 3 (*Prigg v. Pennsylvania*, 16 Pet. 536, 615, 620, 621, 10 L. Ed. 1060); that bestowed upon justices of the peace to arrest, commit to jail, and deliver to the master deserting seamen, under Act July 20, 1790, c. 29, 1 Stat. 131, 134 (*Robertson v. Baldwin*, 165 U. S. 275, 277, 280, 17 Sup. Ct. 326, 41 L. Ed. 715); that conferred upon the courts of the states by the various acts of Congress which empower them to naturalize aliens (1 Stat. 103, 414; 2 Stat. 153, 155; Rev. St. § 2165; *Robertson v. Baldwin*, 165 U. S. 27, 17 Sup. Ct. 326, 41 L. Ed. 715; *Clafin v. Houseman*, 93 U. S. 130, 140, 23 L. Ed. 833; In

the Matter of Martin Conner, 39 Cal. 98, 101, 2 Am. Rep. 427); and that granted by acts of Congress to executive officers of the United States to courts and magistrates of the states in numerous other instances, not to try and determine the cases specified in section 2 of article 3 of the Constitution, but to perform the judicial function of hearing and determining other questions and issues which a proper exercise of the powers granted to the various departments of the government require to be thus decided. The grant by the Congress of the United States of the judicial power to admit aliens to citizenship, and to hear and decide the various questions which do not arise in the cases specified in article 3 of the Constitution, but which a proper exercise of the powers granted by that instrument to the executive or to the legislative department of the Government requires to be judicially decided, was neither expressly nor impliedly prohibited by that article. The congressional power to make such a grant, and to vest judicial authority in state courts and officers, in such cases, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it.

Nor does the contention that the courts of the state of Missouri having common-law jurisdiction are without authority to accept or to exercise the judicial power to naturalize aliens conferred upon them by Congress, because the state which established them has never by any legislative action empowered or permitted them to do so, commend itself to our judgment. The suggestion is noted that the Legislature of a state might prohibit its courts from exercising the power to naturalize aliens, and that this prohibition would be fatal to the devolution of the congressional authority. No such inhibition, however, has been imposed upon the courts of Missouri, and it is unnecessary and would be injudicious to consider and determine in this case what the effect of such legislation might be. That question is not here for consideration. The state of Missouri was admitted to the Union and became a part of this nation in the year 1820. More than 30 years before its admission the Constitution of the United States had empowered Congress to establish a uniform rule of naturalization, and to make all laws necessary to carry that authority into execution. In the exercise of this power, Congress had enacted laws which conferred upon certain courts of the states and territories the judicial power to issue certificates of citizenship to qualified aliens. The Constitution provided that "this Constitution and the laws which shall be made in pursuance thereof * * * shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution and laws of the state to the contrary notwithstanding." When the United States offered admission to the Union to the people of Missouri, it made this offer subject to the patent condition that the Constitution of the United States, and the laws that had been made and should be made by Congress in accordance with its provisions, should become the supreme law of the new state, binding alike upon all its inhabitants, whether laymen or lawyers, citizens or judges. The people of Missouri accepted this offer and its condition, and became a part of the nation. Thereupon the Constitution of the United States, and the laws

enacted in accordance with it, which then conferred upon the courts of the states the judicial power to admit aliens to citizenship, became a part of the supreme law of the new state of Missouri, which the people of that state, by their acceptance of the offer of admission, had contracted should be obeyed and executed by the citizens, the judges, and the courts of their state. The acceptance by the people of Missouri of this offer of admission, in view of the power which had then been granted by the Congress to certain courts of the states to admit aliens to citizenship, and in view of the practice of those courts to exercise this jurisdiction, which had then prevailed for nearly three decades, gave to the courts of Missouri plenary jurisdiction to exercise any power to admit aliens to citizenship which the Congress had then conferred or might thereafter bestow upon them under the provision of the Constitution applicable to that subject. *Claffin v. Houseman*, 93 U. S. 130, 136-142, 23 L. Ed. 833; *Ex parte Gist*, 26 Ala. 156, 164; *Prigg v. Pennsylvania*, 16 Pet. 536, 620, 10 L. Ed. 1060; *Robertson v. Baldwin*, 165 U. S. 275, 280, 17 Sup. Ct. 326, 41 L. Ed. 715. The resistless conclusion is that the Congress of the United States was by section 8, art. 1, of the Constitution, granted the necessary authority to vest in the courts of the states having common-law jurisdiction the judicial power to admit qualified aliens to citizenship; that, in the absence of legislative authority or permission from the states which created them, such courts may lawfully exercise this power, and that section 2165 of the Revised Statutes is neither unconstitutional nor invalid.

Finally it is insisted that section 2165 of the Revised Statutes did not confer jurisdiction upon the St. Louis Court of Appeals, because it is a court of appellate, and not of original, jurisdiction, and because it is not a court having common-law jurisdiction. The act of Congress does not limit its grant to courts of original jurisdiction, but extends it to all courts of record which have common-law jurisdiction, seals, and clerks. As Congress did not except appellate courts from the beneficiaries of this grant, it is neither the province nor the duty of the courts to do so. The remaining question is, has the St. Louis Court of Appeals common-law jurisdiction? Courts having common-law jurisdiction, within the meaning of this section, are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or which, in the determination of the causes which they decide, are governed by the principles, rules, and usages of that law. The term "having common-law jurisdiction" is used to distinguish these courts from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law. *U. S. v. Lehman* (D. C.) 39 Fed. 49, 50; *Parsons v. Bedford*, 3 Pet. 446, 447, 7 L. Ed. 732; *In the Matter of Martin Conner*, 39 Cal. 98, 101, 2 Am. Rep. 427; *People ex rel. v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254. Courts which have some common-law jurisdiction are courts having common-law jurisdiction, and it is not indispensable to the qualification of a court under this act of Congress that it should have all the common-law jurisdiction, or even that it should have general common-law jurisdiction. *Ex parte Tweedy*, 22 Fed. 84; *In the Matter of Martin Conner*, 39 Cal. 98, 101,

2 Am. Rep. 427; U. S. v. Power, 14 Blatchf. 223, Fed. Cas. No. 16,080, 27 Fed. Cas. 607, 608; Ex parte Gladhill, 8 Metc. (Mass.) 168, 170. The common law of England and all the statutes and acts of Parliament made prior to the fourth year of James I constitute the rule of action and decision of all the courts of the state of Missouri, wherever they are not inconsistent with the Constitution of the United States, the Constitution of the state, or the statutes in force for the time being. Rev. St. Mo. 1899, § 4151. The St. Louis Court of Appeals is an appellate court vested with appellate jurisdiction to review the decisions of the inferior courts of certain counties of the state of Missouri in cases in which the amount involved does not exceed \$4,500, and with original jurisdiction to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other remedial writs, and to hear and determine the same. Const. Mo. art. 6, § 12; Rev. St. Mo. 1899, p. 92; Laws Mo. 1901, p. 107; State ex rel. Schierberg v. Green, 1 Mo. App. 226, 227. The writs of habeas corpus, quo warranto, mandamus, and certiorari are common-law writs, and in the issue, the hearings, and decisions upon them the St. Louis Court of Appeals necessarily has and exercises common-law jurisdiction. In the hearing and decision of actions at law presented to it for review, its rule of action and decision must in the great majority of cases be the rules, principles, and usages of the common law. Hence it is a court having common-law jurisdiction, and it falls in the class of state courts upon which Congress had conferred the jurisdiction to admit qualified aliens to citizenship. The aiding, the abetting, the counseling, advising, or procuring, aliens who are not entitled to naturalization to obtain certificates of citizenship from this court by fraud and false statements, is one of the offenses denounced by section 5427 of the Revised Statutes, and there is no escape from the conclusion that the judgment below must be affirmed. It is so ordered.

LEE v. WYSONG et al.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,307.

1. PARTITION—NATURE OF ACTION—TITLE TO SUPPORT.

Where a proceeding for partition is one at law, in which questions of title may be tried, as it appears to be under the law of Texas, on the trial of such an action in a federal court the legal title must prevail.

2. VENDOR AND PURCHASER—UNRECORDED INSTRUMENT—BONA FIDE PURCHASER.

Certain tracts of land in Texas were conveyed to two individuals, who were at the time partners. In 1853 an act of sale was executed by one partner to the other, in New Orleans, covering all his interest in the partnership property, "consisting of the stock in trade * * * real estate taken by the said firms from their debtors in settlement of their debts and situate in the states of Mississippi and Texas. * * *" Such instrument was not sufficient as a conveyance of lands under the laws of Texas, nor was it recorded in that state. In 1901 the sole heir of the partner executing such instrument, through an attorney in fact, sold and

conveyed an undivided half interest in the Texas lands, for a valuable consideration, to plaintiff's grantor; neither such purchaser nor plaintiff having any knowledge of any adverse title or claim. Rev. St. Tex. art. 4640, provides that an unrecorded conveyance shall be void as against a purchaser for value without notice. *Held*, that plaintiff acquired the legal title to the land, as well as the superior equity.

3. SAME—ACTION TO TRY TITLE—EVIDENCE.

In an action at law to determine the title to the land, the act of sale was not admissible as an evidence of title, since, at most, it conveyed merely an equitable right, and where there was, moreover, no satisfactory proof that the lands in question were ever the property of the partnership, or that they were obtained from debtors.

4. DEED—CONSTRUCTION—CONVEYANCE TO PARTNERS.

A deed of lands to two persons as individuals on its face conveys to each an undivided half interest, and no presumption arises that the lands are partnership property, even where it is shown that the grantees were partners in a mercantile business.

5. VENDOR AND PURCHASER—TITLE ACQUIRED—BONA FIDE PURCHASER.

Where plaintiff in an action at law to determine the title to lands pleads a legal title, and proves conveyances which on their face vest the title in him, and defendants set up a claim under a prior unrecorded conveyance from a common source of title, which, under the laws of the state, is void as against subsequent bona fide purchasers for value, without notice, evidence is admissible in rebuttal to show that plaintiff was such a purchaser; such evidence not tending to establish an equitable title, but being in support of plaintiff's legal title.

In Error to the Circuit Court of the United States for the Southern District of Texas.

L. B. Moody and G. H. Pendarvis, for plaintiff in error.

Kittrell & Kittrell and Hume & Hume, for defendants in error.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

SPEER, District Judge. This is an action for partition of lands. It was filed by the plaintiff, R. I. Lee, in the district court of Harris county, Tex., against the unknown heirs of John R. Marshall. Cited by publication, the defendants made appearance, whereupon the plaintiff amended his petition, and the case proceeded against them. Plaintiff is a citizen of Kansas, the defendants are citizens of New York, and the cause was duly removed to the Circuit Court of the United States for the Southern District of Texas, and entered upon the law docket. Simultaneously with the removal the defendants filed their original answer, which presented a general demurrer and a general denial of plaintiff's title. Thereafter the defendants also filed a special plea denying that the plaintiff had any title to or interest in the land sued for, and alleged that the defendants were the sole owners of all the lands, and prayed judgment to that effect. When the cause came on to be heard, a stipulation in writing was made by opposing counsel waiving a jury, and submitting the case, upon the law and facts, to the court.

It appeared from the evidence that the title to this land had originally vested in one A. M. Gentry. This he took as the assignee of certain patents to Jones, to Menifee, to Sanders, and to Jeffries. There is no

dispute as to the title of Gentry. He made four separate deeds to John R. Marshall and A. B. James, conveying to them, for various considerations, four different tracts of this land, "to have and to hold unto the said Marshall and James their heirs and assigns." The plaintiff and the defendants both claim title from John R. Marshall and A. B. James, or Marshall & James, and it follows that there is no dispute with regard to the antecedent title. When, however, we pass Marshall & James, the controversy appears. The plaintiff proved that Amadee De Gasquet James is the sole heir of A. B. James, of the late copartnership of Marshall & James, and that the defendants Martha M. Wysong, Louise M. Pollock, and Marie Marshall were the sole heirs and devisees of John R. Marshall, the other member of the copartnership of Marshall & James, and also sole heirs and devisees of his wife, namely, Eviline Marshall. It appears further from the evidence that on the 25th of August, 1897, Amadee De Gasquet James made a power of attorney authorizing one John McDougall, for James and in his name to ask, demand, sue for, and recover for him all lands in Texas to which he was entitled by inheritance, purchase, or otherwise. The same instrument authorized McDougall to make deeds of conveyance or other instruments, receiving and receipting for the consideration thereof, and also conveyed to McDougall an undivided half interest in and to all such lands. Acting under this power of attorney, McDougall, as attorney in fact for James, made a deed on August 19, 1901, conveying to J. H. McMorrow an undivided half interest in the lands described in the plaintiff's petition. This deed recited a consideration of \$4,320, and contained a clause of general warranty. It was recorded September 21, 1901, in the record of deeds of Harris county. McDougall, in his individual capacity, on August 25, 1901, made a quitclaim deed to J. H. McMorrow of all of his right, title, and interest to this land. This deed recited a consideration of \$10, and contained a clause of warranty against the grantor's heirs and all persons claiming under him. This was also recorded in Harris county on September 21st of the same year. McMorrow, now having in this way all the title which had previously vested in Amadee De Gasquet James, on the 24th of September, 1901, conveyed to R. I. Lee an undivided one-half interest in and to the land sued for. This was for a consideration of \$4,800. It contained a clause of general warranty, and was recorded in the same county on September 26, 1901. This R. I. Lee is the plaintiff, and he, having introduced this evidence, rested his case.

The defendants then put in the same deeds from Gentry to Marshall & James which had been previously introduced by the plaintiff. They then offered a copy of a notarial act of sale passed June 14, 1853, before Theodore Gual, a notary public for the parish of Orleans, state of Louisiana. This instrument was duly exemplified in accordance with the statutes of the United States. From this it appears that A. B. James, for the consideration of \$205,000 paid to him by John R. Marshall, and said Marshall's assumption of and agreement to pay all of said James' liabilities as a member of three several firms of Marshall & James, therein described, and to hold him harmless and indemnified from and against all debts, obligations, and liabilities of whatsoever na-

ture and kind on account of said firms, grants, sells, conveys, transfers, and assigns—

"Unto John R. Marshall, present and accepting, and purchasing for himself, his heirs and assigns, all and singular the rights, title, interest, property, claim and demand of every kind and nature whatsoever of him, the said Andrew B. James, as a copartner in the two firms formerly existing and the one now existing in this city, and in the City of New York, under the name and style of Marshall & James, and composed of the said John R. Marshall and Andrew B. James, of, in and to, the property, effects and assets of the said firms, wheresoever situate and in whose possession and keeping soever the same may be, and consisting of the stock in trade, book debts, accounts, bills receivable, claims, real estate taken by the said firms from their debtors in settlement of their debts and situate in the States of Mississippi and Texas, and generally every other thing belonging to said firms and accruing to them in any manner or form, without any reservation whatsoever, and also any and all capital and balances this day standing to the credit of the said Andrew B. James on the books of the said several firms."

The act of sale recites the periods of the three firms, all styled Marshall & James, and composed of John R. Marshall and A. B. James. The first commenced July 1, 1845, and terminated July 1, 1848, and in this the partners held equal interests. The second commenced July 1, 1848, and terminated July 1, 1850, and in this James' interest was seven-sixteenths, and Marshall's was nine-sixteenths. The third commenced July 1, 1850, and was existing when the act of sale passed, June 14, 1853, and in this James' interest was $38\frac{3}{4}$ per cent., and Marshall's was $61\frac{1}{4}$ per cent. It appears that an exemplified copy of this act of sale had been filed for record in the office of the county clerk of Harris county on January 6, 1902, and recorded February 3d of the same year; but the defendants did not offer it for that reason, which, it was agreed, added nothing to its validity. To this copy act of sale the plaintiff objected because it was not admissible without proof of execution of the original; again, because it purported to dispose of the partnership assets of Marshall & James, and there was no evidence that the lands in dispute were a part of those assets; and for the further reason that it contained no description of the lands in controversy; also since, even if operative, it conveyed only an equitable title, and, in the absence of evidence that he had notice of such equitable title at the time he purchased the lands described in his petition, or in the absence of evidence that he did not pay a valuable consideration therefor, could not affect the rights of plaintiff, holding the legal title. The court overruled these objections, and admitted the exemplified copy in evidence, and to this the plaintiff excepted. The defendants then put in evidence a duly examined copy of said act of sale, made and proved by a witness who tested the accuracy of the copy of the original in the archives and records of the custodian of notarial records in New Orleans, and who testified that it was a true copy of the original. The contents of the examined copy are the same as those of the exemplified copy hereinbefore mentioned. The defendants then proved that the firm of Marshall & James paid taxes for the year 1853 on the lands sued for, and all back taxes which had accrued and remained unpaid from 1850 to 1853, and further that John R. Marshall, individually, as long as he lived, and after his death his estate, paid all taxes on

said lands from and including the year 1854 to the year 1901, and that in 1860 John R. Marshall redeemed one tract of said land, namely, the Sanders tract, from a sale made to the state for taxes due thereon for the year 1848, and also paid taxes due on said tract for the year 1849. The defendant introduced no other evidence. The plaintiff then called J. H. McMorrow and J. H. O'Donnell, and offered to prove by them that his vendor, J. H. McMorrow, had no notice at the time he purchased said lands of the existence of said act of sale of June 14, 1853, and that he was a subsequent purchaser for a valuable consideration. The defendants objected to this testimony for the reason that the plaintiff's action was at law, and that this evidence was cognizable only in equity, and again that the plaintiff had not pleaded, and therefore could not prove, that his vendor purchased said lands for a valuable consideration, and without notice of said act of sale. The court permitted the witnesses to be examined, reserving its ruling upon the objections. The defendants then offered testimony of certain other witnesses, which, however, does not appear material. The court took the cause under advisement, and finally sustained defendants' objections to the plaintiff's contention that his vendor was a subsequent purchaser for a valuable consideration, without notice of the unrecorded act of sale from A. B. James to J. R. Marshall, admitted the act of sale over plaintiff's objection, and thereupon made a final and general finding of the facts and the law for the defendants, to which ruling and finding the plaintiff excepted. Thereupon the court rendered judgment against the plaintiff, that he take nothing by this suit, and in favor of the defendants, that they go hence without day, and that the defendants have and recover costs, etc.

The proceeding for partition, by which it is attempted to try questions of title before the court, was treated by opposing counsel—all accomplished members of the Texas bar—as unquestionably appropriate under the law of Texas. We have the authority of Chancellor Kent for stating that the writ of partition, as enacted by St. 31 & 32 Henry VIII, has been gradually re-enacted and adopted, with probably enlarged facilities for partition, in the United States. Further, it does not appear that the question of possession entered into this controversy; otherwise a disseisin or adverse possession might, under the general rule, bar a suit for partition so long as the ouster continued. 4 Commentaries, p. 364, footnote. For a discussion of the subject, see *Bearden v. Benner* (C. C.) 120 Fed. 690. We assume, then, that it is competent to adjudicate the conflicting titles upon the proceeding before the court. The cause, when removed, proceeded without objection on the law side in the circuit court. The issues presented and passed upon were legal issues, the case submitted here presents only issues at law, and it follows that, on this writ of error, we are restricted to considerations depending upon the legal title. This, it appears, must be resolved in favor of the plaintiff in the court below, who is the plaintiff in error here. All the conveyances of the land described in the petition, from Gentry, who had succeeded by assignment to the title of the original patentees, placed the title, not in the partnership firm, Marshall & James, but in John R. Marshall and A. B. James. About this there can be no question. The deeds are explicit; the

descriptions of the land, definite and precise. It is equally unquestionable that Amadee De Gasquet James was the sole heir of A. B. James, and that the defendants Martha M. Wysong, Louise M. Pollock, and Marie Marshall are the sole heirs and devisees of John R. Marshall and of his wife, Eveline Marshall. There is also no question that an undivided half interest in these lands belonged to these successors in title of John R. Marshall. It is the disputed claim of the plaintiff, the successor in title of Amadee De Gasquet James, the sole heir of A. B. James, which must be determined. Now, Amadee De Gasquet James, it appears from the evidence, duly empowered one John McDougall to recover for him all lands in Texas to which he was entitled, and to convey the same; also, doubtless in consideration of these services of McDougall, an undivided half interest in the lands thus recovered was by the same instrument secured to him. McDougall, pursuant to the power of attorney thus granted, sold the undivided half interest of Amadee to J. H. McMorrow. It is claimed, and not disputed, that he was paid therefor the sum of \$4,320. McDougall also sold his own interest to McMorrow, and conveyed this, as it appears, by a quitclaim deed, only warranting title against his own grantor's heirs and all persons claiming under him. McMorrow, now having bought and paid for the title, conveyed it to Lee, the plaintiff. This party appears from the evidence to be a capitalist dwelling in Kansas, whose business is largely to deal in lands. The deed to Lee recited a consideration of \$4,800, and contained a clause of general warranty.

From this summary it appears that the plaintiff had purchased the legal title to the undivided half interest which formerly belonged to A. B. James. It follows that this title must prevail, unless it appears that, conformably to law, by legal and sufficient conveyance, it has been diverted to the defendants, or to some other person or persons. It is attempted to show this first by the contention that these lands were partnership property of Marshall & James. The evidence, however, is not at all clear or satisfactory to justify this conclusion. The conveyance from Gentry to J. R. Marshall and A. B. James, while made to them jointly, was not made to them as partners. It would probably have created a joint tenancy at common law. This, by the same law, even though such real estate might have been held by the joint tenants as partners, would have been subject to the right of survivorship. The right of survivorship among joint tenants has, however, been abolished in many states, except as to estates held in trust. In most of the United States the presumption is that all tenants who hold jointly hold as tenants in common, unless a clear intention to the contrary be shown. A tenancy in common is defined to be an estate held in joint possession by two or more persons at the same time, by several and distinct titles. 1 Washburn's Real Property, p. 415; 2 Blackstone, p. 191. There is in common tenancy a unity of possession, but no unity of title. It cannot, we think, be presumed that, because Marshall & James were members of the partnership of that name, a conveyance of real estate to John R. Marshall and A. B. James deposited the title among the partnership assets. There is, as before stated, no ambiguity about the deeds. The conveyance to the grantees was to them as individuals. It will, of course, be presumed that each took an undivided half interest. It is

clear that a deed from A. B. James conveying an undivided one-half interest in this land to a purchaser who had no knowledge of the title, save that conveyed by the deeds from Gentry, would have passed the title to such purchaser. While the right of Amadee De Gasquet James, the heir of A. B. James, would, perhaps, not be as incontestable as that of an innocent purchaser, yet, in the absence of any proof that this was partnership property, he would succeed at law to the distinct and separate title of his ancestor. It is, however, contended that A. B. James, by the act of sale, admitted in the Circuit Court, conveyed these lands to his partner. This we are clearly of the opinion is not maintainable. In the first place, there is no sufficient proof of the execution of that instrument as a conveyance of land in Texas. But if proof of execution was sufficient, how can it be said that the general designation, "all stock in trade, book debts, accounts, bills receivable, real estate taken by the said firms from their debtors in settlement of their debts and situated in the States of Mississippi and Texas and generally every other thing belonging to said firms or accruing to them in any manner or form without any reservation whatever," was a sufficient conveyance of the distinct title of A. B. James in the lands in dispute? As we have seen, there is no evidence that these lands were partnership property, except that the partnership paid taxes thereon. The only real estate conveyed by this act of sale was that "taken by the said firms from their debtors in settlement of their debts." However much we may surmise, this does not amount to a conveyance of distinct parcels of land standing in the name of A. B. James. Such a conveyance to the predecessor in title of one party is so indefinite that it cannot defeat the legal title in another. If, moreover, this act of sale is treated as effective to convey anything at all, it can be merely a right to establish by a suitable proceeding in equity an inchoate or equitable title. The plaintiff, however, in that view, would have an opposing equal, if not superior, equity. This act of sale was not recorded at the time of the plaintiff's purchase. It is clear that he had no knowledge of its existence, but paid a valuable consideration for the land, and bought in good faith. His is therefore the equity of a bona fide purchaser without notice. Conceding, arguendo, then, the existence of the inchoate and very indefinite equity of the heirs of Marshall, the equity of Lee cannot be disregarded. Where equities are equal, the law will prevail, and Lee has the legal title. But these equities are not equal. Lee has done all that the law required him to do. He took deeds clearly describing the land. He recorded them in time. He put the world on notice of his dealings with the land in dispute. The predecessors in title of the defendants were content to rely upon vague generalities in description, to leave in doubt whether the interest in dispute was partnership property or not, to execute an instrument not in itself sufficient at the time to convey title to land in Texas, and then to fail or refuse to record it. A court of equity, under the circumstances, would not, we think, hesitate to impose the loss which must fall on one or the other of these parties on those who are slothful, indifferent, or disregarding of the law, or who claim under those whose conduct was so lacking in that vigilance and attention to the rights of others which is exacted by courts of equity. But under the law of Texas, which

must control our action in this case, the right of the plaintiff is even stronger. An innocent purchaser from the heir takes the estate as against an unrecorded deed from the ancestor. *Holmes v. Johns*, 56 Tex. 41. The statutes of the state of Texas provide that an unrecorded conveyance shall be void as against a purchaser for value without notice. Rev. St. Tex. 1895, art. 4640; *De Guire v. St. Joseph Lead Company (C. C.)* 38 Fed. 65. It would seem, therefore, that the evidence offered to show that the plaintiff's vendor purchased the lands in controversy for a valuable consideration, without notice of the unrecorded conveyance from James to Marshall, was offered in support of the distinct legal right created by the policy of the state with reference to this question. The contention that the plaintiff should have specially pleaded, setting up his rights as a bona fide purchaser without notice of the unrecorded act of sale, seems to be equally unmaintainable. The proceeding for partition here is a statutory remedy. It possesses the requisites prescribed by the statute. Rev. St. Tex. 1895, art. 360. The proof of the plaintiff's equity as a bona fide purchaser, without notice of the unrecorded and insufficient act of sale, was not a part of his evidence in chief, of which the defendants were entitled to notice by suitable averments. It was in rebuttal and reply to the proof of defendants offered under the general denial.

For these reasons, we are of opinion that the Circuit Court was in error in admitting the act of sale, and in excluding the evidence of O'Donnell and McMorrow to show that the plaintiff had no notice of the existence of the act of sale at the time that he purchased the disputed interest, and that he was a purchaser in good faith for a valuable consideration, and in giving judgment for the defendants. Judgment of the court below is therefore reversed, and the cause will be remanded to the Circuit Court for its suitable action pursuant to this decision.

LEHIGH VALLEY R. CO. v. DUPONT.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 129.

1. RAILROADS—INJURIES TO PASSENGERS—PLATFORMS—IN SAFE PLACES—QUESTION FOR JURY.

In an action for the wrongful killing of a passenger as he had just reached a narrow platform provided for passengers to board trains, the cars of which overlapped the platform between 13 and 14 inches, by reason of its being constructed on a curve close to the rail, evidence held to justify the court in submitting to the jury the question whether defendant was guilty of negligence in providing an unsafe platform.

2. SAME.

In an action for the killing of a passenger while he was standing on a platform, the railroad company was not negligent merely in running a special train past such platform, shortly before the scheduled time for the arrival of the regular train, which the passenger intended to take, without notice to the station master, nor because such train was permitted to run at an excessively high rate of speed.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where a railroad company maintained a narrow passenger platform at a curve, where trains approaching could be seen only for a short distance,

and the station master, on hearing a train approach, informed deceased, who had a ticket for transportation on the expected train, to go to the platform, under the mistaken belief that such train was the regular train, instead of a special, which passed the platform at a very high rate of speed, and killed deceased just as he reached the platform, by reason of the fact that the train overhung the same some 13 or 14 inches, deceased was not guilty of contributory negligence as a matter of law.

4. SAME—INSTRUCTIONS.

In an action for the death of a passenger as he reached a station platform, by reason of the overhanging of a train which passed the platform at a high rate of speed, an instruction that if deceased did anything that a man of prudence under the circumstances would not have done, or omitted to do anything that a man of prudence would have done, and that deceased had a right to assume that the platform was so related to the track that the train would not sweep over any portion of it, which the court modified on defendant's objection so as to charge that deceased had a right to assume generally that the train would not sweep him off, and that it was his duty to use the platform with ordinary care and prudence, was not erroneous.

5. SAME—CONNECTING CARRIERS—THROUGH CONTRACTS—PARTNERSHIP.

Where the lines of several railroad corporations are conducted as a single system, for the purpose of the traffic between different points, originating on either, and such corporations divided the proceeds of such business on a mileage basis, the several corporations as to such business were partners, and liable to third persons on the principles of the law of agency.

6. SAME—DOMINANT CARRIER—LIABILITY.

Where defendant sold deceased a ticket for transportation between two points, containing nothing to show that such transportation, or a part thereof, was to be performed on the E. Railroad, operated by another corporation, whose stock was entirely owned by the L. T. Railroad Company, the stock of which in turn was owned by defendant company, which in fact controlled the operation of the E. Railroad Company through defendant's officers, defendant was liable for the wrongful killing of such passenger, though resulting from the negligence of the E. Railroad Company.

In Error to the Circuit Court of the United States for the Eastern District of New York.

Allan McCulloh, for plaintiff in error.

Joseph Fessresch, for defendant.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury.

The plaintiff brought the action as the administratrix of Jules Dupont, deceased, to recover damages for his death, alleged to have been occasioned by the negligence of the defendant. The defendant is a Pennsylvania corporation which, besides the railroads which it owns, has acquired control of the railroads of several other corporations through its ownership of the capital stock of these corporations, the whole constituting what is known as the Lehigh Valley Railway System, and forming a continuous main line from Jersey City, N. J., through the state of Pennsylvania, to Buffalo, N. Y., with various branch lines. One of the roads thus acquired is the Easton & Amboy

Railroad, which has its western terminus at Phillipsburg. The Delaware river separates Phillipsburg from Easton, which is the eastern terminus of the main line of the defendant, and the railways of the Lehigh Valley System are connected between these two places by the railroad bridge of the defendant. The deceased was killed in July, 1901, at the railway station at Alpha, a village on the line of the Easton & Amboy Railroad a few miles east of Phillipsburg, by a train running upon that road, while he was standing upon a passenger platform adjacent to the track, preparatory to taking a west-bound train. His passage ticket had been purchased the day before at Easton of the defendant's ticket agent, and entitled him to one continuous passage between Easton or Phillipsburg and Alpha, in either direction.

The principal issues contested upon the trial were (1) whether the death of the decedent was caused by the negligence of the Easton & Amboy Railroad Company; (2) whether he was guilty of contributory negligence; and (3) whether the defendant was liable to the plaintiff for the negligence of the Easton & Amboy Railroad Company.

The evidence upon the trial bearing upon the issues of negligence and contributory negligence was this: The station at Alpha is located upon a curve of the railroad, which to the eastward runs through a cut. At the time of the accident there was a waiting room and platform at one side of the tracks, where passengers commonly awaited the arrival of trains upon either track, and opposite, and across three tracks, and outside the west-bound track, was an uncovered platform, from which they took the trains upon that track. The platform was about 100 feet long and something less than 6 feet broad, and was occupied in part at the rear by a bench and handrail. At the front it was so near the track that the cars in passing overlapped it 13 or 14 inches. A west-bound approaching train could be seen from this platform a distance of about 1,000 feet. It also appeared that the decedent, with certain members of his family, had been awaiting in the waiting room the arrival of the west-bound train due to leave Alpha at 9:31 a. m. for Easton. Very shortly before their train was due the whistle of an approaching locomotive was heard, apparently rounding the curve in the cut to the eastward of the station, and thereupon the station master notified them: "This is your train; all aboard; hurry across." The approaching train was not in fact the train they had been waiting to take, but was a special train sent out by the defendant for the accommodation of its president, consisting of the president's car, another car, and a locomotive. The party hurriedly crossed the tracks, and reached the platform, and a moment after the decedent was killed by the special train, which passed without stopping, and at a speed of between 50 and 60 miles an hour. He was seen to throw up his hand as if to hold his hat on his head, and the next moment he was under the train and cut to pieces, but none of the witnesses saw what occurred during the interval. These facts were practically undisputed. A brief description of the accident was given by one of the witnesses for the plaintiff in the following testimony:

"We sat there in the station, and the station agent told us after a while that the train was coming, and we started from the station across the track, and we found that the train did not slow up any, and the station master told

us to 'hurry up,' and I heard my brother-in-law [the deceased] call to my aunt who was with us to hurry across, and I looked at him and he was just stepping on the platform at that time, and the shriek of the engine as it was nearing the platform then distracted my attention, and I looked towards the train, and that was the last I saw of him until I saw the body going around the wheels."

The deceased had lived at Alpha about a year, and had frequently traveled by train between Alpha and Easton.

The evidence upon the trial upon the question whether the plaintiff's right of recovery was against the defendant or only against the Easton & Amboy Railroad Company established the following facts: The Easton & Amboy Railroad has been operated and managed by the officers and agents of the Easton & Amboy Railroad Company since 1893, at which time a lease which had been made by that corporation to the defendant in 1892 was declared illegal in a suit brought by the Attorney General in behalf of the state of New Jersey. By the decree in that suit it was ordered that the Easton & Amboy Railroad Company should resume possession of its railroad, property, privileges, and franchises, and operate them by its own officers and agents. Since 1893 the entire stock of the corporation has been owned by the Lehigh Valley Terminal Railroad Company, another New Jersey corporation, and the entire stock of this latter corporation has been owned by the defendant; and the directors of the Lehigh Valley Terminal Company have been elected by the vote of the defendant, and the officers and directors of the Easton & Amboy Railroad Company have been elected by the vote of the Lehigh Valley Terminal Company. The freight and passenger business between the two corporations has been done upon a mileage basis, the charges being prorated, and each one receiving its proportion. Considerable evidence was introduced by the plaintiff upon the trial for the purpose of showing that for a long time previous to the accident the defendant had held itself out to the traveling public as the apparent carrier operating the Easton & Amboy Railroad. It appeared that the same person was the superintendent of the defendant and of the Easton & Amboy Railroad Company; that the same person was the general passenger agent of each; that in the advertisements and timetables of the defendant the Easton & Amboy railroad had always been treated as a part of the railroad of the defendant; and that the cars, conductors, and employes upon that railroad have been apparently those of the defendant, the cars being lettered in its name, and the conductors and employes wearing its initials upon their uniforms.

The assignments of error which challenge the rulings of the trial judge upon the questions of negligence and contributory negligence are addressed to his refusal to direct a verdict for the defendant and to his instructions to the jury.

It is unnecessary to consider these assignments in detail. The decedent had put himself in the care of the Easton & Amboy Railroad Company for the purpose of taking passage upon its train then about due to arrive, having a ticket which entitled him to carriage by that train. The relation of carrier and passenger existed at the time he crossed the track and reached the platform. If the carrier had not

used due care to provide him with a safe place to await and board the train, negligence was established. Neither the Easton & Amboy Railroad Company nor the defendant was chargeable with negligence merely because of the running of a special train through Alpha shortly before the schedule time for the arrival of the regular train without notice to the station tender, nor merely because the train was permitted to run at an excessively high rate of speed. The trial judge so instructed the jury, and he left it to them to decide whether, in view of its relation to approaching trains, the platform as it was constructed was an unsafe place.

We think the facts fully justified that instruction. The probability that unexpected trains, running at high speed, might pass it while passengers were properly there, exciting and confusing them, as such an occurrence naturally would, was one which should have been considered by the carrier in determining the locality and dimensions of the platform. So, also, the probability that at times it would be used by the young, or the infirm, or by passengers otherwise incapacitated to exercise the utmost intelligence for their own safety, should have been considered. So, also, its location at a point where a fast train could not be seen approaching for a period of more than about a dozen seconds should have been considered. These considerations would seem to have been neglected when the platform was made as narrow as it was, and located so near the track that passing cars overlapped it as they did. The margin of safety was sufficient under ordinary conditions for passengers aware of its relation to the track, and exercising due prudence, but not sufficient under conditions which were likely to occur when it was being legitimately used. In *Dobiecki v. Sharp*, 88 N. Y. 203, where the cars projected over the platform only from three to five inches, the court were of the opinion that the question of negligence was one for the jury. In *Archer v. The New York, etc., R. R. Co.*, 106 N. Y. 589, 13 N. E. 318, where the cars overlapped the platform only two or three inches, the court considered that the jury were authorized to find negligence. It is not necessary to adopt either of these decisions for the purposes of this case, but they illustrate the trend of judicial opinion in respect to the danger of constructing a platform so that at any part of it a passenger is likely to be struck by passing trains. Nor is it necessary to adopt the view of the trial judge that the only element of negligence for the consideration of the jury was the failure of the carrier to provide a safe place. It suffices that the instructions were as favorable for the defendant as it was entitled to ask. Upon the issue of contributory negligence the facts justified the refusal of the trial judge to direct a verdict for the defendant. The evidence authorized the jury to find that the decedent was killed almost immediately after he had reached the platform; that in the intervening moment his attention was distracted and his deliberative faculties practically paralyzed by the onrush of a flying train and shrieking locomotive in place of an expected train, which would be moving slowly preparatory to stopping at the platform; and that during a second or two of this brief and disconcerting interval he unconsciously exposed himself near the perilous edge of the platform and beyond the undefined safety line.

The trial judge instructed the jury, in substance, that the plaintiff was not entitled to recover if the decedent did anything that a man of prudence, under the conditions and circumstances then existing, would not have done, or omitted to do anything that a man of prudence would have done, and that they were to consider whether he was guilty of any negligence in not going back to the railing at the rear of the platform, and what opportunity he had to reach it, and whether he knew, or had reason to know, that if he stood near the edge of the platform the overhang of passing cars would sweep him off. The only criticism that can be fairly suggested of his instructions is based upon that one in which he stated that the decedent "had a right to assume that the platform was so related to the track that the train would not sweep over any portion of it." Upon an exception by the defendant to that instruction, he qualified it by stating that the decedent "had a right to assume, generally, that the train would not sweep him off, but it was his duty to use the platform with ordinary care and prudence." If the decedent had been unaware previously that the passing trains overlapped the platform, this instruction would have been strictly correct. It should be considered in connection with the instructions which had preceded it, and which directed the attention of the jury to the inquiry whether the decedent knew, or had reason to know, that passing cars would overhang the platform near the edge. The instructions, in their entirety, left the jury under no misapprehension as to the obligation of due care on the part of the decedent.

The remaining assignments of error challenge the rulings of the trial judge upon the question whether the defendant, in any view of the facts, was the carrier against whom the action could be maintained.

The title to the franchises, privileges, and property of the Easton & Amboy Railroad Company was vested in that corporation, and the railroad upon which the deceased was killed was operated and maintained financially and physically by that corporation; but the potential and ultimate control of all its property and business affairs was lodged in the defendant, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit. Inasmuch as, under the laws of New Jersey, the Easton & Amboy Railroad Company was incapable of transferring to the defendant its franchises, privileges, and property, and the defendant could not acquire them, the defendant was not in legal contemplation the owner nor operating the Easton & Amboy Railroad. But the law does not prevent one railroad corporation from making a contract with a passenger to carry him beyond its own road and upon or over the connecting roads of another railroad corporation and assume towards him all the ordinary obligations of a passenger carrier during the transit. The contract, being incidental to one to carry him over its own road, is not *ultra vires*. Nor is it *ultra vires* for a railroad corporation to agree with other railroad corporations upon such terms of co-operation in transacting their joint business as may be satisfactory. And where the lines of several railroad corporations are conducted as a single system for the purposes of the traffic between different points originating upon either, the corporations may constitute themselves a partnership for the business of such traffic; and when they do, al-

though the general management of each road is retained by the corporation owning it, the several corporations are, as to such business, partners, and liable upon the principles of the law of agency. When a relation of joint and several agency exists in a system of dominant and subordinate carriers, the dominant carrier is liable for all breaches of obligation by any of the other constituent carriers in the performance of a contract made by it for the transportation of passengers or freight. These propositions are established by the following authorities: *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 12 N. E. 583; *Philadelphia, etc., R. Co. v. State*, 58 Md. 372; *Wyman v. Chicago, etc., R. Co.*, 4 Mo. App. 578; *Bradford v. So. Car. R. Co.*, 7 Rich. Law, 201, 62 Am. Dec. 411; *Harris v. Cheshire R. Co.* (R. I.) 16 Atl. 512; *Block v. Fitchburg R. Co.*, 139 Mass. 308, 1 N. E. 348; *Independence Mills Co. v. Burlington, etc., R. Co.*, 72 Iowa, 535, 34 N. W. 320, 2 Am. St. Rep. 258; *Cincinnati R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434. We find nothing inconsistent with these propositions decided in *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176. Especially should the dominant corporation be regarded as the principal and the constituent corporations as agents when, as in this case, the dominant corporation ultimately derives all the profits and incurs all the losses arising from the traffic originating on any of the lines. We conclude that the relations of the defendant with the Easton & Amboy Railroad Company in respect to the traffic originating on the lines of either were those of a principal and its agent. The ticket which it sold to the decedent evidenced a contract for through carriage between Easton and Alpha in either direction, and on its face did not purport to be the contract of the Easton & Amboy Railroad Company, or refer to that corporation in any way. In view of the relations between the two carriers, it should be regarded as a contract for through transportation, which, so far as it was to be performed on the Easton & Amboy Railroad, was to be performed by an agent of the defendant. Upon the undisputed evidence the trial judge would have been justified in instructing the jury to find a verdict for the plaintiff if they found in her favor upon the issues of negligence and concurring negligence. Consequently the defendant was not prejudiced by his rulings in receiving evidence offered for the purpose of showing that the defendant had held itself out to the public as operating the Easton & Amboy Railroad, or in submitting the case to the jury upon the theory that the plaintiff was not entitled to a verdict unless they should find that the defendant had so held itself out to the public. The complaint set out the facts constituting the cause of action, and was framed upon the legal theory that the defendant was responsible for its own negligence and for that of the Easton & Amboy Railroad Company, and the amendment permitted by the trial judge was unnecessary and did not prejudice the defendant.

The judgment is affirmed.

LACOMBE, Circuit Judge. I concur in the result and in the opinion generally. I do not, however, assent to the proposition that the decedent "had a right to assume that the platform was so related to the track that

the train would not sweep over any portion of it." It does not seem to me that it can be held to be negligence on the part of a railroad company to place its platform so close to the track that some of its cars will overlap its edge. Such a construction is a reasonable one, because it brings the platform and track so near together that there is no open space left between them when cars of other types, with shallower steps and less overhang, are passing. Certainly it must be patent to any one of intelligence enough to be left loose on a railway platform that the strip of platform nearest the track, while very necessary for a person getting on or off the train, is not intended for people to stand on when a train is passing; the suction alone would make it a dangerous place, even if no car or car step overlapped. Of course, the platform may be so narrow that it should be sent to the jury to say whether the defendant was negligent in not providing a sufficiently safe place to wait on, and such is the case here. But if the charge above quoted had been left unqualified, the judgment should be reversed. It seems to me, however, that the qualification which followed objection to it, in connection with the rest of the charge, sufficiently corrected the error; for, in substance, it told the jury that plaintiff had a right to assume generally that the train would not sweep off any one who used the platform with ordinary care and prudence; and this, independent of the circumstance whether he knew the condition of the platform or not. Such knowledge might have an important bearing on the question of plaintiff's contributing negligence, but none at all on the question of defendant's negligence.

It seems to me as if the opinion of the majority might be taken as not repudiating the proposition that the jury might find defendant negligent solely because its passing cars overlapped the edge of the platform, and I wish to record a strenuous protest against any such proposition.

TREAT v. RUSSELL et ux.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1904.)

No. 1,910.

1. CANCELLATION OF DEED—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence considered, and held insufficient to warrant the cancellation of a deed conveying an undivided interest in a tract of land for fraud, under the rule that in such cases the proof of fraud must be clear, satisfactory, and convincing, where complainants admitted their signatures to the deed, which was formally executed and acknowledged, duly recorded, and remained unchallenged for more than four years, during all of which time the conduct of the parties was consistent with a joint ownership of the land, and in some respects inconsistent with its sole ownership by complainants.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This action was brought by James M. Russell and Minnie A. Russell, his wife, who are the appellees in this court, against Thomas C. Treat, the appellant, to cancel and annul a deed conveying a two-thirds interest in a tract of land situated in Platte county, Mo., containing altogether about 340 acres.

The deed in question purported to be one executed by the appellees, as grantors, in favor of the appellant, as grantee, on April 4, 1896, and to have been acknowledged on the same day before Thomas A. Moxcey, a notary public, and to have been duly recorded in the proper office on May 27, 1896. The appellees, hereafter termed the "complainants," sought to have this deed canceled and annulled, because, as they alleged in their bill, they never did at any time sell or convey, or undertake to sell or convey, to the appellant, hereafter termed the "defendant," an undivided two-thirds interest in the land in controversy. They averred that if the complainants, or either of them, ever appended their signature to the deed in question they were induced to do so by some scheme, trick, device, or fraud which the defendant practiced to obtain such signatures, which scheme, trick, device, or fraud, as they alleged, they could not define or describe otherwise than by saying that the defendant had presented to them the deed in question and had induced them to sign it by representing to them that it was an instrument other and different from the pretended deed, doing so with intent to deceive and to defraud them. They further averred that the defendant signed, or caused some other person to sign, their names to the deed without their knowledge or consent. After the foregoing allegations the complainants alleged that they did not know in which of the two ways last mentioned the signatures of the complainants appearing on the deed had been secured, but that they were secured in one or the other of these ways, and, as they believed, in the latter way; that is to say, by forgery. The defendant answered the bill by denying each and all of the foregoing charges of fraud and forgery. He further alleged that James M. Russell, one of the appellees, acquired a title to the tract of land in controversy in the month of January, 1896; that the conveyance of the title to said Russell was made pursuant to a prior agreement between Russell and one Clark W. Drummond, who was at the time a partner of Treat, whereby said Russell, Drummond, and the defendant, Treat, had mutually agreed to purchase the land from the former owner on joint account, each of the purchasers to have an undivided one-third interest therein; that pursuant to said agreement the title to the land, when purchased, was vested in Russell temporarily, the understanding being that he would convey to each of his associates an undivided one-third interest therein when requested to do so; that under said agreement for the purchase of the land in question the defendant and said Drummond conducted all of the negotiations leading up to the purchase of the land from the former owner, and also negotiated a loan secured by a mortgage on the land, whereby the purchase price was paid; that when the purchase was consummated the conveyance was made to Russell pursuant to the aforesaid agreement; that subsequently the defendant acquired Drummond's one-third interest in the property, and that on April 4, 1896, Russell and wife conveyed to the defendant a two-thirds interest in the land, as he had previously undertaken to do; that this deed was duly acknowledged and recorded, and is the identical instrument which the complainants charge to have been obtained from them by means of fraud or forgery. The defendant also filed a cross-bill seeking an accounting as between himself and the complainants respecting the land and their dealings in connection therewith and certain affirmative relief. The case was removed from the state court, where the bill was originally filed, and after its removal to the federal Circuit Court was referred to a special master to take the testimony, who was also empowered to "examine the evidence and make findings of fact." The master subsequently filed a report, in which he found adversely to the complainants as respects all the charges of fraud and forgery. Exceptions having been filed to this report, the Circuit Court reversed the findings of the master, holding that the deed in question had been obtained fraudulently and deceitfully, and in accordance with that finding it canceled and annulled the conveyance. The case is before this court on an appeal taken by the defendant from such decree.

C. A. Mosman (Thomas F. Ryan and S. K. Woodworth, on the brief), for appellant.

James W. Boyd, for appellees.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The allegation which is contained in the bill that the signatures of the complainants to the deed of date April 4, 1896, which the complainants seek to have canceled, were forged—that is to say, that they were written by the defendant himself, or by some one else whom he had caused or procured to write them, without the knowledge or consent of the complainants—may be ignored, since the complainants, in the course of the trial, practically admitted that the deed bore their genuine signatures when it was exhibited to them, although they professed ignorance as to the manner in which their signatures had been obtained, and also stoutly denied that they had ever consciously signed the deed in question intending to convey to the defendant a two-thirds interest in the land in controversy. Both of the complainants gave evidence tending to show that on one occasion, on or about March 10, 1896, at the request of the defendant, they had appended their names to an instrument of which they could give no better description than that it was “a blank paper that had some printed matter on it, something in the form of a deed or something like that, the size of that paper there” (indicating the deed of April 4, 1896). According to their statements respecting this incident, they went to the defendant's office in Atchison, Kan., on or about March 10, 1896, to execute a deed of trust on the land in question to secure the payment of a note in the sum of \$5,000, which was given to an insurance company for money borrowed to purchase the land from the former owner. After the deed of trust was signed, the defendant said (according to the complainants' testimony):

“Here, just sign this paper, and I can fill it out afterwards. You can go on to dinner. This does not amount to much anyhow, and I can fill it out afterwards. And we signed the paper, and started out of his office door, and he went out with us, and took a paper in his hand. I don't know what paper it was. And he carried it in, and turned on the left, and stopped at an office there—Mr. Solomon's office—and come on out, and we went on down the elevator together, and my wife and me went to dinner to a restaurant, and I don't think we went back in the office that evening. We went home.”

The theory of the complainants, to account for their signatures to the deed of April 4, 1896, appears to be that this blank paper which they claim to have signed on the occasion in question without examination, and on the strength of the foregoing representation, was in fact the deed of date April 4, 1896, which they seek to have canceled, and that it was subsequently filled out by the defendant, and a certificate of acknowledgment appended thereto by the notary at the defendant's request, with intent on the defendant's part to defraud them. The charge that their signatures were forged being abandoned, and the fact being admitted that the deed bears their genuine signatures, there is no evidence in the record, so far as we can discover, that their signatures to the deed were obtained through any trick or artifice of a fraudulent character unless it be that on or about the date last mentioned the defendant did obtain their signatures to a blank deed in the manner last described with intent to perpetrate a fraud.

This, then, would seem to be the principal question of fact in the case: Were the signatures of the complainants obtained to a blank instrument in virtue of a representation that it was of no consequence, or words to that effect? Unless this question is answered in the affirmative, it would seem that the genuine character of the deed has not been impeached, and that it cannot be annulled in virtue of any of the averments which are contained in the bill. Before considering this issue of fact, it is deemed advisable to state some general facts and circumstances, concerning which there is no controversy, which will serve to show the situation and relation of the parties to each other at and previous to March 10, 1896. The land in controversy originally belonged to and the title was vested in persons who resided in the state of Indiana. In 1890 or in 1891 Russell rented the land from the owners for agricultural purposes, and continued to reside on it as a tenant from that time forward until 1895 and thereafter until this action was brought. On or about August 3, 1895, he entered into an agreement with the owners of the land for its purchase at the price of \$5,400 in the aggregate, or at the rate of \$16 per acre. Of this sum \$800 was to be paid in cash, and the balance in five equal annual installments, that were to be secured by a mortgage on the land. There was some delay in carrying out the agreement, and before the contract of sale was executed by the delivery of the deed Russell negotiated a sale of the land to one Smith at the price of \$18 or \$20 per acre. This agreement with Smith appears to have been made in the month of November, 1895. Smith was to pay the entire purchase price in cash. To enable him to buy the land, Smith tried to negotiate a loan through the defendant, Treat, and his partner, Drummond, who resided at Atchison, Kan., and were engaged in negotiating loans upon real property for a commission. An arrangement was entered into by Smith with Treat and Drummond in virtue of which they agreed to join with Smith in making the purchase. By the terms of this agreement the land, when conveyed, was to be deeded to Smith, who was to execute a mortgage upon the land for the purchase money, but the property, when bought, was to be held by him for the benefit of himself, his son, and Treat and Drummond, each to be entitled to an undivided one-third interest therein. This arrangement, however, with Smith, was not carried out, because Treat and Drummond failed to obtain a loan on the property for such a sum as was needed to pay for the property at the price of \$20 per acre. Smith having failed to raise the money to purchase the land from Russell, Russell himself applied to Treat and Drummond to negotiate a loan on the property in the sum of \$5,000 to enable him to carry out his contract for the purchase of the land, which had not at that time been executed.

Up to this point there is no substantial controversy between the parties concerning any of the material facts, but here there is a conflict as to what occurred. Russell contends, in substance, that he never agreed with Treat and Drummond to purchase the land jointly with them, and that he simply employed them as brokers to negotiate a loan in his behalf, while Treat insists that when Russell applied to them to obtain a loan on the property in the sum of \$5,000

he and his partner entered into a verbal agreement with Russell of substantially the same character as that which they had previously had with Smith, namely, that they would unite with him in purchasing the property on joint account, and would endeavor to raise the money wherewith to purchase the land by negotiating a sale of a mortgage on the property in the sum of \$5,000, which mortgage should be executed by Russell. The defendant produced much testimony which tended to show that a verbal agreement substantially like that which is set forth above in the statement, was entered into between himself and Drummond on the one hand with Russell on the other for the joint purchase of the land, in pursuance of which a mortgage on the property was executed by Russell and negotiated by Treat and Drummond; that the purchase money to the amount of \$5,000 was thus secured and paid to the former owner of the land; and that the property was thereupon conveyed to Russell in January, 1896, he agreeing to convey to Treat and Drummond an undivided two-thirds interest therein when requested to do so, which conveyance he and his wife subsequently executed and acknowledged on April 4, 1896.

Recurring to the principal issue of fact which is stated above, it is to be observed that no witness in the case besides the complainant and his wife gave testimony tending to show that either on March 10, 1896, or at any other date prior to April 4, 1896, they were requested by the defendant to sign a blank instrument resembling a deed, and that they did sign such an instrument pursuant to such request. This incident which the complainants relate, so far as the record discloses, was witnessed by no other person, and it is the only explanation which they seem able to give of the manner in which their genuine signatures to the deed of April 4, 1896, could have been obtained. The testimony of the defendant in relation to this incident is very positive, and to the effect that the only instrument which the complainants signed on March 10, 1896, was a deed of trust on the property in dispute securing the loan for \$5,000, with which the property was purchased, and possibly an order directing how the money, when obtained, should be expended, and that neither on that occasion nor any other were the complainants requested to sign any blank paper resembling a deed or any other instrument. The defendant's testimony is equally positive to the effect that the deed of April 4, 1896, was signed and acknowledged on that day in his office, and not on March 10, 1896, both of the complainants being at the time present, and fully conscious of its contents and what they were doing. The defendant's statement in this latter respect is fully corroborated by the notary public before whom the deed of April 4, 1896, was acknowledged, who claims to have a distinct recollection of meeting both of the complainants in the defendant's office on that day, of their signing the deed in his presence and acknowledging it before him. The notary is himself corroborated by the official record of his proceedings on that day, which he was required to keep. This record shows the acknowledgment of the deed in question on April 4, 1896, and, while the notary was unable, on his examination, to say definitely whether he asked the complainants if they knew what was

in the deed, or told them what was in it, at the time he took their acknowledgment, yet that it was safe to say that he did the one thing or the other. Moreover, the presumption that the complainants were acquainted with the contents of the deed, and signed it with a full understanding of its contents, is created by the notarial certificate of acknowledgment, which presumption, if not conclusive, is entitled to great weight, the certificate being an official record, and it cannot be overcome at this late day without the clearest and most convincing evidence of fraud.

The record discloses other facts which support the contention of the defendant that the deed of April 4, 1896, was consciously executed by the complainants in pursuance of a verbal agreement made with Treat and Drummond prior to the negotiation of the loan for \$5,000 that the land in controversy should be purchased on joint account, and that Treat and Drummond should have a two-thirds interest in the property when it was acquired. For more than four years subsequent to April 4, 1896, the defendant, Treat, frequently visited the land on which the complainants were residing, and conferred with Russell about the management of the place, the execution of leases for parts of the land, and other matters which would naturally interest one who had a proprietary interest in the property. He also advanced and paid interest on the outstanding loan when Russell was unable to do so, and also paid taxes upon the property when they became in arrear. The money so advanced by the defendant from time to time amounted to a sum exceeding \$700. Russell never seems to have resented such interference with his affairs, but for several years conferred with the defendant freely, and accepted assistance and advice from him precisely as one would be expected to confer with and seek assistance from another who was interested with him in a joint venture. In a word, the actions of the parties subsequent to April 4, 1896, are consistent with the theory that the defendant had a proprietary interest in the property, and entirely inconsistent with the view that his interest was merely that of a broker who had once negotiated a mortgage on the land, and was only interested in seeing that the interest on the loan was paid, and that the mortgage was not foreclosed. Besides, on May 4, and again on May 13, 1901, after difficulties had arisen between the parties, the complainants entered into written agreements with the defendant concerning the future management and control of the land, which agreements almost in their opening paragraphs contained a recital to the following effect:

"That whereas the said parties hereto are owners, and have been for the past five years, of three hundred and forty acres of land situated in sections fourteen and fifteen and twenty-three in township fifty-four, range thirty-seven, Platte county, Missouri," etc.

On May 13, 1901, the complainants also executed a deed of trust covering the property in controversy to one Holbert to secure a note which they had executed in the sum of \$335, in which deed of trust they described their interest in the land as being "an undivided one-third interest." Some time afterwards, and in the month of August, 1901, complainant and his wife also entered into an agree-

ment with the defendant for the arbitration of certain differences which had arisen between them, and which seem to have grown in part out of the contract of May 13, 1901, heretofore mentioned. This agreement of arbitration also begins with the following recital, to wit:

"Whereas T. C. Treat is and has been for more than five years past the owner of an undivided two-thirds interest in three hundred and forty acres of land in sections fourteen, fifteen and twenty-three in township fifty-four, range thirty-seven, Platte county, Missouri, and J. M. Russell is the owner of the undivided one-third thereof. * * * now, therefore, it is agreed that S. J. Blythe, John Page and William Reece be and they are hereby appointed and agreed upon to go through the accounts of each and both of said parties," etc.

The complainants say, in substance, that they signed these several written documents, being at the time ignorant or unconscious of the recitals which they contained, and with respect to the contract of May 13, 1901, containing the above-quoted recital as to the ownership of the land, they allege that their signatures thereto were obtained by the false representation of the defendant that it was merely a mortgage on the crops and produce of the land, given to secure the payment of the sum of about \$700, which the complainants admit that they then owed to the defendant for money theretofore advanced by him for their benefit in keeping down the interest on the mortgage. It is therefore urged in their behalf that, as they were not aware of the recitals, they do not serve to estop the complainants from denying that the defendant is a joint owner of the property, and that they should not even be regarded as admissions or evidence of such joint ownership. But we have not been able to adopt this view of the case. The complainants were able to read and write, and they seem to possess the average intelligence of persons in their station in life. They had full opportunity to read the instruments containing the aforesaid recitals before signing them, and, as certain disputes had already arisen between themselves and the defendant before the several documents were prepared for signature, we find ourselves wholly unable to credit the statement that they signed the instruments in question without being aware of the admissions which they contained. Moreover, even if we were able to believe that the several documents were signed by the complainants without reading them, and in ignorance of the recitals, yet the law would not excuse them for their negligence in signing written agreements of such importance as these appear to have been without taking the pains to read them and to ascertain what statements they contained and what obligations they imposed. Enough friction already existed between the parties when the documents were executed. Their relations at the time had become so far strained that the complainants should have read these several instruments carefully before executing them, and we feel constrained to believe that they did examine them, or at least that they had a fair understanding of their contents, before they executed them. No other conclusion than this seems to be admissible in view of all the facts and circumstances of the case.

In addition to the recitals last mentioned, the record also contains evidence of oral statements made to at least five different per-

sons at various times by the complainant Russell, which statements are in the nature of admissions that defendant was a joint owner of the land in controversy.

The learned judge of the trial court seems to have been largely influenced to his decision that the deed of April 4, 1896, was obtained fraudulently and deceitfully by the thought that the oral agreement in virtue of which the land was bought and in execution of which the deed was made and delivered was an unconscionable agreement, according to the testimony of the defendant, in that it imposed an excessive burden upon the complainant Russell, and that it ought not to be given effect for that reason. We entirely agree with the view that the contract in question did impose on the complainant Russell what seems now to have been an undue burden in that it obligated him to till the land when it was bought, or to see that it was properly tilled, and to apply the rents and profits to the extinguishment of the mortgage indebtedness, which, when extinguished, would make him the owner of only a one-third interest in the land, while the defendant would become the owner of the remaining two-thirds. In view of this outcome, the bargain as made, seems, at the present time, to have been unfair. We conceive, however, that Russell's desire to obtain at least one-third of the land at the time the bargain was made may have been so strong, and the difficulties which stood in the way of his obtaining the necessary funds to buy the entire tract may have been so great, that he was entirely willing to enter into the contract with the defendant for a joint purchase. He may have perceived, or at least thought that he perceived, some peculiar advantage to himself in allying himself with the defendant in making the purchase on the terms proposed. It may have seemed the only way open to him at the time of becoming the owner of a part of the land, and he may have been willing to assume the burden which the contract imposed to accomplish that end. At all events, in view of the situation of the complainants at the time the agreement was entered into and the motives which may have actuated them at the time, it does not appear to us that the bargain was so unreasonable or unconscionable as to justify the inference that it was never made, and that the deed of April 4, 1896, was not consciously executed by the complainants, but was obtained through some trick or artifice, and is therefore fraudulent. This being a proceeding, so far as the complainants are concerned, to set aside a deed bearing their genuine signatures, solely on the ground that it was procured through some trick or artifice, which deed, on its face, appears to have been formally executed, and to have been duly recorded in the proper office very shortly after it was executed, and to have remained unchallenged by any one for at least four years, and the rule being, in this class of cases, that to warrant a court of equity in setting such a conveyance aside the proof of the alleged fraud must be clear, satisfactory, and convincing to the mind of the chancellor (*Atlantic Delaine Co. v. James*, 94 U. S. 207, 214, 24 L. Ed. 112; *Forrester v. Scoville*, 51 Mo. 268; *Jackson v. Wood*, 88 Mo. 76; *Hupsch v. Resch*, 45 N. J. Eq. 662, 18 Atl. 372; *Pomeroy's Eq. Jur.* vol. 2, § 859), we have little hesitation in holding that on the proof contained in this record the

deed of April 4, 1896, ought not to be set aside. In view of what has already been said concerning the character of the evidence, it is obvious that the proof which was relied upon by the complainants to obtain the cancellation of the deed is neither clear, satisfactory, nor convincing. Indeed, it does not seem to preponderate in their favor. It results from this conclusion that the relief prayed for by the complainants in their bill ought not to have been granted, and that the decree of the lower court was erroneous.

We have next to consider and determine what action shall be taken on the defendant's cross-bill, to which reference has already been made in the foregoing statement. By the terms of the decree which was entered in the lower court, the cross-bill was dismissed. This cross-bill appears to have been filed by the defendant mainly with a view of obtaining a receiver of the property while the litigation concerning the ownership thereof was in progress, and incidentally to obtain an accounting of the rents, issues, and products of the land which had been received by the complainant Russell during the years 1896 to 1901, both inclusive. The special master to whom the case was referred esteemed it his duty, as it seems, to take an account as prayed for in the cross-bill, the result being that he reported that the complainant Russell was indebted to the defendant in the sum of about \$323.54. The trial court, on entering its decree, observed, however, that no such matter as taking an account between the parties was referred to the master, the reference being only with respect to the issues raised by the original bill and the answer thereto. The order of reference seems to justify this conclusion, since no mention was made therein of the issues presented by the cross-bill. Moreover, the trial before the master seems to have proceeded on the theory that the issue which he was to determine was that as respects the validity of the deed of April 4, 1896, and very little attention was paid by the complainants to the introduction of testimony relating to the accounting. For these reasons the evidence which is contained in the present record is insufficient, in our judgment, to state the account accurately with due regard to the rights of the complainants. It is also probable that crops have been grown on the land since this litigation has been pending, concerning which a further accounting must, in any event, be had.

For these reasons the decree below will be reversed and annulled, and the case will be remanded to the lower court, with directions to order another reference either to the former master or to another master to be selected by the court, for the purpose of restating the account between the parties, if it so happen that they are unable to state the account themselves, and to receive such further testimony on that head as the parties may desire to introduce. Such restatement of the account will proceed upon the theory that the deed of April 4, 1896, is a valid conveyance, and that the defendant, Treat, since the date of that conveyance, has been the owner of an undivided two-thirds interest in the land in controversy, and that the net sum realized from the rents and profits of the land in controversy, including that part thereof which may have been tilled by Russell himself, should have been applied to the payment of the mortgages on

the land and the taxes against the same from and after April 4, 1896. In stating the account the complainant Russell should be allowed credit for all permanent improvements made on the land in the meantime at his own cost and expense. The master reports "that there was no agreement among the parties as to each supposed tenant in common not charging for work in connection with this land until May 4, 1901." In view of this finding, the master will be at liberty to find and state in his report what would be a reasonable compensation for the work and labor performed and the services rendered by the complainant Russell from April 4, 1896, to May 4, 1901, in caring for, managing, and supervising the joint property during that period; but the question whether the complainant should be allowed such compensation as against the defendant will be reserved for future consideration and determination on the coming in of such report.

The decree below is accordingly reversed, and the cause is remanded to the lower court, with directions substantially as indicated in the preceding paragraph.

THE TROOP.

KENNEY et al. v. LOUIE.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1904.)

No. 939.

1. SEAMEN—INJURY IN SERVICE—LIABILITY OF SHIP FOR FAILURE TO GIVE PROPER CARE.

Under the general maritime law, as recognized and administered by the admiralty courts of the United States, a seaman may maintain a suit in rem to recover damages caused by the failure of a master to furnish him with proper care, treatment, and supplies after his accidental injury in the service of the ship—the duty being one which rests upon the ship, in respect to which the master represents the owners; and neither the British admiralty decisions, nor the English merchants' shipping act, deny such right, although in matters relating to the navigation of the ship the English decisions treat the master and crew as fellow servants.

2. SAME—JURISDICTION TO ENFORCE LIABILITY—FOREIGN SHIP.

An American court of admiralty may, in its discretion, entertain jurisdiction of a suit by an alien seaman against a foreign ship to recover damages for the gross negligence or misconduct of the master, in failing to furnish libellant proper care, nursing, and medical treatment after his accidental injury while in the service of the ship; and the assumption of such jurisdiction will not be held an abuse of discretion by an appellate court, where the circumstances were such that otherwise the libellant, who was left in this country, permanently injured, and without money, would probably have been without any effective remedy.

3. SAME—GROUNDS OF RECOVERY—DAMAGES.

A decree affirmed which awarded a seaman \$4,000 damages against a ship on the ground of the gross negligence of the master in failing to furnish libellant proper care and medical attendance after his accidental injury in the service of the ship, by reason of which he suffered greatly and was permanently crippled.

Ross, Circuit Judge, dissenting.

¶ 1. See Seamen, vol. 43, Cent. Dig. §§ 39, 187.

'Appeal from the District Court of the United States for the Western Division of the District of Washington.

For opinion below, see 118 Fed. 769.

J. M. Ashton and W. L. Sachse, for appellants.

A. W. Buddress, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On July 7, 1901, at Philadelphia, the appellee, a subject of the German Empire, shipped on board the British ship Troop as an able-bodied seaman, for the period of three years. On the morning of January 16, 1902, the said ship left the inner port of Fusan, Korea, on a voyage to Puget Sound. At about 2 o'clock in the afternoon of that day the appellee, while at work on one of the upper yardarms of the ship, lost his footing and fell, thereby sustaining severe injuries; his right leg being broken near the thigh, and his left arm being broken between the elbow and the wrist. The weather was calm and the ship was making no headway. Instead of sending the appellee back to the hospital at Fusan, a distance of six or seven miles, the master of the ship, with the assistance of the steward, set the appellee's broken leg and arm, and had him carried to his bunk in the forecabin. There he remained until February 26th, when he was placed on a tug and taken to a hospital at Port Townsend; the ship having arrived at Port Angeles on February 21st. The appellee libeled the ship for damages; alleging that the master negligently failed to take him back to the port of Fusan and to place him in a hospital there, and that he wrongfully and negligently and unskillfully set his fractured leg and arm, and that the master was negligent in not paying further attention to him thereafter, and in not sending him to a hospital on arriving at Port Angeles.

The appellant A. F. Kenney, the master of the ship, made claim for the same, and answered the libel, denying the allegations of negligence, and averring that the ship was a British ship, and that under the laws of Great Britain the master and the appellee were fellow servants; that the neglect, if any there were, to furnish proper medical treatment, was the neglect of the master, a fellow servant, for which neither the ship nor her owners were responsible. The proof offered on the trial to sustain this allegation concerning the British law was sections 92 to 266, inclusive, of the merchants' shipping act of 1894. No testimony was taken of counsel learned in the British admiralty law, and no other proof was offered than a printed volume purporting to contain the act aforesaid. The court entered a decree for the libellant and against the ship for the sum of \$4,000.

Concerning the law of the case on the appeal, the appellants principally rely on two propositions: First, that by the decision of the Supreme Court of the United States in the case of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, a doctrine has been announced which denies the right of a seaman to pursue a vessel in rem for injury occasioned by the neglect of the master to furnish him proper medical treatment when sick or injured in the service of the vessel; and, second, that, whatever may be the established rule upon

that subject in the United States, the admiralty law of England, by which the present case is to be governed, recognizes no such lien. In the case of *The Osceola* the Supreme Court answered two questions which had been certified to it from the Circuit Court of Appeals for the Seventh Circuit, which, condensed into one, were, in substance, whether a vessel was liable in rem to a member of the crew for injury resulting from the improvident and negligent order of the master, in directing that the gangway be unshipped while the vessel was at sea, running against the wind. The appellants rely on the language of the opinion, where it is said, "The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure"—and upon the final proposition announced in the opinion at page 175, 189 U. S., page 487, 23 Sup. Ct., 47 L. Ed. 760, "that the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident." These observations of the court are general in their terms, but it must be remembered that they were directed solely to the questions certified to it for decision. The inquiry concerned the liability of the ship to a member of her crew for injuries received through a negligent order of the master, made while navigating the ship. It is not implied in the language so used, nor is it to be presumed therefrom, that the court intended to establish a rule narrower than that recognized by the more recent decisions of the federal courts, that the master and the crew are fellow servants only as to matters connected with the navigation of the ship, but that the master of a ship at sea represents the owners in respect to the personal duties and obligations which they owe the seamen. *Olson v. Oregon Ry. & Nav. Co.* (D. C.) 96 Fed. 111, affirmed in 104 Fed. 574, 44 C. C. A. 51; *City of Norwalk* (D. C.) 55 Fed. 98; *Gabrielson v. Waydell* (C. C.) 67 Fed. 342. Nor is it to be presumed that the learned justice who delivered the opinion of the court intended to discredit the views theretofore expressed by him in *The J. F. Card* (D. C.) 43 Fed. 92, where, in discussing the obligation of the ship to care for and cure sick and injured seamen, he said, "Of course, if there be any negligence or misconduct on the part of the officers of the vessel, this would furnish a separate ground for action, in which the seaman would recover not only his expenses for medical attendance, etc., but compensation for his personal injuries, as in ordinary cases of negligence;" nor is it, we submit, to be presumed that it was the intention of the court to overrule, without referring thereto, a long line of American decisions in which it has been uniformly held for nearly a century that a seaman injured while in the service of his ship is entitled to proper care and medical attention at the expense of the ship, and that, if this be neglected, the ship may be held in consequential damages. *Brown v. Overton*, 4 Spr. 462, Fed. Cas. No. 2,024; *The Chandos* (D. C.) 4 Fed. 645; *The City of Alexandria*

(D. C.) 17 Fed. 390; *The Vigilant* (D. C.) 30 Fed. 288; *The J. F. Card* (D. C.) 43 Fed. 92; *Gabrielson v. Waydell* (C. C.) 67 Fed. 342; *The Fred E. Sander* (D. C.) 95 Fed. 829; *Whitney v. Olsen*, 108 Fed. 292, 47 C. C. A. 331; *The Eva B. Hall* (D. C.) 114 Fed. 755; *The Iroquois*, 118 Fed. 1003, 55 C. C. A. 497; *The Troy* (D. C.) 121 Fed. 901. Not only does the opinion in the *Osceola* Case express no disapproval of the doctrine of these decisions, but it incidentally cites the two leading cases of *Brown v. Overton* and *The City of Alexandria*—the former upon the proposition that a seaman receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship. That was a case in which consequential damages were awarded a seaman who was injured on a voyage from Calcutta to Boston, for the failure of the master to take him into the port of St. Helena for medical treatment.

To support the proposition that the law of Great Britain gives no lien upon a vessel for consequential damages in a case such as is here presented, the appellants rely upon the provisions of the merchants' shipping act of 1894. A few only of the sections of that act are pertinent to the present inquiry. Section 156 provides, in substance, that a seaman may not by any agreement forfeit his lien on the ship, or be deprived of any existing remedy for the recovery of his wages. Section 207 provides that the expense of providing necessary surgical and medical advice and attendance, and the expense of maintenance of a member of the ship's crew who is hurt or injured in the service of the ship, "shall be defrayed by the owner of the ship without any deduction on that account from his wages," and that if by the neglect of the master or owner there is failure to equip the ship with proper medicines, medical stores, or accommodations, the owner or master shall be liable to pay all expenses (not exceeding three months' wages) properly and necessarily incurred by reason of the illness, and that such expenses may be recovered as if they were wages duly earned, "but this provision shall not affect any further liability of the master or the owner for the neglect or any other remedies possessed by the seaman or apprentice." Section 208:

"If any of the expenses attendant on the illness, hurt or injury of a seaman or apprentice, which are to be paid under this act by the master or owner, are paid by any British consular officer or other person on behalf of the crown, or if any other expenses in respect of the illness, hurt or injury of any seaman or apprentice whose wages are not accounted for under this act to that officer are so paid, those expenses shall be repaid to the officer or other person by the master of the ship. If the expenses are not so repaid, the amount thereof shall, with costs, be a charge upon the ship, and be recoverable from the master or from the owner of the ship for the time being, as a debt to the crown, either by ordinary process of law or in the same court and manner as wages due to seamen."

It is contended that under these statutory provisions the lien upon the ship in favor of the seaman is limited to his claim for wages, and that, while the owner of the ship is required to furnish medicine and attendance, if he fails so to do the owner, not the ship, must repay to the seaman the amount of expenses actually incurred therein. It is to be noted, however, that the act gives to any British consular officer who pays such expenses a lien on the ship therefor, for it declares

that such expenses shall be a charge upon the ship, to be recovered in the same court and manner as wages due seamen. It is undisputed that, under the English law, wages due a seaman may be recovered by a proceeding in rem in the admiralty court. It is not shown what was the law of Great Britain prior to the enactment of the merchants' shipping act of 1894. If prior to that time the English admiralty courts recognized a lien upon a ship, and the right to proceed against her in rem for the recovery of damages, in a case such as we have here under consideration, we do not find that the act, in terms or by necessary implication, has impaired that right. It has declared, it is true, that the expenses of medical advice and attendance to a hurt or sick sailor shall be defrayed by the owner of the ship, and it provides for the recovery of damages, to a limited extent, for the failure so to do, but this is not necessarily inconsistent with the existence of a right to pursue the vessel in rem; and there follows the proviso that "this provision shall not affect any further liability of the master or owner for the neglect or any other remedies possessed by the seaman or apprentice."

But it is said that, irrespective of the special provisions of the merchants' shipping act of 1894, by the law of England, as interpreted by its courts, the master and the crew of a ship are fellow servants at all times, under all circumstances, and as to all relations; and the appellants cite the decision of Lord Chancellor Herschell in *Hedley v. Pinkney, etc., S. S. Co., Ltd.*, 7 Asp. Mar. Law Cases, 483, in which it was said:

"It was argued that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, and that the law which exempts a master from liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case."

And the Lord Chancellor proceeded to add that he did not think it possible to give effect to that contention.

That was a case in which the personal representative of a seaman who had been lost at sea sued the owners for damages; alleging that the master, while navigating the ship at sea, was negligent, in failing to have placed in position, on the approach of stormy weather, a detachable portion of the ship's rail. The court, in denying the right of the administratrix to recover, made use of the language above quoted. What was there said was in answer to the argument that a duty rested upon the master to keep the ship at all times in a seaworthy condition, and that as to that duty he was not a fellow servant with the members of the crew. There was no question in that case, however, but that the vessel was in a seaworthy condition when the voyage began, and that the owners had in that respect fully met their obligation. In holding, as the opinion does, as to the question there presented and the argument so advanced, that the master and the crew were fellow servants, the decision is not inharmonious with the more recent decisions of the American courts; and there is nothing in the language of the court that may not be reconciled with the view that as to all the duties of the ship or its owners to the crew, where sickness or injury has in-

tervened, the master is, in England as in the United States, the representative of the former.

It is urged, also, that in the opinion in the *Osceola* Case the Supreme Court has placed upon the decision in *Hedley v. Pinkney, etc.*, S. S. Co. a construction which accords with the appellants' contention in the present case. It is true that the court in that case said:

"In the English courts the owner is now held to be liable for injuries received by the unseaworthiness of the vessel, though not by the negligence of the master, who is treated as a fellow servant of the seamen. Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the merchants' shipping act of 1876, 39 & 40 Vict. c. 80, § 5, wherein, in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage. *Hedley v. Pinkney, etc.*, S. S. Co., 1894 App. Ca. 222—an action at common law. Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court jurisdiction act of 1861, although it seems an action in admiralty will lie against the master in personam for an assault committed upon a passenger or seaman. * * * In England the master and crew are also treated as fellow servants, and hence it would follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. *Hedley v. Pinkney, etc.*, S. S. Co."

It is clear, however, that this language of the opinion and the discussion of the British law in reference to the question under consideration were directed to the question which had been certified to the court—the question of the liability of the ship for an injury to a seaman occasioned by the negligent act of the master in navigating the ship. It is not perceived that it had any reference to the entirely different question which is involved in the case at bar—the question of the duty of the ship to a seaman after he has been injured in the performance of his duty.

But it is contended that the doctrine of the liability of the ship to furnish medical attendance to the seaman, as recognized in American decisions, received its origin in article 6 of the laws of Oleron, and that those laws have never been recognized as constituting a part of the admiralty jurisprudence of England, but, on the contrary, have there been repudiated in the case of *The Whitton*, 8 Asp. Mar. Law Cases, N. S. 110 (affirmed by the House of Lords in 8 Asp. Mar. Law Cases, N. S. 272), where it was said that the original or common-law jurisdiction of the High Court of Admiralty of England must be ascertained "from the continuous practice and judgments of the great judges who have presided in the Admiralty Court, and from judgments of the High Courts at Westminster. * * * Neither the laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse towns, are of themselves any part of the admiralty law of England." The court, to sustain that utterance, proceeded to point out the absurdities of some of the obsolete portions of the laws of Oleron. Conceding, however, that the laws of Oleron, as a whole, are not at the present time any part of the admiralty law of England, by virtue of proclamation, legislative act, or the adjudications of the admiralty courts, it

does not follow that certain of their provisions are not the basis of the English admiralty law as it is at present administered. Said Judge Ware, in 1837, in deciding the case of *The William Harris*, 1 Ware, 373, Fed. Cas. No. 17,695, "There is not a single principle of maritime law more generally recognized by the usages of all commercial nations than this: That the expenses of the sickness of any of the crew shall be borne by the vessel." In *Harden v. Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047, decided in 1823, Story, Circuit Justice, speaking of the universal rule that such expenses were made a charge upon the ship, referred its origin to the laws of Oleron, "which have been held in peculiar respect by England, and have been in some measure incorporated into her maritime jurisprudence"; and in *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641, the same distinguished jurist quoted from the "excellent treatise" of Lord Tenterden on Shipping, who, he said, lays it down generally "that, by the ancient marine ordinances, if a mariner falls sick during the voyage, or is hurt in the performance of his duty, he is to be cured at the expense of the ship"; and the learned justice proceeded to add, "And he is fully borne out in this statement by the language of the ordinances cited by him on this occasion." See Laws of Oleron, art. 6, etc. In all the American adjudications it is clear that section 6 of the articles of Oleron has been regarded as the origin of the law on that subject as it is administered in our courts. From what source has that provision of those ancient laws been incorporated into our admiralty law, if not through its adoption and recognition in the country from which we have inherited that law? There seems no room to doubt that King Richard I adopted for his kingdom the laws of the Island of Oleron, which was then a part of his dominion. See Benedict's Admiralty, § 51, and authorities there cited.

Question is made of the jurisdiction of the trial court, on the ground that the ship is a foreign vessel, and both the appellants and the appellee are aliens. Conceding that the court had discretion to exercise or decline jurisdiction, we discover nothing in the record to indicate that there was abuse of discretion in that regard. The British vice consuls at Port Townsend and Tacoma disclaimed authority to adjudicate the matters involved in the suit. *Bolden v. Jensen* (D. C.) 70 Fed. 505; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Panama R. R. Co. v. Napier Shipping Co.*, 166 U. S. 285, 17 Sup. Ct. 572, 41 L. Ed. 1004. Said the court in *The Belgenland*, "As the assumption of jurisdiction in such cases depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action." The court then proceeded to affirm the rule that the appellant must show that the trial court has exercised its discretion on wrong principles, or that it has acted so absolutely differently from the view entertained by the appellate court that the latter is justified in saying that discretion has been wrongly exercised. To have relegated the appellee to an English court would almost certainly have been to deny him any remedy. He, a German, was left on American soil, crippled and without means. He has prosecuted his suit in forma pauperis. If he had been able to go to England, he could not know when the

Troop would be there, or that she would ever be there, or that, if she were, any of his witnesses would be on board or within his reach.

Concerning the facts of the case, we are not convinced, upon a careful consideration of the evidence, that error was committed by the District Court. The court found negligence in the failure of the master to send the appellee back to the hospital at Fusan, gross negligence in the treatment of the appellee at sea, and further negligence in the failure to send the appellee immediately to a hospital on arriving at Port Angeles, from all of which negligent acts the appellee has been permanently crippled, and disabled from following his calling as a mariner.

The decree of the District Court will be affirmed.

ROSS, Circuit Judge (dissenting). I agree with the court below that the gross neglect of the master of the ship disclosed by the record presents a shocking instance of "man's inhumanity to man"; but, being of the opinion that by the law of England the ship is not liable in rem for the damages claimed, and that under the decision of the Supreme Court in the case of *The Osceola*, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, I feel obliged to dissent from the judgment against the ship, allowing the libellant \$4,000 damages for the neglect of the master in his treatment of him.

THE MATTERHORN.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1904.)

No. 968.

1. ADMIRALTY—PROVING LAW OF FOREIGN COUNTRY.

Where the maritime law of a foreign country, which is different from our own, is relied upon to defeat an action, it must be both alleged and proved.

2. SEAMAN—INJURY IN SERVICE—LIABILITY OF SHIP FOR NEGLIGENCE TO FURNISH CARE AND TREATMENT.

Under the maritime law of the United States a suit may be maintained by a seaman against the ship to recover damages for the neglect of the master to furnish him proper care and medical attendance after he was injured by being assaulted by the master.

Appeal from the District Court of the United States for the District of Oregon.

The appellee, a subject of the kingdom of Norway and Sweden, was an able-bodied seaman on the ship *Matterhorn*, having shipped at Hamburg for a voyage therefrom to Portland, Or., and other ports. He filed his libel alleging that while on the voyage he was beaten and kicked by the master for failure to respond to a signal to go aft; that he was seriously injured and ruptured by the assault; that the master failed to furnish him medical care or attendance, but compelled him to perform his usual duties, whereby his injury was greatly aggravated and rendered more difficult to cure; and that by the negligence of the master as aforesaid he has become permanently disabled. The answer denied all of these allegations of negligence and maltreatment, but it admitted that on account of the failure of the appellee to obey a signal to go aft the master, while under great provocation, struck him once

upon the face. The answer then proceeded to allege "that the ship flies the British flag, and is owned wholly by British subjects, and that the act of the master, as aforesaid, was permissible under British law." The court found upon the evidence that the master assaulted the appellee, threw him upon the deck, and with force kicked him in the lower portion of the abdomen so that he was badly and permanently ruptured; that thereafter the master failed and neglected to properly care for him, or provide him with proper treatment and attendance, and, with the exception of a few days, compelled him to perform the usual duties of an able-bodied seaman; and that by reason of such neglect the appellee was damaged in the sum of \$500, which sum was decreed to be a lien on the ship.

Williams, Wood & Linthicum, for appellants.

V. K. Strode, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Much of the discussion on the appeal relates to the appellants' contention that by the law of Great Britain the ship was under no obligation to care for or cure a seaman injured in her service, and was not subject to a lien for damages resulting from the master's neglect to furnish such care or medical attendance. We find it unnecessary to consider this question, for the reason that the British law upon the subject is neither pleaded nor proven. It is not even shown that the *Matterhorn* is a British ship. The answer, it is true, alleged that she flies the British flag, and is owned by British subjects, but no proof whatever was offered to sustain that averment, nor is there anything in the evidence tending to show that it was true, except that one of the witnesses for the appellee, who was also a member of the crew, was on cross-examination asked the question if he had ever before sailed in a British ship. But, if such proof had been made, it would not have dispensed with the observance of the rule that, where reliance is placed on a foreign law different from our own, it must be alleged and proven. *The Montana* (C. C.) 22 Fed. 728; *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 445, 446, 9 Sup. Ct. 469, 32 L. Ed. 788. It is true that the appellants introduced in evidence the British merchants shipping act of 1894, but no particular portion of it was either designated or embodied in the record, nor is there anything to show that it was offered for any purpose, except to sustain the only allegation of the answer referring to it—that the violent act of the master was permissible under its provisions.

The contention is made that by the decision in the case of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 433, 47 L. Ed. 760, the Supreme Court has undermined the doctrine that a ship is subject to a lien for damages for neglect of her master to furnish proper care and medical attendance to a seaman injured in her service. Our views concerning that contention have been expressed in the case of *The Troop* (decided at the present term) 128 Fed. 856, and we find it unnecessary to add to what is there said.

Nor do we find ground for disturbing the findings of fact of the District Court, before whom the greater portion of the testimony was taken. They were findings made upon conflicting evidence, and will

not be reviewed in this court unless they are clearly shown to have been wrong. *Jacobsen v. Lewis Klondike Expedition Co.*, 112 Fed. 73, 50 C. C. A. 126, and cases there cited.

The decree of the District Court is affirmed.

LINCOLN et al. v. LEVI COTTON MILLS CO.

(Circuit Court of Appeals, Second Circuit. March 4, 1904.)

No. 84.

1. BROKERS—AGENCY FOR BOTH PARTIES—CONTRACT OF SALE.

In an action for breach of a contract of sale, the entire correspondence between defendants and the sellers showed that both parties understood that defendants were middlemen, who had regular customers for whom they sold goods like those in question, and other regular customers for whom they bought. *Held*, that there was no impropriety in such double agency.

2. SAME—UNDISCLOSED PRINCIPAL.

Where defendants sold certain yarn for plaintiff, and, on demand, refused or neglected to disclose the name of the buyer after deliveries had been refused, defendants thereby became personally liable on the contract.

3. SAME—BREACH.

Where brokers made a contract for the sale of yarn for plaintiff to an undisclosed buyer, and, while the contract was being carried out and deliveries made, the brokers requested a suspension of deliveries until further notice, and subsequently advised plaintiff that their customer had notified them that he would not receive any more goods under the contract, on account of the quality of the goods previously delivered, such notice constituted an unconditional breach of the contract.

4. SAME—DAMAGES.

Where yarn was sold by a manufacturer through a broker, the manufacturer, on a breach of the contract by the buyer, was not bound to sell the yarn in the open market, and hold the buyer for the difference between what he realized from such sale and the contract price, but was entitled to recover the profit he would have made if the buyer had not prevented the performance of the contract, less the profit actually received from the sales to others.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, against the plaintiffs in error, who were defendants below. The judgment was entered upon the verdict of a jury, which was directed by the court. The action was brought to recover upon a contract in writing whereby the plaintiff agreed to manufacture certain cotton yarn, and to deliver the same in weekly installments for the sum of 27 cents per pound. It was charged as a breach that the defendants refused to permit plaintiff to proceed with the manufacture and delivery of the goods.

¶ 2. See *Brokers*, vol. 8, Cent. Dig. § 140.

Howard A. Taylor, for plaintiffs in error.

H. C. Bernstein, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. For a considerable time prior to the transactions complained of, defendants' firm had been acting as commission merchants for the plaintiff—selling the plaintiff's goods, making advances thereon, and collecting the accounts therefor.

The following letters and telegrams passed between the parties, evidencing the "written contract" declared upon:

(1) Defendants to plaintiff (telegram) February 21, 1900:

"May we sell 25,000 to 50,000 pounds thirties two-ply skein twenty-seven cents deliveries following present orders. Please wire quick answer."

(2) Plaintiff to defendants (telegram) same date:

"Sell 25,000, two thousand weekly, 50,000 three possibly four commencing about Aug. 1st: confirm."

(3) Defendants to plaintiff (letter) same date:

"We wired you to-day as follows [quoting the telegram supra] which we now confirm, hoping to have prompt reply."

(4) Defendants to plaintiff (letter) February 23, 1900:

"We have your telegram of the 21st [quoting it]. In reply to this will say that we are negotiating with our customer, but fear that the distant deliveries will prevent our booking for this particular party."

(5) Defendants to plaintiff (telegram) February 26, 1900:

"We have sold for your account 50,000 thirties two-ply skein, 4,000 lbs. weekly August delivery twenty-seven cents."

(6) Defendants to plaintiff (letter) February 26, 1900:

"We enclose order No. 40 for 47,200 pounds No. 30, two, which we have closed in accordance with your telegram, and we are wiring you to this effect to-day. This customer would like weekly deliveries to begin earlier than August: and to have the weekly amount run up to 7,000 pounds per week. We told him, if we could possibly arrange it, deliveries would begin earlier than August and also if the amount could be increased this should be done."

The "order No. 40," which was inclosed, reads as follows:

"Feb. 26, 1900. Sold for account of Levi Cotton Mills 47,200 lbs. 30 two skein * * * same as order No. 10 27 cents. * * * Deliveries 4,000 lbs. weekly Aug. 1. * * * Ship to Catlin & Co., Pascoag R. I.

"Catlin & Co."

On March 3, 1900, defendants directed shipments to be made to Warren, Mass., or Pawtucket, R. I.

(7) Defendants to plaintiff (letter) April 4, 1900:

"This order was originally taken for 50,000 lbs. but in estimating the amount due on our customer's order, the order was sent to you as 47,000 lbs. We have a letter from this customer asking us to change the order to 50,000 lbs. Kindly arrange to make this change. If there is any objection to your doing so, we should be glad to have you advise us and we will notify our customer."

This increase to 50,000 was accepted by plaintiff on April 5th.

Subsequently, when controversy arose, the plaintiff requested the defendants to give the name of their customer who purchased order No. 40, but the request was ignored.

This detailed statement of the correspondence disposes of the first point here argued. Catlin & Co. were agents of the plaintiff to, effect sales of yarn. They were also agents of other persons who wanted to buy yarn. Document No. 7, *supra*, is illuminative of the situation. Manifestly, one of their purchasing customers had applied to defendants to get him a large quantity of yarn. Some they had bought elsewhere, and, upon finding the terms satisfactory, they ordered from plaintiff enough to make up the unfilled balance of their customer's order to them. The entire correspondence shows that both sides understood that defendants were middlemen who had regular customers for whom they sold, and other regular customers for whom they bought. There was no impropriety in such double agency, it being clearly understood by both parties. *Talcott v. Chew* (C. C.) 27 Fed. 273; *Butler v. Thomson*, 92 U. S. 414, 23 L. Ed. 684. Having made the contract as agents for an undisclosed principal, and refusing or neglecting to disclose such principal when called upon, they became themselves personally liable on the contract.

The second point advanced by defendants, namely, that the proof fails to show that defendants broke the contract, may be similarly disposed of. On June 4, 1900, defendants wrote to plaintiff that they had received word from their customer that, owing to some change in the market conditions, such customer wished shipments withheld for a time. To this plaintiff replied that it could hold up as long as defendants have some of the other orders for it to work on. On July 5th defendants wrote that the customer was objecting to the mixtures which he had been finding in the yarn, and that he would not want any deliveries before the 1st of August, at least. And again on July 11th that he "has had so much trouble with the yarn that he has notified us that he would not receive any, but we have refused to accept cancellation of the order. Please do not start on this until we advise you." To this plaintiff replied, calling attention to the fact that the customer was complaining before plaintiff had commenced shipping. Subsequently, on September 8th, it wrote to defendants, "How is customer's pulse on 40 order on which you asked us to hold up until further notice?" To this defendants on September 11th replied: "Our customer, order No. 40, has advised us he will not receive any more yarn on that contract on account of the quality of yarn which we have been delivering him." Certainly there was nothing equivocal or indeterminate about this statement. It was the positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract which the authorities require. *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Marks v. Van Eeghen*, 85 Fed. 853, 30 C. C. A. 208. We do not find in the further correspondence—either in that portion which was admitted in evidence, or in the part which was excluded—anything which can be construed as a waiver of plaintiff's right to elect to treat this renunciation of the contract as a breach which terminated it.

Some minor points which have been cursorily stated in the brief need not be discussed at length. There was not sufficient evidence

to send the cause to the jury on any theory of an accord and satisfaction covering this claim. The testimony of the witness Burnstine showed quite clearly that the negotiations and payment relied upon to make out this defense related to another matter. As to the measure of damages which was applied, the court followed the rule laid down in *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. There was no conflict of evidence as to the items of cost, nor anything in the cross-examination of plaintiff's president which would have warranted the jury in rejecting his statement of such items.

The judgment is affirmed.

The following is the opinion of the court below:

WHEELER, District Judge. This is a motion to set aside a verdict directed by the court. The complainant alleges that "The above-named defendants entered into a contract in writing with the plaintiff, whereby the plaintiff agreed to manufacture for the defendants, at their special instance and request, certain goods, wares, and merchandise, consisting of fifty thousand (50,000) pounds of cotton yarn, and to deliver the same in weekly installments of four thousand (4,000) pounds each, beginning August 1, 1900, for which these defendants agreed to pay to the plaintiff the sum of twenty-seven (27) cents per pound." "And that the defendants refused to permit the plaintiff to proceed with the manufacture and delivery of such goods as in said contract provided, and continued so to refuse to permit the said plaintiff to manufacture and deliver the said goods, or any part thereof." In their answer, after denial of the contract and breach, "the defendants allege that for a considerable period prior to October 26, 1900, they had been acting as commission merchants for the plaintiff, selling the plaintiff's goods, making advances thereon, and collecting the accounts therefor."

Negotiations began by this telegram:

"Boston, Mass., Feby. 21st, 1900.

"Levi Cotton Mills, Rutherfordton, N. C.: May we sell twenty-five to fifty thousand pounds thirties two-ply skein twenty-seven cents deliveries following present orders. Please wire quick answer.

"Catlin & Co."

They resulted in the following letter and accompanying order:

"Boston, Feb. 26th, 1900.

"Levi Cotton Mills, Rutherfordton, N. C.—Dear Sirs: We enclose Order No. 40 for 47,200 pounds No. 30/2, which we have closed in accordance with your telegram, and we are wiring you to this effect to-day.

"This customer would like weekly deliveries to begin earlier than August, and to have the weekly amount run up to 7,000 pounds per week. We told him if we could possibly arrange it, deliveries would begin earlier than August, and also if the amount could be increased this should be done.

"Yours truly,

Catlin & Co. W."

"Sold for account of

Boston, Feb. 26, 1900.

"Levi Cotton Mills,

"Order No. 40.

"47,200 lbs. 30/2 skein

"54 inch reel—2 1/2 oz. skeins 18 turns

Same as Order No. 10

"27 c. 2% 10th fol. mo.

"Deliveries 4,000 lb. weekly Aug. 1.

"Have deliveries begin before Aug. 1 if possible, and deliveries to run 7,000 lb. wky if it can be arranged.

"Ship to Catlin & Co., Pascoag, R. I.

"Frt. Paid.

Catlin & Co."

The amount was afterwards changed from 47,200 pounds to 50,000, and the plaintiff procured cotton for manufacturing the yarn. On July 5th before time to commence on it for delivery according to the order, the defendants wrote to the plaintiff, "Regarding order No. 40. * * * Please do not start on this until we advise you"—and again on July 11, wrote the same.

The plaintiff wrote to the defendants:

"Rutherfordton, September 8, 1900.

"Messrs. Catlin & Co., Gentlemen: * * * How is customer's pulse on 40 order, on which you asked us to hold up until further notice? * * *

"Yours Respy.,

Levi Cotton Mills Co.,

"per M. Levi, Pres't."

The defendants answered:

"Boston, September 11, 1900.

"Levi Cotton Mills—Dear Sirs: * * * Our customer order No. 40 has advised us he will not receive any more yarn on that contract on account of the quality of yarn which we have been delivering him. * * *

"Yours,

Catlin & Co."

The plaintiff wrote and sent:

"December 31, 1900.

"Messrs. Catlin & Co., New York City—Gentlemen: We hereby request the name of Customer who purchased order No. 40. Please reply promptly. * * *

Levi Cotton Mills,

"per M. Levi, Pres."

To this no answer was received.

Because of the defendants' directions, the plaintiff did not manufacture the goods. Damages for the loss of the order were proved to the amount of the verdict directed. The defendants offered no evidence.

Upon this motion the defendants contend that no contract for the goods binding the defendants was made out, and that no breach of it is shown, if there was. The contention of the defendants as to liability is, in substance, that nothing but agency of the defendants for the plaintiff in the transaction complained of is shown. The plaintiff insists that they became principals. A commission merchant is, in terms, more than a mere agent of one party in making sales, but acts between both in conducting the business. *Slack v. Tucker*, 23 Wall. 321, 23 L. Ed. 143. In making order 40, in question, the defendants, by the words "sold for account of Levi Cotton Mills," assumed that there was a sale of goods described, upon the terms named, from the plaintiff to some purchaser. If there was no other purchaser, they would stand in the place of one, and be holden, as such, to make good their assumption. The order, when accepted, bound the plaintiff to furnish the goods, and the defendants to take them, for the purchaser they represented they had, or for themselves. If they had one, they were bound to produce him; if not, to stand in his place. They not only did not produce, but withheld knowledge of, such other principal, if there was one, and thus took, or left themselves in, the place of a purchaser, like agents for an undisclosed principal. *Story on Agency*, § 267. The order is signed by the defendants in their own names, as parties to be charged thereby, within the statute of frauds. Their liability is that of the one giving the order which they desired to have filled, and which by acceptance became a contract of the plaintiff to make, and of the defendants to take, the goods according to the terms of the order.

There was considerable correspondence about this order besides that quoted, but at no time did the defendants revoke the direct requests of July 5th and July 11th not to start on the order until they should advise; and matters so remained till the peremptory information on September 11th that no more would be received on that order. After these directions, the plaintiff would not seem to have been warranted in proceeding with the manufacture of the goods at the expense of the defendants; nor would waiting for their advices accordingly, under the circumstances, be an abandonment or waiver of their rights under the contract. The defendants had a right to stop the manufacture and take the consequences. This is what they appear to have preferred. The liability for damages for the breach followed.

Motion overruled.

COX v. DURHAM et al.**(Circuit Court of Appeals, Eighth Circuit. March 14, 1904.)****No. 1,960.****1. FALSE IMPRISONMENT—SUFFICIENCY OF WARRANT TO PROTECT OFFICER—QUESTION FOR COURT.**

Whether a warrant of arrest sufficiently describes the person arrested thereon to afford protection to the officer making the arrest against an action for false imprisonment is a question for the court, where the facts are undisputed.

2. SAME—DESCRIPTION OF PERSON.

A person's middle name is not recognized in law, and the omission of the initial letter of such name in a warrant of arrest, or a mistake therein, is immaterial.

3. SAME—USING INITIAL OF FIRST NAME.

It is sufficient to describe a person in a warrant by giving the initial letter of his first name instead of writing such name in full, especially where he ordinarily uses and is known by the initial.

4. SAME.

A warrant commanding the arrest of J. I. Cox, and reciting the filing of a complaint charging said Cox, "late of the county of Boulder and state of Colorado," with having committed a crime in such county, and being a fugitive from justice, protects the officer in the arrest thereon of James T. Cox, commonly known as J. T. Cox, where he was the person in fact intended, although he was not late of said county nor a fugitive from justice, the description being sufficient, and those being matters to be determined on his trial, and not by the officer.

In Error to the Circuit Court of the United States for the Western District of Missouri.

James M. Houston, for plaintiff in error.

A. S. Van Valkenburgh (William Warner and Robert F. Porter with him on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge. James T. Cox, the plaintiff in error, brought this action against Edwin R. Durham, the United States marshal for the Western District of Missouri, John E. Morrison, and the American Surety Company of New York, who are the defendants in error. The complaint contained two counts, in one of which damages were claimed apparently on account of the abuse or misuse of process, and in the other damages were claimed as for a false imprisonment. The surety company was the surety on the official bond of the marshal, while the other defendant, Morrison, appears to have been one of the marshal's deputies who made the arrest hereinafter described. The facts which gave rise to the controversy appear to be these: In April, 1899, a post office at Boulder, Colo., was broken into and robbed. The robber was at first unknown, but afterwards a man who went by the name of George Rogers was arrested at Lincoln, Neb., for some offense against the postal laws, and while on the way to jail threw away some papers and checks which were supposed to have some bearing or throw some light on the robbery previously committed at Boulder. Among the papers so thrown away, but subsequently recovered,

was an express money order receipt which indicated that the money order was purchased by J. T. Cox and was payable to J. J. Cox at a place named Belton. A post office inspector by the name of Waters, who was engaged in investigating the robbery at Boulder, Colo., when this receipt came into his hands and certain inquiries had been made with reference thereto of persons who were acquainted with Rogers, was led to conclude that the real name of the man Rogers, who threw the receipt away, was J. T. Cox, and that he had in fact committed the robbery at Boulder. For the purposes of the present case it is unnecessary to state more in detail the reasons which led him to this conclusion. As the name of the state where Belton was located was not stated on the face of the receipt, the inspector proceeded to ascertain its location. He found that there were only four post offices named Belton in the United States, one of which was located in Texas, one in Oklahoma territory, one in South Carolina, and one in Missouri. He thereupon addressed an inquiry to the postmasters at three of these places to ascertain if any person by the name of J. T. Cox was known or was living in the vicinity. He received a letter from the postmaster at Belton, Mo., under date of January 11, 1900, informing him that a man by the name of J. T. Cox was living in that vicinity. Acting on the belief that the person residing near Belton, Mo., by the name of J. T. Cox, was the person for whom he was in search, and believing, apparently, that the evidence in his possession tended to show that he had committed the robbery at Boulder, he proceeded to Kansas City, Mo., near which city Belton, Mo., is located, and laid the facts and his suspicions before the United States attorney for the Western District of Missouri. Thereupon one of the assistants of that officer filed an information under oath before a United States commissioner, charging, on information and belief, that on or about April 11, 1899, at the county of Boulder and state of Colorado, "one J. I. Cox, alias George Rogers, * * * did unlawfully and feloniously break into a certain building then and there used * * * as a post office of the United States with intent therein to commit larceny and other depredations, and the property of the United States to steal, take, and carry away; and that the said J. I. Cox, alias George Rogers, is now a fugitive from justice within the Western District of Missouri." On the filing of such information the commissioner issued a warrant commanding the United States marshal for the Western District of Missouri and his deputies, or any or either of them, in the name of the President of the United States, "to apprehend the said J. I. Cox, alias George Rogers, wherever found in your district, and bring his body forthwith before me or any other commissioner having jurisdiction of said matter, to answer the said complaint, that he may then and there be dealt with according to law for the said offense." The warrant contained the usual recital that a complaint in writing under oath had been made before the commissioner, "charging that J. I. Cox, alias George Rogers, late of Boulder county, in the state of Colorado, on or about the 11th day of April, A. D. 1899, did at the county of Boulder, in violation of section 5478 of the Revised Statutes of the United States, unlawfully and feloniously break into a building then and there used * * * as a post office of the United States, with intent there-

in to commit larceny and other depredations." This warrant was placed by the marshal in the hands of one of his deputies, the defendant, John E. Morrison, who proceeded to Belton, Mo., to make the arrest. The arrest was made a little after daylight on the morning of January 16, 1900, and handcuffs were placed on the prisoner at the time of the arrest, although the plaintiff protested that if the marshal desired to take him to any place he would go peaceably without being handcuffed. While being taken by train from Belton to Kansas City, Mo., the warrant was read to the prisoner, and when so read to him he advised the officer that his name was J. T. Cox, and not J. I. Cox, as specified in the warrant, and that for this reason he was not properly described. After the plaintiff was taken to Kansas City, Mo., he was brought before the commissioner, and advised the commissioner that his true name was J. T. Cox, and not J. I. Cox, whereupon, as the plaintiff testified, the commissioner changed the letter I to a T, saying that the "I" was meant for a "T." He was committed to jail under the description James T. Cox, alias George Rogers, and was vaccinated pursuant to jail regulations. Several hours after he had been committed to jail, but on the same day, the plaintiff was discharged and left for home that evening, it having been discovered in the meantime by the post office inspector that he was not the man who had committed the robbery at Boulder, Colo., and that the suspicions previously entertained to that effect were erroneous.

At the conclusion of the trial, the trial court instructed the jury, in substance, as a matter of law, that there could be no recovery against the marshal as for a false imprisonment; that the warrant was sufficient to protect the officer from an action of that character. The trial court, however, allowed the jury to determine whether in executing the process the marshal's deputy had been guilty of any harsh or unnecessary ill treatment of the prisoner amounting to an abuse of process, and permitted them to assess such damages as they deemed reasonable if they so found. Under these instructions the jury returned a verdict in favor of the defendants, on which a judgment was subsequently entered, and the case is before this court for review.

Counsel for the plaintiff in error say, in substance, that the principal errors complained of consist in the action of the trial court in declaring, as a matter of law, that the plaintiff was sufficiently described in the warrant of arrest; that the warrant protected the officer in making the arrest, so that he could not be held liable as for a false imprisonment, and in refusing to submit these questions to the jury, by whom, as counsel for the plaintiff urges, the sufficiency of the warrant as a justification should have been determined. We fail to perceive that it was within the legitimate province of the jury to determine whether the warrant contained an adequate description of the plaintiff and was sufficient to protect the marshal in an action for false imprisonment. There was no controversy with reference to the facts in the light of which this question ought to be determined. The plaintiff's real name was confessedly James T. Cox, while the warrant commanded the arrest of J. I. Cox. The plaintiff resided near Belton, Mo., and it is manifest from the testimony that he was the man whom the postmaster had reported as living near that place, and whom the post

office inspector had in mind when he laid the matter before the United States attorney and sued out the warrant, so that the very person was arrested for whom the warrant was intended. It is true that the inspector supposed, when he sued out the warrant, that the plaintiff was the man who had committed the robbery at Boulder, Colo., and for that reason the warrant recited that he was "late of Boulder county, in the state of Colorado," but it commanded the arrest of "J. I. Cox, alias George Rogers, wherever found in your district"; and, to justify his act in making the arrest, the marshal was neither bound to prove that the plaintiff was late of Boulder county, Colo., or that he had actually committed the robbery, these being matters to be determined by a petit jury. The question to be decided, so far as the marshal is concerned, is whether, under a writ commanding the arrest of J. I. Cox, he had the right to arrest James T. Cox, it being shown beyond peradventure that the person who was taken into custody was the one for whom the warrant was intended. This, we think, was a question of law which the court, and not the jury, was required to determine.

It is claimed that the warrant in question did not "particularly describe" the plaintiff within the meaning of those words as used in the fourth amendment to the Constitution of the United States, and that for this reason it afforded no protection to the officer who served it. It is not expressly contended, as we understand, that the plaintiff was not particularly described because his full given name "James" was not written in the warrant. Such a contention, if made, could not be upheld, because the modern doctrine is that a man may be sufficiently described by the initial letter of his given name, as well as by the name in full, and this is so especially where a man is commonly designated by the initial letter of his given name, and where he answers to that name and makes a practice of writing his name in that way in ordinary business transactions. *Ferguson v. Smith*, 10 Kan. 398, 402; *State of Iowa v. Van Auken*, 98 Iowa, 674, 677, 68 N. W. 454; *Oakley v. Pegler*, 30 Neb. 628, 632, 46 N. W. 920; *Casey v. People*, 159 Ill. 267, 42 N. E. 882. See, also, *Breedlove v. Nicolet*, 7 Pet. 413, 430, 8 L. Ed. 731; *United States v. Janes* (D. C.) 74 Fed. 543. The record before us contains abundant evidence that the plaintiff usually went by the name and was often referred to as J. T. Cox. He stated on his cross-examination that his name was J. T. Cox, and that letters intended for him were thus addressed and received, and that he had letters in his possession which were thus addressed. We are of opinion, therefore, that a warrant describing him in that manner would be a sufficient protection for the officer who executed it. We can conceive of no reason why a man who responds, when addressed, to the name of J. T. Cox, and is so called by his acquaintances, should challenge the validity of a warrant which thus describes him.

The principal objection to the warrant appears to be that the initials of the plaintiff's name as set forth in the warrant were J. I. instead of J. T., his true initials; but this objection is answered and overcome by the rule that the law knows or recognizes but one given name, and that the omission of the initial letter of the middle given name, or a mistake made in the initial letter of that name, is not regarded as material. This doctrine is announced in a large number of cases, and

seems to be well settled. Thus, in *Games v. Dunn*, 14 Pet. 322, 327, 10 L. Ed. 476, the court observed: "The law knows of but one Christian name, and the omission or insertion of the middle name or of the initial letter of that name is immaterial." In the case of *People v. Lockwood*, 6 Cal. 205, an indictment for murder charged the killing of one J. P. Beatty, while the evidence showed that the name of the deceased was J. T. Beatty. The court held that the misnomer in question was not material, the middle name not being regarded in law as a part of the name of the deceased. See, also, *Franklin v. Talmadge*, 5 Johns. 84; *English v. State*, 30 Tex. App. 470, 18 S. W. 94; *Delphino v. State*, 11 Tex. App. 30; *Orme v. Shephard*, 7 Mo. 606. The rule that one's middle name is not recognized in law does not apply to a mistake made in the initial letter of the first Christian name. It seems that a mistake made in the initial letter of the first Christian name in a criminal proceeding amounts to a material variance, but not so if the mistake is in the initial letter of the middle name. *English v. State*, supra.

In the case of *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643, upon which counsel for the plaintiff in error seems to place his chief reliance, a warrant was issued for the arrest of James West, without other description, under which the officer arrested Vandy M. West, who, as the evidence showed, was never known or called by any other name. It was held that such a warrant afforded no protection to the officer, in that it contained no description of the party to be arrested, and that because it contained no such description it was incompetent to show, in an action for false imprisonment, that Vandy M. West, a person not described, was in fact the person for whom the warrant was intended. The case at bar, in our judgment, is essentially a different case. The warrant did contain a description of the plaintiff, in that it gave his family name and the true initial letter of his first Christian name, this being the initial which he commonly used and by which he was generally known and addressed. Now, as the law recognizes but one Christian name, treating the middle name as immaterial, the description contained in the warrant was sufficient to identify the plaintiff, and a description of that kind must be regarded as sufficient to satisfy the mandate of the Constitution that a warrant shall particularly describe the party to be arrested. At all events, a description which is sufficient to enable the officer to identify the arrested party should serve to protect the officer, especially when it appears that it was served on the party for whom it was intended.

The judgment below is accordingly affirmed.

OIL WELL SUPPLY CO. v. HALL et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 504.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—DISCRETION TO SUBMIT ISSUES TO JURY.

Issue having been joined in a petition in involuntary bankruptcy against a partnership, and a jury trial waived, defendants subsequently filed an amended answer admitting insolvency, but not admitting the commission of the acts of bankruptcy charged, and praying that they be adjudged bankrupts on certain conditions. The district judge refused to act upon such answer, and certified the cause to the Circuit Court, which permitted the withdrawal of the amended answer, and submitted the issue joined by the original answer to the jury, which returned a verdict for defendants. The result having been reported back to the District Court, the judge therein adopted the verdict and dismissed the petition. *Held*, that the action taken was not under section 19 of the Bankruptcy Act, (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), but was within the discretion of the court—the verdict being taken as advisory, merely—and that, where it appeared that the matter was fairly tried upon its merits, the order of dismissal would not be reversed on appeal because of informality in the procedure.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Clarksburg, in Bankruptcy.

This case comes up on appeal from the District Court of the United States for the Northern District of West Virginia, sitting in bankruptcy. The Oil Well Supply Company and the Jarecki Manufacturing Company, corporations of Pennsylvania, with the National Supply Company, a corporation of West Virginia, filed in the District Court their petition in bankruptcy against James F. Hall and Curtis I. Hall, copartners as Hall Bros., charging them as being insolvent, and, within four months next preceding the date of the petition, with having committed an act of bankruptcy, to wit, concealing and removing, and permitting to be concealed and removed, part of their property, with intent to hinder, delay, and defraud their creditors. Upon consideration of the petition, his honor Judge Jackson, District Judge, issued his rule calling upon the alleged bankrupts to show cause before him at Parkersburg, W. Va., on 16th June, 1902, why the prayer of the petition be not granted. The respondents appeared, and filed a paper which contains a notice to dismiss the petition for want of lawful process, and a demurrer, a plea, and an answer. The plea is that the petitioners have no provable debts against them. The demurrer and the answer set up the same or similar defenses, as follows: "First, no valid or legal process has been issued upon the petition or served upon the defendants; second, the petition does not allege an act of bankruptcy on the part of the defendants, or either of them, within four months next preceding the filing of the same; third, the petition does not allege that the petitioners are, and each and every one of them, without lien or preference for their claim against the said defendants; fourth, the petition does not set forth any provable debt on the part of any or all of the said petitioners against the said defendants; fifth, the petition does not properly allege the insolvency of the said defendants; sixth, the petition does not allege any fact from which the court may draw the legal inference that the defendants have, within four months next preceding the filing of the said petition, committed any act of bankruptcy. The defendants pray judgment of the court whether they should further defend this proceeding, and that they may be hence dismissed, with their costs in this behalf expended. That no valid or legal process has been issued or served upon the defendants. That the petition does not allege any act of bankruptcy on the part of the defendants, or either of them, within four months next preceding the filing of the same. That the petition does not allege that the petitioners are each and

every one of them without lien or preference for their claims against the said defendants. That the petitioners are not each of them without lien or preference for their claim against the said defendants. That the petition does not set forth any provable debt due to either or all the said petitioners by the said defendants. That the petition does not properly allege the insolvency of the said defendants. That the petition does not allege any facts from which the court may draw the legal inference that the defendants, within four months next preceding the filing of the said petition did, both or either of them, commit an act of bankruptcy. The defendants deny that they, or either of them, have committed the act of bankruptcy set forth in said petition, or that they are insolvent, and aver that they should not be adjudged bankrupts for any cause set forth in said petition, and this they pray may be inquired of by the court."

The questions thus made came before the District Court. The motion to dismiss the petition was refused, but the demurrer was sustained, and leave was given to the petitioning creditors to amend their petition. Leave was given to file the plea and answer, subject to the right to file the demurrer. The order closed with these words, "The right of trial by jury is waived by said alleged bankrupts," and the cause was continued. The creditors amended their petition pursuant to the leave granted. Thereupon the respondents demurred to it on several grounds. The demurrer came on to be heard on 23d August, 1902, and was overruled on all points but one, and that was allegation of new matter. Respondents then asked leave to amend their answer theretofore filed. This was allowed, and the following reference ordered: "And all questions and matters properly arising under the pleadings herein are referred to George W. Johnston, one of the referees of said cause in bankruptcy, for the purpose of taking such testimony as the petitioners herein may adduce in support of the issues raised by the pleadings herein, and such testimony, also, as may be adduced by the alleged bankrupts in opposition thereto, and to report his findings herein to this court, along with the testimony taken hereunder, as soon as practicable; but, before the said referee shall proceed to execute this reference, he shall give ten days' notice to all parties of record, or their attorneys, of the time and place of such hearing."

The parties went before the referee. Thereupon respondents filed their amended answer, in the words following: "The alleged bankrupts, the firm of Hall Bros., composed of James F. Hall and C. I. Hall, trading as such firm, and James F. Hall and Curtis I. Hall, each of them individually, desire to amend their answer heretofore filed in this cause, and for amended answer, say, first, that they as a firm, and they—each of them—individually, are unable to pay and discharge the debts now owing by the said firm, and by them and each of them individually, and are willing to be adjudged bankrupts; second, that their inability to pay their said debts results from the fact that they were prevented from the completion of certain contracts under which they were operating, and certain other contracts under which they were about to begin operations, by the institution of certain suits and the issuance and levy of certain attachments in the circuit court of Tyler county, West Virginia, on or about the 7th day of March, 1902. Therefore the said firm of Hall Bros., James F. Hall and Curtis I. Hall, and each of them individually, pray this honorable court that they, as such firm, and each of them as individuals, may be by this court adjudged bankrupts, and discharged from the payment of all debts properly dischargeable in bankruptcy; that the order adjudging such bankruptcy shall give the respondents a period of ten days in which to prepare and file a statement of their joint and several properties, assets, debts, and liabilities; that by the said order a trustee be appointed to take charge of and administer their joint and several estates according to law; that said order shall further show that the order heretofore issued by this honorable court in this cause staying the attachment proceedings and other proceedings in the circuit court of Tyler county, West Virginia, be, and shall be thereby, dissolved, and that the trustees so appointed be authorized and directed to defend the said attachment proceedings, and to move the said court to quash and vacate all attachments issued and executed upon the property of the respondents, to the end that there may be perfected in the said trustee a right of action, full and complete, for damages for the unlaw-

ful detention of the property so attached for the benefit of the estate of the respondent bankrupts; that the order dissolving the said staying order shall likewise authorize the said James F. Hall, in his own name and for his own benefit, to proceed with his defense to an order of arrest issued and executed against him in connection with one of the causes pending in the circuit court of Tyler county, West Virginia, to which the said staying order was addressed. And your respondents will ever pray."

The referee marked this amended answer "Filed," to be read as part of the testimony in the case. The referee reported all this to the court, adding: "And the petitioners, by their counsel, not desiring at this time to take any testimony in the matter, submit the questions raised on the answer to the court, and the parties, by their counsel, agreeing that the matters arising on the answer shall be heard before the Honorable John J. Jackson, judge of said court, at Parkersburg, on the 30th September, 1902, at 11:30 o'clock a. m." The cause came up before the judge, and, by an order made as in the District Court, he says: "This cause came on this 30th September, 1902, to be heard upon the papers heretofore read, and the decrees heretofore entered, and upon the answer filed by the bankrupts, in which they admit they are bankrupts, but upon conditions stated in the answer that this court is of opinion should not be attached to any admission of that character, not at this time to adjudicate them bankrupts, but to continue the motion to the plaintiff to have the defendants adjudicated bankrupts until the next term of this court, sitting in Parkersburg, in January next, at which time the case can be submitted to a jury to determine whether or not they should be adjudicated bankrupts." The order then names a trustee, and makes some other provisions not bearing on the issues before us. There is no District Court at Parkersburg. This order of 30th September is explained by an order taken in the Circuit Court on 22d January, 1903, as follows: "This day came the parties, by their attorneys, and it appearing that, heretofore, to wit, on 30th September, 1902, the judge of the United States District Court for the Northern District of West Virginia made an order directing that the fact of the commission by Hall Bros. of an act of bankruptcy, and the fact of their insolvency, be certified to the Circuit Court of the United States for the Northern District of West Virginia for trial before a jury, it is ordered that this cause be docketed in the Circuit Court of the United States for the Northern District of West Virginia for further proceedings to be had therein." The hearing was fixed for 17th March next thereafter, and on that day in the Circuit Court this order was entered: "This cause came on this day to be heard pursuant to the order entered herein on the 30th day of September, 1902, directing that this cause be referred to a jury of the court to determine whether or not the alleged bankrupts had been guilty of acts of bankruptcy as in the petition alleged, whereupon the alleged bankrupts, by counsel, moved the court for leave to withdraw their amended answer, and to permit their answer to the original petition to be filed and considered as an answer to the amended petition, to which motion the petitioning creditors, by counsel, objected, which objection was overruled, and leave was given by the court, and said answer is ordered to be filed and considered accordingly."

This case was then tried before a jury, and verdict had for respondents. A motion was made for a new trial, which was refused in the Circuit Court. The result of the trial of the case in the Circuit Court having been reported to the District Court, a decree was entered adjudging that the petition of the petitioning creditors be dismissed, with costs, but allowing an appeal to this court. It is here on assignments of error as follows: "First, the court erred in failing and refusing to adjudge the said Hall Bros. bankrupts upon the petition of your petitioners; second, the court erred in dismissing the petition wherein petitioners pray that said Hall Bros. be adjudged bankrupts; third, the said court erred in directing the trial by jury in said proceeding as to whether the said Hall Bros. were guilty of the acts of bankruptcy charged by your petitioners in their petition; fourth, the court erred in refusing to set aside the verdict of the jury upon said trial, which found said defendants Hall Bros. not guilty of the acts of bankruptcy charged against them as aforesaid; fifth, the said court erred in not setting aside the said verdict

because the said trial had been improperly and illegally directed in said proceeding; sixth, the court erred in failing to adjudge the said Hall Bros. bankrupts upon their final answer in said cause."

C. D. Merrick, for appellants.

Waller R. Staples, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

SIMONTON, Circuit Judge (after stating the facts as above). It is very clear that the case below was not submitted to the jury under the provisions of the nineteenth section of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]). The respondents did not demand a jury. Indeed, the record states that a jury was waived. But the District Judge, of his own motion, and for his own satisfaction, desired the aid of a jury in passing upon the question whether an act of bankruptcy had been committed, as charged in the petition. It is always within the discretion of a judge to seek the aid of a jury in solving a question of fact. In the court of chancery the chancellor can do this, either by ordering an issue out of chancery to be tried in the law court, or by impaneling a jury himself in his own court, and submitting the question to them himself. *Wilson v. Riddle*, 123 U. S. 615, 8 Sup. Ct. 255, 31 L. Ed. 280; *Idaho, etc., Co. v. Bradley*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433. In all such cases the verdict of the jury is advisory—not binding on the court, which must for itself determine the issues. This was the course pursued here. The judge presented the issue to the jury, but he afterwards adopted their conclusion, and gave effect to it by his own decree. This he need not have done if the jury trial had been had under the nineteenth section of the bankruptcy act. In carrying out his purpose to seek the aid of a jury, he used a jury in the court over which he was about to preside, and which best suited his convenience—the jury in the Circuit Court at Parkersburg. As the verdict of the jury was sought by himself to aid his conclusion, he could select any jury, especially as the jurors in the District and Circuit Courts of the United States can be used in either court.

As the jury was called by himself to his aid, it would seem that he had the right to formulate the issue upon which he desired them to pass. Therefore, when he chose the issue presented in the original answer, and withdrew the issue presented in the amended answer, he was within his discretion. Especially was this the case when the amended answer was unsatisfactory to him, because it did not admit any act of bankruptcy antecedent to the filing of the petition and annexed conditions which he would not allow. Beside this, if he had used the amended answer in determining the issue, there would have been no controversy; this amended answer admitting the affirmative of the issue. The petitioning creditors were not surprised at this action of the judge, nor were they taken at a disadvantage. They did not move for a continuance on either of these grounds, but they presented their witnesses, went to trial, and the witnesses were all examined. Exceptions were taken during the

course of the trial, which were afterwards argued. The cause had all the formalities and safeguards of regular trial. When it was ended, a motion for a new trial was entered. The judge then took the matter under advisement, and made his own judgment. It would seem that full examination was made, and substantial justice was effected. The petitioners had every opportunity of making out their case. Its merits were passed upon by the court after he had had the aid of the jury. *Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373; *Deery v. Cray*, 5 Wall. 575, 18 L. Ed. 653. In *Allis v. Insurance Co.*, 97 U. S. 144, 24 L. Ed. 1008, the court says, "When it can be seen that no harm resulted to appellant, this court will not reverse a decree on account of an immaterial departure from technical rules of proceeding." It is true that there were informalities—perhaps it should be said disregard of forms—but they do not appear to us to be reversible errors.

The judgment of the court below is affirmed.

THE KAWAILANI.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1904.)

No. 932.

1. FEDERAL COURTS—APPEAL—FILING TRANSCRIPT—TIME—MOTION TO DISMISS.

Where a transcript of the record is filed in the Circuit Court of Appeals after the time prescribed by the rules has expired, but before a motion is made to dismiss the appeal on that ground, such motion will not be granted.

2. REVENUE LAWS—INTOXICATING LIQUORS—FRAUDULENT CONCEALMENT—VESSELS—CONDEMNATION—TRIAL—ACTS OF JUDGE.

Where, in a proceeding to condemn a vessel for violating the United States revenue laws, in removing and concealing certain intoxicating liquors with intent to escape payment of revenue taxation, at the conclusion of the evidence the question of the identity of the liquor was in doubt, it was proper for the court, on its own motion, to recall an internal revenue collector who had testified, and question him further on such issue.

3. SAME—INTOXICATING LIQUORS—COMMON KNOWLEDGE.

Where, in a proceeding for the forfeiture of a vessel for violating internal revenue laws, in transporting and secreting certain *okolihoa*, there was no controversy that the liquor transported and secreted was the product of the ti root, grown in Hawaii, which the Supreme Court of such republic had previously held was a "well-known spirituous liquor, of great strength, and very intoxicating," it was not necessary that proof of the intoxicating qualities of such liquor should be introduced.

4. SAME—MANUFACTURE—TIME.

In a proceeding for the forfeiture of a vessel for violating the internal revenue laws, in transporting and concealing intoxicating liquors, evidence held to justify a finding that the liquor concealed was manufactured in Hawaii subsequent to the taking effect in that territory of the revenue laws of the United States.

Appeal from the District Court of the United States for the District of Hawaii.

Wm. Daingerfield (Clarence W. Ashford, of counsel), for appellant. Marshall B. Woodworth, U. S. Atty. for Northern District of California, and Robert W. Breckons, U. S. Atty. for District of Hawaii.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. A motion is made in this cause to dismiss the appeal. It is not contended that the appeal was not duly perfected, but that the record was not filed in this court within the time prescribed by its rules. The appeal was perfected July 18, 1902, and the record was not filed here until January 5, 1903; but it was filed before any motion was made to dismiss, the latter not having been made until June 9, 1903. As said by the Circuit Court of Appeals for the Sixth Circuit in *Altenberg et al. v. Grant et al.*, 83 Fed. 980, 981, 28 C. C. A. 244: "Bingham v. Morris, 7 Cranch, 99 [3 L. Ed. 281], shows that, if the transcript of record is filed before the motion for dismissal, the motion will not be granted." The motion to dismiss is denied.

The appeal is from a decree of the District Court for the District of Hawaii condemning and forfeiting to the United States the schooner Kawaiiani, her tackle, apparel, and furniture. The grounds for the seizure, condemnation, and forfeiture stated in the libel of information are, in short, that at and prior to the time of seizure one G. K. Kehahune, then and there being in charge of the vessel in the port of Honolulu, did use the same in the removal of certain spirituous liquors upon which a tax was imposed by the laws of the United States, which tax had not been paid, with the intent then and there to defraud the United States of the tax, and at the same time and place did deposit and conceal on the schooner certain spirituous liquors upon which a tax was imposed by the laws of the United States, which tax had not been paid, with the intent then and there to defraud the United States thereof, in the depositing and concealing of which liquors the said vessel was used by the said Kehahune. Two claimants appeared and answered—Hong Quon and L. Apana—setting up ownership of the schooner, and putting in issue the averments of the libel. After a trial of the issues, the court found the facts in favor of the government, and decreed a forfeiture of the property.

In their argument, the appellant's counsel confined themselves to the second, third, fourth, fifth, and sixth assignments of errors, which are as follows:

"Second. The United States having rested its case, and said appellants having put on testimony and rested, and no testimony being offered in rebuttal, appellants, by their counsel, moved to strike out all the evidence given by said A. L. Webster, and all tests of said liquor made in court, for the reason that there was no testimony before the court to identify the liquor so tested by said witness, as the liquor mentioned in the libel herein. Third. That the court erred in finding as a fact, and in presuming, as set forth in its said decision, that the liquor produced in court upon said hearing and trial was distilled liquor manufactured in the territory of Hawaii. Fourth. That the said court erred in finding, as a matter of fact, that said last-described liquor was produced or manufactured in the United States. Fifth. That the court erred in finding, as a matter of act, that the liquor so produced in court, or the liquor mentioned in said libel of information, was produced in the terri-

tory of Hawaii since the extension to the islands which now constitute said territory became subject to the internal revenue laws of the United States. Sixth. That the court erred in finding, as matter of law, that the liquor mentioned in said libel of information, or the liquor so produced in court, or any thereof, was or is liable or subject to any tax under the laws of the United States."

It is insisted on the part of the appellant that it was essential to the government's case for the proof to show that the liquor in question was distilled in Hawaii subsequent to the taking effect in that territory of the internal revenue laws of the United States, to wit, June 14, 1900, the date of the taking effect of its organic act of April 30th of the same year (chapter 339; 31 Stat. 141); that the court below based its findings of fact to that effect upon mere presumptions, and without any proof of those facts. It is also insisted that the character of the liquor found by the government's officers concealed on board the schooner in question by its captain was not such as to bring it within the provisions of the revenue laws, and that the liquor found concealed on the vessel was not properly identified as that introduced in evidence on the trial of the case. In connection with the latter point, complaint is made that, upon the conclusion of the testimony, the court below, of its own motion, recalled the internal revenue collector, Roy H. Chamberlain, and questioned him further in respect to the identity of the liquor offered in evidence with that found by him on the vessel. To that action of the court below the appellant reserved an exception, and here insists upon it. There is no merit in it. The recalling of the witness was clearly within the discretion of the court, and was highly proper, if the evidence already given left the question of the identity of the liquor in doubt, and the witness could make the matter clear. This he did by his testimony.

In respect to the nature of the liquor in question, it appeared without conflict in the evidence that it is the product of the ti root grown in the Hawaiian Islands, and known as "okolehoe," and so well known there that the Supreme Court of the Republic of Hawaii, in deciding the case of a defendant convicted of the offense of distilling spirituous liquor without a license, in violation of a certain section of the Session Laws of the Republic of 1892, spoke of it as "a well-known spirituous liquor, of great strength, and very intoxicating." Rep. Ha. v. Akoni, 11 Hawaii, 53. In that case the liquor itself was produced before the jury for examination, just as the liquor in question here was produced before the court, and examined by the witnesses, one at least of whom testified that it was okolehoe. In *Commonwealth v. Peckham*, 2 Gray, 514, the court held that an allegation, in an indictment, of an unlawful sale of intoxicating liquor, is supported by proof of a sale of gin, without proof that gin is intoxicating, saying:

"Jurors are not presumed to be ignorant of what everybody else knows, and they are allowed to act upon matters within their general knowledge without any testimony on those matters. Now, everybody who knows what gin is knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating, without testimony to show it to be so. No juror can be supposed to be so ignorant as not to know what gin is. Proof,

therefore, that the defendant sold gin, is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin."

Was the evidence sufficient to justify the conclusion of the court to the effect that the liquor concealed by the captain of the schooner on board of her was manufactured in Hawaii subsequent to the taking effect in that Territory of the revenue laws of the United States? In this connection it must be remembered that circumstantial evidence is sometimes quite as strong as direct. If the liquor in question had not been subject to the tax imposed by the revenue laws of the country, there could have been no motive on the part of the captain of the schooner in concealing it on board, and in denying to the revenue officers, as he repeatedly did, that he had it. It was only after the officers had commenced a search of the vessel under their warrant, and had been prosecuting their search for some time, that the captain produced the liquor. And how did he get it? It appears from the testimony that one Peter Makia lived at Kahana, in the northern part of the Island of Oahu, and that it was to his house, at the request of the captain of the schooner, that the liquor was brought, and from which he took it on board the vessel. Makia's testimony is to the effect that he had lived at Kahana about a year and eight months; that up in the mountains, but a short distance from his house, a Japanese was engaged in making okolehoa; that within a few months of the time the witness was testifying he had seen a part of the plant with which the Japanese manufactured the liquor; and that it was to this place that the witness sent, at the request of the captain of the schooner, for the liquor that the captain afterwards concealed upon the vessel, and upon which it was shown no tax was ever paid to the government. We think these facts and circumstances, and others of a like nature, sufficient to justify the conclusions of the court below.

The judgment is affirmed.

ROBERTS v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1904.)

No. 984.

1. LIENS—CLAIM AGAINST RAILROAD COMPANY—PRIORITY OF MORTGAGE.

An order, given by a railroad company, directing its treasurer to pay the holder a sum "out of the proceeds of the sale of the first bonds sold of this company," does not create a lien on the property of the company, afterwards sold and transferred before the issuance of any bonds to a second company, which assumed payment of the debt, so as to take precedence of a mortgage executed by the purchasing company to secure an issue of bonds, but the claim of the holder is subordinate to the lien of such mortgage.

Appeal from the Circuit Court of the United States for the Northern District of California.

For opinion below, see 110 Fed. 70.

This is a suit brought by the Central Trust Company of New York against the California & Nevada Railroad Company and others, to foreclose a mortgage made by said railroad company to secure an issue of bonds. Mary E. Roberts, appellant herein, was named as a party defendant having or claiming

to have some interest in the property. The claim of Mrs. Roberts is evidenced by a written instrument, draft, or order, which reads as follows:

"No. 64.

San Francisco, September 10, 1881.

"\$5,000. To C. F. Burrell, Treasurer California & Nevada Railroad Co.: Pay to John T. Davis, or order, five thousand dollars (\$5,000), payable out of the proceeds of the sale of the first bonds sold of this company.

"D. M. Walker, President.

"E. A. Phelps, Secretary.

"Accepted to be paid as herein specified.

"C. F. Burrell, Treasurer."

Indorsed: "Pay to the order of Mrs. Mary E. Roberts.

"John T. Davis."

On the day this loan was made, a resolution was passed by the board of directors authorizing the execution of this writing, which resolution was duly recorded in the minute book of the corporation. The cause was referred to a master, and the facts relative to her claim were reported by the master as follows:

"A corporation, known as 'The California & Nevada Railroad Company,' was organized under the laws of the state of California, on the 25th day of March, 1881, for the purpose of constructing and operating a railroad from the city of Oakland, Cal., to the state line between the state of California and the state of Nevada, at or near the town of Bodie, Cal., a distance of about 250 miles. Said railroad company got rights of way, graded some 12 miles of road, and laid 5 miles of rails. On the 10th day of September, 1881, Mary E. Roberts loaned or advanced to said railroad company the sum of \$5,000, upon the representation of John T. Davis, one of the promoters and president of said company, that the money was needed to push the working of the road, and received therefor a demand upon the treasurer of said company for the sum of \$5,000, 'payable out of the proceeds of the sale of the first bonds sold of this company.' Thereafter, on the 25th day of March, 1884, a new corporation was organized, called the 'California & Nevada Railroad Company.' The new corporation was composed of nearly the same persons as the first company, and was organized for the same purposes. The first corporation, on the 25th day of March, 1884, sold and transferred to the second company its entire road and properties. As a part of the consideration of the transfer, the second company agreed to assume all the outstanding obligations of the first company. Thereafter, on the 10th day of April, 1884, the second company, having acquired possession of all the property of the first company as aforesaid, executed a mortgage or deed of trust to the Central Trust Company of New York, the complainant in this action, which mortgage covered all the property then owned or which might thereafter be acquired by said company. Said mortgage was given to secure the payment of 5,000 bonds, to be issued by said railroad company, of the denomination of \$1,000 each, payable in 30 years, with interest at the rate of 6 per cent. per annum, payable semiannually, 'to pay for the construction, equipment, and completion of the railroad.' In pursuance of said deed of trust or mortgage, 545 of the bonds were issued by said railroad company. The railroad company having made default in the payment on said bonds, this action was brought by the trustee to foreclose the mortgage. On the 3d day of June, 1886, an action was commenced in the superior court of the city and county of San Francisco, by Mary E. Roberts, upon the written instrument aforesaid, to recover the sum of \$5,000 and interest. A writ of attachment was issued and levied upon the whole property of said railroad company. Said attachment has not been discharged, and said action is still pending. The defendant Mary E. Roberts in her answer prays that it may be adjudged that the defendant railroad company is indebted to her in the sum of \$5,000, with interest, and that the lien acquired by her under the writ of attachment aforesaid is a prior lien upon the properties of the said railroad company to any and all bonds issued after June 3, 1886, the date of the levy of the attachment aforesaid."

The final decree in the court below is adverse to Mrs. Roberts' contention. Hence this appeal.

John A. Wright, for appellant.

Platt & Bayne (Galpin & Bolton, of counsel), for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The contention of appellant is that the claim of Mrs. Roberts constitutes an equitable lien upon the property mortgaged, and takes priority in marshaling the assets over all the bondholders, because before the mortgage was given she had an assignment of the "proceeds of the first bonds sold of this company"; and she claims that the Central Trust Company took the mortgage with notice of this equitable assignment to her, and that when the first bonds were sold the proceeds must be regarded in equity as a fund having impressed on it a lien in the nature of a trust by virtue of the equitable assignment held by her. It is not claimed that any bonds were issued prior to the execution of the mortgage herein sought to be foreclosed. The mortgage was given to secure the issuance of bonds. There never was any sale of bonds for money. There were no cash subscriptions for the bonds. They were all issued to contractors for construction or repair work, or for salaries and professional services. There were 545 bonds issued, but of that number only 345 bonds were found by the master to have been legally issued. Under the facts of this case it became necessary to execute the mortgage in order to secure the issue of the bonds. When the new corporation was organized, it assumed all the outstanding obligations of the old corporation, and undoubtedly the new corporation is liable, in a proper proceeding, for the payment of that debt. But the sole question here is whether Mrs. Roberts is entitled to a prior lien upon the proceeds of the foreclosure sale, to wit, upon the railroad.

It is conceded by both parties that her rights in the premises must be determined by the strict terms of the order or draft. This document was an acknowledgment of the sum of money received from her "to push the working of the road," and an agreement that the demand should be payable out of the proceeds of the sale of the first bonds sold of this company. It did not of itself create a lien upon the property of the corporation. It did not constitute an agreement by the company to set apart any specific earnings or property in the hands of a third person to meet the interest or principal due upon Mrs. Roberts' claim. And herein it differs from the principles announced in *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, and other cases cited by appellant. It was a mere personal promise on the part of the railroad company that it would pay the claim in a certain way out of a fund which never came into existence. The attachment suit was not brought until after the lien of the mortgage attached. The demand of Mrs. Roberts is a meritorious one, but it is subordinate to the lien secured by the mortgage.

In *Fogg v. Blair*, 133 U. S. 534, 540, 10 Sup. Ct. 338, 340, 33 L. Ed. 721, it was held that a liquidated claim against a railroad company, not converted into judgment, which another railroad company, pur-

chasing its road and property, agrees with the selling company to assume and pay as part of the consideration, does not thereby become a lien upon the property, so as to take priority over the lien of a mortgage made by the purchasing company to secure an issue of bonds. Mr. Justice Field, in delivering the opinion of the court, among other things, said:

"The property of a railroad company is not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may be. He must obtain a lien upon the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts. * * * There is no evidence in the record before us that the parties who took the bonds issued by the St. Louis, Hannibal & Keokuk Railroad Company had any notice, actual or constructive, of the demand of the complainant. But, if they had, it would not have affected their rights. That demand was not then reduced to judgment, and created no lien upon the property of the company, nor any restriction upon the company's right to use it for any lawful purpose. The bonds were given to raise the necessary funds to complete the road of the company, and the mortgage was executed to secure their payment. They were negotiable instruments, and in the hands of the purchasers cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors. We are unable to perceive any ground upon which their priority over the claim of the appellant can be in any way impaired. We do not question the general doctrine, invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In *Cushing v. Chapman* (C. C.) 115 Fed. 237, it was claimed by the complainant that under the averments of his bill *Newton & Co.*, by a certain contract, "obtained an equitable estate or title to 47 of said bonds to be first thereafter issued, and as soon as issued the railway company held them in trust for *Newton & Co.*" The bill discloses that the 47 bonds were to be a part of a total issue of \$1,550,000 of equal dignity, secured by a first mortgage on the railway's property as the full limit of such issue. This contention of the complainant depended upon the terms of a written contract between the railway and said *Newton & Co.*, which reads as follows:

"In consideration of said sale and assignment [that is, the assignment of a certain judgment *Newton & Co.* held against the Tennessee Railroad Company, and assumed by the Tennessee Railway], the party of the second part [the Tennessee Railway] agrees to transfer and deliver to the parties of the first part [*Newton & Co.*] its first mortgage bonds, to be hereafter issued in the construction of its railway, to the amount of said decree, one dollar of bonds, at their face value, for each dollar of the amount of said decree. The delivery of said bonds to be made as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway."

Judge Philips, in his opinion, said:

"In its fullest import and broadest construction, this is an executory contract or agreement to thereafter deliver to *Newton & Co.* 47 of the first mortgage bonds to be thereafter issued by the railway 'in the construction of its

railway,' and 'to be made as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway.' I understand the law to be that a mere promise, however clear or solemn in character, to pay a debt out of a particular fund, does not operate as an equitable assignment of the fund, and especially so when it is a part of a mass of property to be thereafter created. To constitute such an equitable assignment, there must be such an actual or constructive appropriation of the fund or subject-matter 'as to confer a complete and present right on the party meant to be provided for, although the circumstances do not admit of its immediate existence'; that, if the holder of the fund could retain control over it, with the power, sua sponte, on his part, to satisfy the promise in cash, it is fatal to an equitable assignment."

And he cited numerous authorities to sustain his position. See, also, *National Bank v. Allen*, 90 Fed. 545, 551, 33 C. C. A. 169; *Coler v. Allen*, 114 Fed. 609, 611, 52 C. C. A. 389; *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, 384, 14 Sup. Ct. 127, 37 L. Ed. 1113; *Silent Friend Mining Co. v. Abbott* (Colo. App.) 42 Pac. 318.

The decree of the Circuit Court in relation to appellant's claim was correct, and is affirmed.

ALASKA FISH & LUMBER CO. v. CHASE.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1904.)

No. 983.

1. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH—DAMAGES.

Where plaintiff brought suit for breach of a contract of employment, but made no claim that there was anything due for services actually rendered, the measure of damages was the actual loss sustained, and not the amount of wages stipulated from the time of the discharge to the time of the trial.

2. SAME—WRONGFUL DISCHARGE—OTHER EMPLOYMENT.

Where a servant was wrongfully discharged before the termination of his contract of employment, it was his duty to use prompt and reasonable diligence to procure other employment of a similar character, and, if he failed to do so, the damages should be mitigated to the extent of the compensation which he might have received by proper effort to seek employment.

In Error to the District Court of the United States for the First Division of the District of Alaska.

W. E. Crews (Lorenzo S. B. Sawyer, of counsel), for plaintiff in error.

Malony & Cobb, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The parties to this action entered into a written contract on the 14th day of February, 1902, by which the defendant in error (plaintiff below) agreed to work for the plaintiff in error (defendant below) "as a superintendent or foreman, or in such other capacity as both parties hereto consent to, for the term of one year,

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 50, 52.

beginning March 1, 1902, in the territory of Alaska, or elsewhere in the United States, as said party of the first part (the plaintiff in error) shall desire, and to well and faithfully devote his entire time, efforts, and attention during said year to the services of the said party of the first part," in consideration of which the company agreed that, so long as the defendant in error should faithfully perform his duties under the contract, it would pay "his traveling expenses from Seattle, state of Washington, to Alaska, and return, providing the party of the second part remains in the services of the party of the first part for the term of one year, as hereinafter stated, and also pay or furnish, free to the party of the second part, board and lodging, and will further pay the party of the second part the sum of \$200 per month, payable monthly, and within 30 days after the end of each month." The case shows that the defendant in error entered the service of the company in Alaska, in pursuance of the contract, and so remained until June 24, 1902, at which time he was discharged, and paid in accordance with the terms of the contract up to that time. On the 3d day of October, 1902, he brought the present action against the company, alleging, after setting out the contract and his entry upon his duties under it, that on the 24th day of June, 1902, the defendant to the action, without cause and in violation of the contract, discharged the plaintiff from its employment, and refused to permit him to render any further services thereunder, his readiness and willingness to perform which he also alleged. The complaint further alleged that the fishing and canning business, which was the subject of the contract—

"Is of such a nature that it is customary and necessary to secure employment therein by the year, or for the whole season of fishing and canning, and plaintiff, although he has endeavored so to do, has not been able, and will not be able, prior to the beginning of the next season of fishing, to wit, about March 1, 1903, to secure any employment, and will during the whole period from June 24, 1902, to March 1, 1903, be left without employment and compelled to support himself at his own expense; that defendant has only paid plaintiff the sum of \$766.66 on his wages due and to become due under said contract, and refuses to pay plaintiff's expenses to Seattle, or to pay his board and lodging from and after said 24th day of June, 1902; that by reason of the breach of contract by defendant as aforesaid plaintiff has been damaged in the following sums, to wit:

For loss of wages	\$1,633 33
Expenses for board and lodging	410 00
Expenses return trip to Seattle	25 00
Making an aggregate of	\$2,068 33

"Wherefore plaintiff prays judgment against defendant for the sum of two thousand sixty-eight and ³³/₁₀₀ dollars (\$2,068.33), together with costs herein incurred."

The answer of the defendant contained, among other things, the following:

"For further, separate, and affirmative defense, defendant alleges that plaintiff failed and neglected to in any wise perform the conditions of the contract of employment on his part, and that the plaintiff is unskilled, negligent, and incompetent, and in all respects failed to perform the duties for which he was employed, and the defendant was compelled to and did employ other persons to perform the duties for which the said plaintiff was employed; that plaintiff in no respect complied with the terms of his contract, and his repre-

sentations as to his knowledge, skill, and ability were false; that by reason of the unskillfulness, want of knowledge, and lack of experience on the part of said plaintiff, defendant was compelled to dispense with his services by mutual agreement between the plaintiff and the defendant on or about the 24th day of June, 1902, at which time plaintiff and defendant had a mutual, full, complete, and absolute settlement of all differences between them. Defendant then and there paid to the plaintiff all sums of money due the plaintiff for his services theretofore rendered, which settlement was in all respects satisfactory to the plaintiff in all particulars; and plaintiff then and there made, executed, and delivered his receipt in writing in full of all demands, which receipt defendant now holds, and which settlement was a complete and absolute one, and satisfactory to all parties at the time. Defendant denies that it at this time is indebted to the plaintiff in the sum of \$2088.33, or any other sum whatsoever."

On the trial the plaintiff introduced the contract in evidence, and testified on his own behalf to the effect that he was competent for the work undertaken by him, and that he performed his duties thereunder to the best of his ability until his discharge by the defendant on the 23d day of June, 1902, and that up to the time of his discharge no complaint had been made in regard to his services. The plaintiff also testified that after his discharge by the defendant he sought to obtain other employment of the same or similar character, but without success, and in answer to the question by his counsel, "Now, what was the reasonable value, Mr. Chase, of the board and lodging that was to be furnished you under this contract?" said, "Well, of course, at a place like that, it would be over twenty-five or thirty dollars a month—at Shakan." And in answer to the question, "Now, Mr. Chase, state what it would cost to procure such board and lodging here in Alaska as the company furnished you down there—the reasonable cost?" the plaintiff said, "I would say it would cost somewhere about fifty dollars a month." The bill of exceptions then recites:

"After some evidence had been introduced on behalf of the defendant, and the plaintiff having offered some in rebuttal, and the cause having been submitted to the jury, the court then gave the following instructions to the jury: 'Perhaps I should state to you, further, that the rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the 1st day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount, perhaps, to the same thing in the end.' To the giving of which instructions, the defendant then and there excepted, and his exception was by the court duly allowed."

The instruction thus given and excepted to is the concluding clause of the instructions of the court in respect to the measure of damages, the whole of which is as follows:

"Now, as to the measure of damages: That is what the defendant agreed to pay this man, if he has a right to recover at all, viz., two hundred dollars per month and his board. If there were proof upon the question, he would be entitled to the expense of a return trip to Seattle, because that, as I understand it, is a part of the contract. Now, for what time may he recover? The allegation of the complaint is that they or he was damaged by reason of the discharge and consequent violation of the contract of hire. If the plaintiff had waited until the end of the year specified in his contract of hire, he might recover for the whole term mentioned in the contract, if entitled to recover at all. But the question now is, what was the damage he sustained by reason of such discharge? What the future holds in store for any one, no one can

tell. If a man were sick, or should he die, that would terminate his contract of hire, and he could recover nothing beyond that period. We are all liable to die at most any time. So uncertain is the future that to say a man will live for any time and may recover damages up to any time in the future is a proposition that is too uncertain to constitute a measure of damages. Evidence has been offered in this case on the part of the plaintiff, without objection, that he had made an effort to obtain employment from the time of his discharge, I believe, up to the present time; and that he had been unable to secure employment. Because of that declaration, uncontradicted, and coming before the court and jury without objection, I say to you the measure of damages in this case, if the plaintiff recovers, and you find he is so entitled to do, is the wages he was to receive from the time he was paid off up to the present time, the date of this trial, and such damages for board during the meantime as he is entitled to under the evidence before you. As to the character of the evidence upon the question of board, you will recall what that is. The defendant did not state what the expense of board was at Shakan, but what the expense had been to him, viz., fifty dollars a month. He stated, perhaps, in the first place, that the board down there might cost the company perhaps twenty-five to thirty dollars per month; but it is for you to determine under the evidence just what he is entitled to, and you are to recall just what the evidence was on this point. And if there is any evidence before you—I frankly state I do not recall any—as to the expense of a passage back from Shakan to Seattle, the plaintiff under his contract of hire is entitled to recover that, and you should so find. Perhaps I should state to you, further, that the true rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the 1st day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount, perhaps, to the same thing in the end."

The instruction, as well as the theory upon which the complaint proceeds, is erroneous. The plaintiff's cause of action was not for wages, but for damages for breach of the contract. The complaint nowhere alleges that there is anything due the plaintiff from the defendant for services actually rendered; and, while it alleges that the plaintiff has been damaged by the defendant, the specific allegations of damage hereinbefore quoted clearly show that what he asked as damages, and all that he asked, is pay for his constructive services at the rate specified in the contract. In *Saxonia Mining & Reduction Co. v. Cook* (Colo.) 4 Pac. 1111, it is said:

"When a servant is discharged, without a sufficient legal excuse, before the expiration of his term, he has his choice of two remedies: He may treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach; or, in some cases, he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, can in no case exceed the wages for the entire term. *Wood, Master & Servant*, § 125, and authorities cited; *Smith, Master & Servant*, 91; *Suth. Dam.* 471. Under the remedy in the latter class of cases, the measure of damages is, not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. He cannot recover the wages accruing for the balance of the term as a matter of course. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received, or that might have been received, for such labor is to be deducted from the amount of the damages occasioned by the breach of the contract sued upon. *Wood, Master & Servant*, § 125, and cases cited; 1 *Suth. Dam.* 473."

See, also, numerous cases cited in 1 Am. & Eng. Enc. of Law (2d Ed.) 1104.

The plaintiff's duty (if he was improperly discharged) was to use prompt and reasonable diligence to procure other employment of a similar character, and thus reduce the damages; and, if he did not conform to that duty, the damages should be mitigated to the extent of the compensation which he might have received by proper effort in seeking employment. *Park Bros. & Co. v. Bushnell*, 60 Fed. 583, 9 C. C. A. 138; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Costigan v. R. R. Co.*, 2 Denio, 609, 43 Am. Dec. 758. This phase of the case was eliminated from consideration by the jury under the instructions of the court below, which were to the effect that the plaintiff was entitled to recover (if at all) the amount that would be due under the contract in question from the 1st day of March, 1902, to the time of the rendition of the verdict, less the amount actually paid. The jury might have been satisfied, from the plaintiff's own testimony, from his manner of testifying, for instance, that he did not make any reasonable or bona fide effort to obtain other employment, and yet by the instructions of the court they were precluded from giving effect to such a conclusion.

The judgment is reversed, and the cause remanded to the court below for further proceedings.

BRITISH AMERICA ASSUR. CO. v. DARRAGH.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1904.)

No. 1,262.

1. INSURANCE—ARBITRATION—RIGHT TO SUE.

Where a fire insurance policy provided that in the event of a disagreement as to the amount of the loss the loss should be ascertained by appraisers, and after loss an agreement was made, in which the only thing submitted to arbitration was the extent of the damage, the insurer's liability being expressly reserved, such arbitration agreement was no bar to insured's right of action on the policy.

2. SAME—COLLATERAL AGREEMENT.

Where a fire policy provided for arbitration only in the event of a disagreement as to the amount of the loss, and after loss, but before there had been any attempt to agree on the amount thereof, it was agreed to submit the amount of the loss to arbitration, such agreement was a substantial departure from and independent of the policy, and avoided the effect of the policy provision.

3. SAME—ATTEMPT TO ARBITRATE—TERMINATION—ESTOPPEL.

Where, after loss under a policy, and before any disagreement as to the amount thereof, the parties agreed to submit the loss to arbitration, and two arbitrators were appointed, but the arbitration failed by reason of the withdrawal of insured's arbitrator because of the failure of the arbitrator appointed by insurer to act with reasonable dispatch, and insurer failed to object to such withdrawal, it was estopped from thereafter insisting that insured was barred by such abortive arbitration from suing on the policy.

¶ 1. Conditions of insurance policy as to arbitration, see notes to *Mutual Fire Ins. Co. v. Alvord*, 9 C. C. A. 628; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 30 C. C. A. 389.

See Insurance, vol. 28, Cent. Dig. § 1431.

4. SAME—UMPIRE—DELEGATION OF AUTHORITY.

Where an umpire was appointed to determine disagreements between arbitrators appointed to determine an insurance loss, such appointment was a personal trust, and it was therefore improper for him to base his conclusions on facts reported to him by one of his employes.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Chas. P. Cocke, W. W. Howe, John Clegg, and Lamar C. Quintero, for plaintiff in error.

Harry H. Hall, for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and SPEER, District Judge.

SPEER, District Judge. In August, 1901, Mrs. J. L. Darragh secured from the plaintiff in error and other insurance companies insurance on her sugar house and machinery on Justine plantation in parish of St. Mary. The aggregate amount insured by the several policies was \$42,000. In December of the same year the sugar house and machinery of Mrs. Darragh were destroyed by fire. The insurance not having been paid, an action was brought in the Circuit Court for the Eastern District of Louisiana on the policy of the plaintiff in error, it being agreed between counsel for the litigant parties that one case should be tried, and thus determine the controversy.

The ground of defense is based upon a clause of the policy, which is as follows:

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

It does not appear from the evidence that there was any effort to reach an agreement as to the amount of loss, or that there was any disagreement between Mrs. Darragh and the insurance companies on this subject. On January 10, 1902, Mrs. Darragh and Mr. Cooke, who represented the insurance companies, signed what is termed a "non-waiver agreement." The effect of this paper may be gathered from its last clause:

"The intent of this agreement is to preserve the rights of all parties hereto, and provide for an investigation of the fire and the determination of the amount of the loss or damage, without regard to the liability of the party of the first part."

It appears from this, and otherwise throughout the record, that at no time did the insurance companies admit liability. On the same day on which the "nonwaiver agreement" was made Mrs. Darragh and the insurance companies entered into the following agreement:

"That A. F. Slingerup and A. N. Hadley shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of the 23rd of December, 1901, as specified below.

"Provided, that the said appraisers shall first select a competent and disinterested umpire, who shall act with them in matters of difference only.

"The award of any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss.

"It is expressly understood that the said agreement and appraisalment is for the purpose of ascertaining and fixing the amount of sound value and the loss and damage only to the property hereinafter described, and shall not determine, waive or invalidate, any other right or rights of the parties to this agreement.

"And it is further expressly understood and agreed that, in determining the sound value and the loss or damage upon the property hereinbefore mentioned, the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire; and in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction shall be made."

Four days later, namely, on January 14th, Slangerup and Hadley were sworn as appraisers, and they selected Lewis Johnson, of New Orleans, to act as umpire "to settle matters of difference that exist between us by reason of and in compliance with the foregoing agreement and appointment." When Mrs. Darragh brought her action, this last agreement was relied upon by the insurance company as a bar to her right of action. An exception, as it is termed under the Louisiana practice, or plea in bar, as it might be termed elsewhere, was presented setting out this defense. An issue having been joined on this plea, evidence was submitted, and the jury, under the instructions of the court, found the plea bad. The action then proceeded before another jury, and after full hearing a verdict was rendered for the plaintiff in the court below against the defendant company for \$5,000—that being the full amount of the policy. Under the agreement between the parties, this verdict, if sustained, will entitle Mrs. Darragh to recover upon the several policies the full amount of the insurance thereby granted, aggregating \$42,000. After verdict and judgment on the last trial, the plaintiff in error sued a writ of error to this court, not to the action of the court and jury on the last trial, but to the verdict and judgment on the first trial involving the plea in bar.

There are numerous exceptions, but they all depend on the determination of this question: Under the facts of this case, was the plaintiff debarred from prosecuting her remedy at law to have the liability of the insurance companies determined, and to recover insurance for the loss which she had sustained, because of the stipulation for an appraisalment in the policy above set forth, or because of the agreement to submit to Slangerup, appointed by the insured, and Hadley, appointed by the insurers, and Johnson as umpire, the question of loss which the insured had sustained? Whatever may be the effect, generally, of a stipulation in a policy of insurance providing for an appraisalment of the loss sustained, in which it is also stipulated that no right of action shall inure to the insured until the appraisalment has been made, it is quite clear to the court, under the facts of this case, that the agreement upon which the plaintiff in error here relies cannot be regarded as a bar to Mrs. Darragh's right of action. At no time did the defendant companies admit their liability, and as late as February 15, 1902, the general agents of several of the insurance companies wrote to Mrs. Darragh, as follows:

"As a matter of fact, we are not in position, at this time, to admit any liability whatever, under the policies; we are not in possession of all the facts,

but from information which we have received, we have been led to believe that the companies are not liable."

The agreement for particular persons to arbitrate into which Mrs. Darragh and the plaintiff in error entered was expressly restricted to the ascertainment of sound value and loss and damage only, and the rule is clear that "where it is agreed that an award shall have no reference to any other question than the estimate of damage done, the assured properly brings an action on the policy, and not on the award." May on Insurance (4th Ed.) § 493. Mrs. Darragh all the while was pressing for the collection of her insurance. Even had the award been made, there was no reason why her proceeding at law should have been barred. Said the Supreme Court of Massachusetts in *Soars v. Home Insurance Company*, 140 Mass. 345, 5 N. E. 149:

"The award has reference merely to the damages. The agreement of submission merely refers to arbitrators, the appraisal and estimate of the damage by fire to the plaintiff's property, and expressly provides that the award shall have no reference to any other question or matter of difference, and shall be 'of binding effect only so far as regards the actual cash value or damage to such property.' A valid award under this submission might be evidence of the damages in any action upon the policy; but it is too clear to admit of any discussion that the only action of the plaintiff must be upon the policy, and not upon the award."

There are, however, infirmities of even more gravity in the case of plaintiff in error. The policy provides for arbitration only in the event of disagreement as to the amount of loss. It appears neither from the evidence nor from the agreement actually made that there had been any disagreement on this subject. The agreement to arbitrate actually signed provided therefore for an independent arbitration in anticipation of a possible disagreement. This clause of the policy provides that "the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage." The agreement signed provides, in addition to this, that "the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof at and immediately preceding the time of the fire; and in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction shall be made." Now, a stipulation in a standard policy like that on which action is brought, by which it is sought to deprive the insured of her right of action, is in derogation of common right, and under the familiar rule will be strictly construed. It follows that any substantial departure therefrom will make the agreement in which such departure appears collateral with and independent of the policy, and will avoid the effect of the latter instrument. It is to close the doors of the courts to the insured whose property has been damaged or destroyed.

But, had this agreement to arbitrate the loss been in strict accordance with the terms of the policy, it cannot, under the facts of this case, be regarded as a bar to Mrs. Darragh's right of action. It is very clear from the evidence submitted to the jury that not only was there no appraisal of the loss sustained, but that nothing was done which can be regarded as an attempt in good faith to make such an appraise-

ment. A portion of the oral evidence upon this point was in conflict. This conflict was for the jury, and by their verdict they have settled it in favor of Mrs. Darragh. Much evidence was submitted in writing. This was in the form of letters written by the appraiser, parties, and their agents and attorneys, while the matter was pending, dum fervet opus. All the while Mrs. Darragh is urgent for the action of the appraisers. On January 27, 1902, her attorney, Mr. Charles O'Neil, writes to the adjuster of the various insurance companies:

"Mr. Hadley, the appraiser representing the insurance companies, has gone to Mexico, without submitting his estimates, and although he expects to return within two weeks, it may be that he will be away longer. We are not willing to wait indefinitely, especially without knowing whether you intend to deny liability or not.

"Mrs. Darragh's mortgage creditor is interested in these policies and the delay in their settlement has caused and is still causing severe annoyance and loss to Mrs. Darragh."

Two days later the adjuster answers this earnest letter as follows:

"Replying to your oracular letter of the 27th inst., I beg leave to say that we know of no condition of our contracts requiring answer, at this time in any event, to your various queries. Expressly reserving all of our rights, and without waiver of any description, we remain, yours respectfully."

On February 3, 1902, Slingerup, one of the appraisers, writes to Mrs. Darragh, through her agent, Mr. M. F. Tiernan:

"Dear Sir: I have earnestly endeavored to get Mr. Hadley to arrive at some reasonable agreement as to the value and losses of your sugar house and machinery, but he was too busy while in this city with his own business, that of purchasing of machinery for Mexico, that he could devote very little time, in fact, the only thing that he did was to figure out the loss of the building, which was so radically wrong, that I was compelled to employ a builder to figure out the lumber and cost of the building. In order to get at anything like the value and loss we visited Justine plantation (as you know), arriving there on a Saturday, and Mr. Hadley left Justine on Sunday at noon for Mexico.

"As it is impossible to know when he will return, and, as it will be impossible for me to be in readiness at any time that it may suit Mr. Hadley's convenience to come here, for this reason I ask you to relieve me of any further connection with this appraisalment."

On February 15th, as we have seen, the insurance companies wrote a letter, in which they state substantially that they deny liability, and on February 20th the adjuster above mentioned, a Mr. Cooke, wrote to Mrs. Darragh a letter which contains the following statement:

"I note that your appraiser has withdrawn; he should not have been appointed. You have the right to now name a competent and disinterested appraiser in his stead."

On March 3d Mrs. Darragh replied to Mr. Cooke as follows:

"I have your favor of February 20th inst., suggesting that in view of the refusal of Mr. Slingerup to act further as an appraiser, I have the right to name a competent and disinterested appraiser in his stead. I have been subjected to so much annoyance and delay in the matter of this appraisalment, and have been so impressed by the failure of the appraisers agreed upon to reach any result, that I am unwilling to proceed further under our agreement.

"Mr. Slingerup refuses to devote any more of his time to the matter, and has resigned, and Mr. Hadley has gone to Mexico.

"Our agreement was to submit to these two men. There is no general agreement to submit to any one else. I signed at the same time, a non-waiver agreement.

"I now decline to make any new agreement to arbitrate, and withdraw my non-waiver agreement. You have my proofs of loss which I assume to be satisfactory. You have the right under the policy to call for an appraisal in case of disagreement as to the amount of loss. Should you make such demand, I shall cheerfully comply with it."

From all of this it appears that not only was there no appraisal and no disagreement, but that, before his duties were well entered upon, Mrs. Darragh's appraiser withdrew, and that his withdrawal was not objected to by the defendant companies. This, in our judgment, estops them from now insisting that this abortive and imperfect arbitration should conclude the rights of the insured. But even then Mrs. Darragh makes it clearly to appear that, while she will no longer assent to an independent arbitration like that which has given her so much trouble, she yet recognizes the rights of the insurers to call for an appraisal under the policy in case of disagreement as to the amount of loss; and even at this late day she says, "Should you make such a demand, I shall cheerfully comply with it." Slingerup, Mrs. Darragh's arbitrator, at this time was dying of cancer of the throat. He died, indeed, before the action was tried. His testimony, which the jury accepted as true, must have been given by him with full knowledge of approaching dissolution. He testifies plainly and unmistakably to the effect that the duties of the appraisers were never performed before his withdrawal, and that there had been no such disagreement as would have justified the appearance and action of the umpire. It further appears that, notwithstanding the earnest objections of Mrs. Darragh to his withdrawal, it was compelled by the conduct of the appraiser for the plaintiff in error. Notwithstanding all of this, thereafter Mr. Hadley, the arbitrator for the insurance companies, and Mr. Johnson, the umpire, reached an agreement as to the amount of loss, which is nearly ten thousand dollars less than the agreed value of the property insured and the amount of the insurance appearing on the face of the policies. It is to be observed that at the time this action was taken and this estimate made Mrs. Darragh had no appraiser, and her interests were not represented in any manner. It is to be further observed that the appointment of Mr. Johnson as umpire was a personal trust, and, if all else had been regularly done, this would have required his personal participation in the ascertainment of the loss sustained. But Mr. Johnson was otherwise engaged, and sent one of his employés to make a report upon which his own conclusions were based. It is not by proceedings of this character that Mrs. Darragh can be debarred her constitutional right to seek established justice by suitable application to the court having jurisdiction.

The exceptions having been confined to the trial of the plea in bar, no exceptions or assignments of error having been presented on the trial of the case upon its merits, and no error appearing in the action of the court or in the verdict of the jury, the judgment of the Circuit Court is affirmed.

GREEN BAY & M. CANAL CO. v. NORRIE.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 100.

1. DECREE—CONSTRUCTION — SUPERSEDEAS — PROHIBITORY INJUNCTION—VIOLATION.

In an action to recover water rights in certain ponds, plaintiff prayed judgment that defendant be commanded to rebuild and restore the embankment and drain on the south bank of the river, opposite the property conveyed by plaintiff to the United States with a reservation of the water power. The state court rendered judgment that plaintiff was the owner of the water power created by the dam previously erected, and adjudged that defendant be perpetually restrained from drawing any water from the pond created by the dam. On appeal, it appearing that defendant, instead of the earth embankment, had constructed a series of stone piers, with openings between the same which could be closed by movable gates, and which, when closed, operated to maintain the pond, the court held that, as defendant's headgates would stop the water as effectually as would an embankment, the plaintiff was not injured by leaving the gates, and that the refusal of the injunction as prayed was a proper exercise of the trial court's discretion. *Held*, that the injunction contained in the judgment of the state court was prohibitive only, and not mandatory, and was therefore not suspended by a supersedeas bond given on appeal to the United States Supreme Court, where the judgment was affirmed.

2. SAME—ESTOPPEL.

The fact that both parties to a suit mistakenly supposed that a supersedeas bond on an appeal from the Supreme Court of the state to the United States Supreme Court operated to suspend a prohibitory injunction did not estop one of the parties from contending, in an action on the bond, that such was not its effect.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 118 Fed. 923.

This cause comes here upon writ of error to review a final judgment of the Circuit Court, Southern District of New York, dismissing plaintiff's amended complaint on the merits, upon demurrer thereto for insufficiency of facts. The action is at law upon a federal statutory supersedeas bond in the penal sum of \$30,000, given by defendant and three other co-sureties upon a writ of error to the Supreme Court of the United States to review a final judgment entered in the circuit court of Outagamie county, Wis., in a suit in which the Green Bay & Mississippi Canal Company was plaintiff and the Kaukauna Water Power Company was defendant. In the Wisconsin suit it was contended that a certain pond, from which the Kaukauna Company was drawing water power for the use of some mills which it operated (or leased) on the banks of the Fox river, was part of a system of ponds and canals maintaining slack-water navigation on said river, originally owned by the plaintiff; that the same had been conveyed by plaintiff to the United States, with reservation of "the water powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto"; that a necessary part of such work was an embankment across the river front of "lots 6 and 7, where they abut on Fox river, of the height of eight or ten feet, and of sufficient thickness and strength to hold the water in said pond"; that the maintenance of such embankment across said lots was necessary to the maintenance of plaintiff's water power; and that the Kaukauna Company had "cut, broken, torn away, and removed the embankment along and on said lot 6 for the space of about 200 feet." Plaintiff prayed judgment against the Kaukauna Company, commanding it "to rebuild and restore to its former state and condition the embankment

and drain on said south bank of said river upon and across said lot 6." The Wisconsin action was tried in the circuit court, was appealed to the Supreme Court of that state, and upon mandate of the latter court there was entered the final judgment in said circuit court, from which the appeal was taken to the United States Supreme Court, and the bond here sued upon was executed. That judgment "considered and adjudged that the plaintiff is the legal owner of the water power created by such dam [describing it] over and above what is required for navigation." It adjudged \$193.22 costs to plaintiffs, and ordered and adjudged that defendants, the Kaukauna Company and others, "be, and they hereby are, perpetually restrained from drawing any water from the pond maintained by the dam across the Fox river, * * * mentioned in the complaint, for hydraulic power." The supersedeas bond is in the usual form; the condition being "that if the said defendants above named shall prosecute their writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be void." The judgment appealed from was affirmed by the United States Supreme Court, without any modification. *Kaukauna Co. v. Miss. & Green Bay Co.*, 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004. It seems to have been supposed by all parties that the supersedeas bond operated to suspend the injunction, and the Kaukauna Company, during the pendency of the appeal, continued to draw water from the pond for hydraulic power, without interference or objection, and without any application being made to the court to punish it for disobedience of the injunction. The action at bar is brought to recover damages for such continued drawing of the water.

Moses Hooper, for plaintiff in error.

T. N. Rhinelander, for defendant in error.

Before LACOMBE and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Demurrer was interposed to the original complaint, and the points raised thereby were discussed by Judge Townsend in an opinion reported in 118 Fed. 923. He referred to *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888, and *Leonard v. Ozark Land Company*, 115 U. S. 465, 6 Sup. Ct. 127, 29 L. Ed. 445, and held that a supersedeas does not suspend the effect of a prohibitory injunction pending appeal. The plaintiff in error here does not question the correctness of that conclusion; so it will be sufficient, on that branch of the case, to refer to Judge Townsend's opinion. That opinion contains the following:

"The parallel which the plaintiff seeks to draw between an action in ejectment and a bill in equity for an injunction fails, for the reason that the judgment in ejectment is such as to entitle the plaintiff prevailing to have the process of the court upon that very judgment carried out affirmatively until the party in possession is actually removed. A supersedeas in such case stays the active force of the judgment. An injunction, on the contrary, does not of itself change the status, or go further than to pronounce upon the rights of the parties and forbid the doing of acts inconsistent with those rights."

The plaintiff, in the hope that it might thereby convince the court that its situation was similar to that of the successful plaintiff in ejectment, amended its complaint by setting forth the locus in quo and the proceedings in the Wisconsin courts in much greater detail. It is now contended that the injunction was not merely prohibitory, but mandatory as well; that by the decision of the Wisconsin court "in effect it was adjudged that the canal company was the owner of the water power, and that possession thereof should be taken from the Kaukauna Company and transferred to the plaintiff."

If the injunction were in fact mandatory, it would be suspended by the appeal and supersedeas; but the argument of plaintiff in error fails to convince us that it is not purely prohibitive. Manifestly it is prohibitive in form. It perpetually enjoins and restrains from drawing any water from the pond for hydraulic power. It is to be noted that the embankment and the headgates which the Kaukauna Company had placed therein were located wholly on property of that company, and the judgment did not profess even to put the canal company into possession of, or in control of, either. All that it was adjudged the plaintiff owned was the right to have the surplus water from the pond flow onward to his premises without being reduced in volume by drafts of the Kaukauna Company. In a purely technical sense only could it be said that the judgment put him into possession of the water power. Moreover, not only is the form of injunction prohibitory, but that form was selected by the court *ex industria*.

It will be remembered that the bill prayed that the Kaukauna Company be commanded "to rebuild and restore to its former state and condition the embankment and drain." This was a specific prayer for a mandatory injunction. The complaint in the present action shows that the works of the Kaukauna Company consisted of a series of stone piers, with openings between the same, and with movable gates or slides to close such openings, so that, when such slides or gates were closed, the same operated to maintain the mill pond; this constituting what may be termed a substituted embankment, in place and stead of the original earth embankment. Upon the trial of the action in the Wisconsin circuit, that court found that:

"In building its canal, the Kaukauna Company has erected and maintained works on the south shore of the river that does the same service that was performed by the embankment mentioned in the deed from John Hunt."

And upon appeal the Supreme Court of Wisconsin said:

"Inasmuch as the headgates to the defendant's canal stop the water as effectually as would an embankment of earth, and the plaintiff is not injured by leaving the gates as they are, a refusal of the injunction prayed is a very proper exercise of the discretion of the court."

In view of this, we fail to see how it can be maintained that the prohibitory injunction which was granted was in fact, or was intended to be, the mandatory injunction which was refused.

It is further contended that because, prior to the decision in the Wisconsin court, the water was being drawn from the pond through the open gates, the injunction must be construed to be mandatory, as well as prohibitory, on the ground that it first required the gates to be closed, and thereafter to be kept closed. In our opinion, this distinction is too fine drawn for practical application. The important and controlling feature of the injunction is the compelling of the defendant to refrain in the future from doing the acts complained of. It is not concerned with what he may or may not do to enable himself to comply with this command thereafter to refrain. It would be a curious rule of construction which would hold an injunction against the use of machinery, for instance, embodying some patented improvement, to be mandatory if it were served during working hours, when

the machinery was in motion, and prohibitory only if it were served at night or during the midday recess, when the machinery was at rest.

We find no force in the suggestion of an estoppel resulting from the circumstance that all parties mistakenly assumed that the supersedeas stayed the operation of the injunction.

The judgment of the Circuit Court is affirmed.

CHILBERG v. LYG.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1904.)

No. 976.

1. BROKERS—SALE OF MINES—SUBAGENTS—EMPLOYMENT—CUSTOMS—KNOWLEDGE.

A general custom in a certain city for brokers intrusted with the sale of mining properties to employ subagents to assist in securing purchasers, and to allow them commissions out of the purchase price for their services, is not binding on the owner of mining claims left with a broker for sale, in the absence of proof of the owner's knowledge thereof.

2. SAME—CONTRADICTING WRITTEN CONTRACT.

Where a broker engaged to sell certain mines agreed to effect the sale for a commission of 5 per cent, evidence of a custom of brokers to employ subagents to assist in the sale, and to allow them a commission out of the purchase price for a sale affected, was inadmissible, as tending to vary the unambiguous agreement of the parties.

3. SAME—VALIDITY OF CUSTOM—PUBLIC POLICY—FRAUD.

A custom of brokers in a certain city to employ subagents to assist in securing purchasers for mining claims, and to allow them commissions out of the purchase price for their services, ordinarily secured by raising the price of the property, was contrary to public policy, as directly leading to fraud and questionable practices.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

W. V. Rinehart, Jr., and Ballinger, Ronald & Battle (J. J. Kennedy, of counsel), for plaintiff in error.

Page, McCutchen & Knight, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action at law brought by the defendant in error in the court below to recover of the plaintiff in error certain moneys received by him as the agent of the plaintiff below and of his assignor, one Dexter, on the sale of certain mining claims situated in Alaska, and belonging to Lyng and Dexter, respectively. The case shows that Lyng, acting for himself and Dexter, employed the plaintiff in error, Chilberg, who resided at Seattle, Wash., to sell these claims, agreeing to take \$2,000 cash on each claim, and a balance of \$23,000 for Lyng's claim, and \$28,000 for Dexter's claim by September 15, 1900; "the claims to be worked by the buyers the whole season or

¶ 1. See Customs and Usages, vol. 15, Cent. Dig. §§ 23, 24.

until Sept. 15th, the owners to get one-half or will take one-third of all gold taken out up to that time"; Chilberg to receive for his services in that behalf a commission of 5 per centum. The latter effected a sale of the two claims to a Mr. Strout, acting for a Mr. Fleitmann, of New York, and was so prompt in remitting (in part) that he telegraphed Lyng from Seattle to San Francisco \$3,770.70, which was \$2,000 on each claim, less his commission of 5 per centum, amounting to \$200, attorney's fee for drawing papers, \$15, and cost of telegrams, \$14.30. This was followed by a letter from the plaintiff in error reading as follows:

"Seattle, Wash., May 14, 1900.

"Mr. R. T. Lyng, Room 14, Mills Building, San Francisco, Cal.—Dear Sir: I have to-day wired you through the Crocker-Woolworth National Bank \$3,770.70 covering amount accruing to you from sale of Nos. 4 and 5 Below on Anvil Creek as consummated by me. You will note that the total cash consideration reads \$7,500.00, \$3,500 of this was a confidential commission to parties who brought the trade about, and it is important that nothing be said about it so it can reach Mr. Strout in Alaska or Mr. Fleitmann in New York.

"If it should become public, it would probably spoil the balance of the trade. As this sort of a scheme was one on which I succeeded in raising the price to come out of the ground \$7,000.00 on each claim so I think you should be very well pleased with the whole trade.

"Mr. Fleitmann of New York for whom Mr. Strout is acting is several times over a millionaire, and able and willing to work the claims out if they show prospects, if it requires \$100,000.00 to do it, and from what I can learn these will be costly mines to work. It has been hard work to keep the sale open until the last papers arrived, and the 'Knockers' almost spoiled it twice.

"I hope you will be satisfied with the trade, and will expect the balance of my commission as the money is paid over to you.

"You will note that the quitclaim deeds are placed in escrow with the Alaska Banking and Safe Deposit Co., of Nome, who are the correspondents of our bank here, which I trust will be satisfactory to you. You will note also that I have provided that you receive one-half of all the gold taken out instead of one-third if they do not complete the purchase. I have used every endeavor to promote your interest in this matter, and feel highly gratified that it is consummated. I trust that you will observe the caution I have requested as to the \$3,500.00 as it would seriously harm friends of mine, and be detrimental to your chance of completing the deal.

"Enclosed find agreements, also location notice of your No. 4 which I return to you as requested. I also enclose the first power of attorney, which you sent me, and which was not used.

"With kindest regards, I remain, Very truly yours,

"Eugene Chilberg."

The purchaser of the claims subsequently, and prior to Dexter's assignment of his interests to Lyng, paid to Dexter \$8,750 of the deferred payment, 5 per centum of which the latter paid over to the plaintiff in error, Chilberg, and also paid to Lyng a like sum of \$8,750 on the deferred payment due on the claim sold by him, the defendant's commission on which Lyng had not paid at the time of bringing this action. Dexter having thereafter assigned to Lyng all of his rights in the premises, the latter brought the present action to recover of the agent, Chilberg, that portion of the cash payment made by the purchaser on the two claims which the defendant, Chilberg, failed to pay over to the owners of the claims, with interest and costs.

In his answer to the complaint the defendant, Chilberg, denied that

he received as cash payment on the sale of either of the claims in question any other or greater sum than \$2,000, and also set up in defense—

"That it was then, is now, and at all times herein mentioned has been, a general custom, usage, and practice in the city of Seattle for agents intrusted with the sale of mining properties to employ subagents and brokers to assist in securing purchasers for such properties, and to allow them commissions out of the purchase price for their services. That defendant followed said general custom, usage, and practice, and employed a broker to assist in securing a purchaser for said claims, and agreed with said broker that he should have, of the first cash payment which he might secure from any purchaser, all thereof over and above the amount fixed by the plaintiff as such cash payment, all of which was by the defendant promptly reported to the plaintiff, and he made no objection thereto."

On the trial it was clearly proved, and not disputed, that the defendant did in fact receive from the purchaser \$3,750 in cash on each claim, for only \$2,000 of which did he account to the owner of the property. The defendant claimed, and so the testimony showed, that he employed his cousin, one J. E. Chilberg, to assist him in effecting a sale of the property, to whom he turned over \$3,500 of the cash paid by the purchaser. There was no evidence tending to show that either the plaintiff or his assignor, Dexter, knew of any such arrangement between the defendant, Chilberg, and his cousin, or ever authorized any such arrangement, or ever varied the agreement by which the defendant, Chilberg, was employed as the agent of Lyng and Dexter to sell the claims for an agreed commission of 5 per centum on the amount of sale. Not only did the evidence fail to show any knowledge on the part of the plaintiff or of Dexter of any such custom as was alleged by the defendant, but at one stage of the trial, when the defendant was endeavoring to prove that the alleged custom prevailed in Seattle, the court propounded to one of the attorneys for the defendant this inquiry, which was answered as follows:

"The Court: I would inquire just at this stage, Mr. Rinehart, do you intend to show knowledge or impute knowledge to Mr. Lyng—express knowledge, knowledge of this usage, if there be such usage? Mr. Rinehart: To be fair with the court, I cannot promise to prove express knowledge—Mr. Lyng having testified that he did not know of such a usage—but I think I can show facts which will charge him with knowledge, and would justify the jury in believing that he did have knowledge, and that he dealt with that knowledge in view."

Nothing was given in evidence tending to show any such knowledge on the part of the plaintiff or Dexter. The court below rightly excluded proof of any such custom on that ground. But no such custom, if it existed, could avail the defendant, for the reason, first, that it would be inadmissible to thus vary the unambiguous agreement of the parties (*Thompson v. Riggs*, 5 Wall. 663, 18 L. Ed. 704; *Schooner Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657; *Keller v. Meyer*, 74 Mo. App. 318; *Davis v. New York S. S. Co.* [Sup.] 54 N. Y. Supp. 78; *Jefferson v. Burhans*, 85 Fed. 949, 29 C. C. A. 481); and, secondly, such custom, if it existed, would be against public policy, as directly tending to lead to fraud and questionable practices. No better illustration of this fact is needed than that afforded by the letter of the

defendant written to the plaintiff after the completion of the transaction in question, where he said:

"You will note that the total cash consideration reads \$7,500. \$3,500 of this was a confidential commission to parties who brought the trade about, and it is important that nothing be said about it so it can reach Mr. Strout in Alaska or Mr. Fleitmann in New York. If it should become public, it would probably spoil the balance of the trade. As this sort of a scheme was one on which I succeeded in raising the price to come out of the ground \$7,000 on each claim, so I think you should be very well pleased with the whole trade. Mr. Fleitmann of New York, for whom Mr. Strout is acting, is several times over a millionaire, and able and willing to work the claims out if they show prospects, if it requires \$100,000 to do it, and from what I can learn, these will be costly mines to work. It has been hard work to keep the sale open until the last papers arrived, and the 'Knockers' almost spoiled it twice. * * * I trust that you will observe the caution I have requested as to the \$3,500, as it would seriously harm friends of mine, and be detrimental to your chance of completing the deal. * * *

See *De Bussche v. Alt*, 8 L. R. Ch. Div. 286; *Geyser-Marion G. M. Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; *Day v. Holmes*, 103 Mass. 306; *Dodd v. Farlow*, 11 Allen, 426, 87 Am. Dec. 726; *Hopper v. Sage* (N. Y.) 20 N. E. 350, 8 Am. St. Rep. 771; *Smith v. Clews* (N. Y.) 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627.

The court below properly instructed the jury to render a verdict for the plaintiff, less 5 per centum commission on the \$8,750 which was subsequently paid to him by the purchaser, to which the defendant was entitled under the contract between the parties.

The judgment is affirmed.

McMANUS et al. v. CHOLLAR.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1904.)

No. 1,269.

1. FEDERAL COURTS—JURISDICTION—EQUITABLE DEFENSES—STATE PRACTICE.

Since the federal courts sitting in Texas observe the distinction between legal and equitable rights, an equitable defense cannot be maintained in an action of trespass to try title brought on the law side of a federal court sitting in that state, though under the state statutes equitable defenses are available in such action in the state courts.

2. SAME—DEEDS—CONSTRUCTION—PAROL EVIDENCE.

Where, in trespass to try title, there was no ambiguity in any of the conveyances, except that the common grantor had made absolute deeds to different parties covering the same tract of land, and the words of description were plain and unequivocal, letters written by such grantor to the grantee under the later deed, preliminary to the conveyance to him, were inadmissible to vary or explain the same.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

J. F. Lanier, for plaintiffs in error.

F. D. Minor and Geo. C. Greer, for defendant in error.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

SPEER, District Judge. This is a writ of error from the Circuit Court of the Eastern District of Texas. The case with relation to which the plaintiffs in error esteem themselves aggrieved is an action of trespass to try title to land. It was brought by Mary R. Chollar against William P. T. McManus and others. Verdict was directed against the plaintiffs in error, and from this and from certain rulings of the court the writ of error was granted.

The land sued for lies in the county of Hardin, state of Texas, and contains 420 acres. This is described in the plaintiff's petition as "all of that certain 640-acre survey originally granted to James B. Reaves, and described in patent No. 109, volume 12, dated February 12, 1860, from the state of Texas to R. O. W. McManus, save and except that certain two hundred and twenty acres off the south portion of part of said survey, * * * described in the deed from R. O. W. McManus to Caroline A. Parry, dated April 3, 1860." The tract of land sued for is otherwise described as the same embraced in a certain deed from R. O. W. McManus to James W. Danielson, dated August 17, 1877. There was also a claim for damages in behalf of the plaintiff in the court below, the defendant in error here, which were alleged to have been caused by the detention of said land. The damages laid are in the sum of \$5,500, and there is an alleged continuing damage of \$100 per month.

The plaintiffs in error answered said petition in the Circuit Court by a general demurrer, by general denial, and plea of not guilty, and by alleging that the cause of action, if any, is barred by the statute of limitations.

The statutory remedy by action of trespass to try title is defined by the following provisions of the Revised Statutes of Texas:

"Art. 5248. All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements, or other real property shall be by action of trespass to try title."

"Art. 5256. The defendant in such action may file only the plea of 'not guilty' of the injuries complained of in the petition filed by the plaintiff against him.

"Art. 5257. Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action, except the defense of limitation, which shall be especially plead."

Under these and some other statutes, the prevailing jurisprudence in the state courts of Texas is that an action of trespass to try title can be maintained or defeated on equitable titles (see *Hart v. Turner*, 2 Tex. 374; *Johnson v. Byler*, 38 Tex. 606; *Mayer v. Ramsey*, 46 Tex. 376; *Fuller v. Coddington*, 74 Tex. 334, 12 S. W. 47); but in the courts of the United States, although sitting in the state of Texas, the distinction between equitable and legal rights, based on constitutional provisions, has always been maintained (*Sheirburn v. De Cordova et al.*, 24 How. 423, 16 L. Ed. 741; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; *Carter v. Ruddy*, 166 U. S. 493, 496, 17 Sup. Ct. 640, 41 L. Ed. 1090). Therefore, whenever an action of trespass to try title is brought on the law side of the United States courts, an equitable defense thereto

cannot be maintained, and it follows that the rights of the parties before the court must be determined upon legal as distinguished from equitable principles.

A brief statement of the evidence will indicate how important is the effect of this rule in this case:

The plaintiff in the court below offered a patent dated February 10, 1860, from the state of Texas, granting to R. O. W. McManus, as assignee of James B. Reaves, 640 acres of land in the form of a square; also a deed from R. O. W. McManus to Caroline A. Parry, dated April 3, 1860, conveying 220 acres of the south end of the survey which accompanied the patent of James B. Reaves, and which may be termed the Reaves survey; also a deed dated August 17, 1877, from R. O. W. McManus to James W. Danielson, conveying 420 acres, the same being the south part of said Reaves survey. It will be presently seen that it is under this deed that the plaintiff in the Circuit Court claims title to the land in controversy. She also introduced a copy of the will of James W. Danielson, who it appears died in 1886, and bequeathed all of his estate to her; also evidence showing she had paid the taxes on 420 acres of the Reaves tract since 1887; and also the two letters following, from R. O. W. McManus to J. W. Danielson:

"Moss Bluff, Liberty Co., Texas, July 17--77.

"Major Danielson: I wrote you a letter by Capt. Wrexford who was here on the Schooner Whisper. From what he said you have no use for the boat, and wished to sell her, and as money is so scarce, I made you a proposition to give you 420 acres of land adjoining New Sour Lake, even for the boat. The land was granted to me as assignee of J. R. Reeves, title perfect and all taxes paid, and will give a warrantee deed. The land is all heavily timbered and on or near the railroad survey from Sabine to Dallas. Now, if the exchange suits you, or it does not, let me know at once by sending a postal card. I will give you the patent from the state to me. So you will have the claim of title complete. If you conclude to trade, make out a bill of sale to the boat in due form and acknowledge it before a justice, and send the boat and will make deed and send back by them who come with the boat, or I will come and make out the papers at Harrisburg. Please let me know your conclusion.

"R. O. W. McManus.

"The land is of more value than you set on the boat, but I have more land than I can manage, hence will swap even, as I want a boat just now to go to Sabine for lumber for fencing a pasture for my beeves.

"McM. Answer at once."

"Moss Bluff, Liberty County, Tex., Aug. 5, '77.

"Mr. J. W. Danielson, Dear Sir: Your postal came and noted. Myself and wife are alone, and it is impossible for me to leave. Now, you say if I will increase the land to 640 you may trade. The 420 acres is really of more value than the boat, but I am 65 years in Dec., and wish to get my land matters closed up, as my children have all left me and will not assist me in paying the taxes. I intend to dispose of them in order to save them the trouble of fighting for them. I have one more small tract of good land and timbered of 213 acres in the same neighborhood, which with 420 acres equals 633 acres, titles perfect and taxes paid to this year, which will be due next Spring. Now, if you will make a bill of sale and in due form before a notary and send the boat to my house, I will make and send you deeds to the two tracts of land duly acknowledged, with the chain of title. I can get a load of ties for her here from M. Haskiel and take to Harrisburg, and the men who brings the boat can run her in that trade a few times, so they will make a little by coming. I am in an out of the way place to get anywhere only by boat, hence I am compelled to have one. Of course I expect the boat to be in good order

and tight, and that you will send everything belonging to her. We are trading on honor more than any other way, as I did not examine the boat when here, was only on deck.

"Yours,

R. O. W. McManus.

"Decide at once, as I may have to go to Waco soon."

It was admitted that R. O. W. McManus died during the year 1883, and that the defendants in the Circuit Court, who are the plaintiffs in error here, are his heirs at law.

After the evidence was submitted the trial judge directed a verdict in the following language: "Gentlemen of the Jury: Under the facts of this case you are instructed to return a verdict for the plaintiff for the land sued for"—and judgment pursuant thereto was accordingly entered.

From this statement it will be apparent that the conflict was the outgrowth of the conditions following: R. O. W. McManus owned all of this land, amounting to 640 acres. It is undeniable that he sold 220 acres off of the south end of said survey to C. A. Parry. Thereafter he also sold to James W. Danielson 420 acres of land, the same being the south part of said survey. The plaintiff in the Circuit Court, claiming under the will of Danielson, maintains that her deed to 420 acres off the south part of said survey must include all of the land which R. O. W. McManus had not sold to Parry. It follows that if this contention is true she is entitled to all of the tract except that to which Parry had title. This would altogether oust the heirs of McManus. The contention of the defendant in error is based upon what is termed by her counsel "an uncertainty as to the identity of the tract of land intended to be conveyed" by the deed from McManus to Danielson. There is, however, no ambiguity in any of the conveyances. The words of description are plain and unequivocal. It is said that the uncertainty arises from extrinsic facts, and that extrinsic evidence is admissible to show this. For this purpose the letters of McManus to Danielson were offered in evidence. There is, however, as stated, nothing ambiguous about these conveyances save the fact that the grantor, R. O. W. McManus, made absolute deeds to different parties, conveying the same tract of land. The deed from McManus to Caroline A. Parry was made many years before that from McManus to Danielson, and conveyed 220 acres off of the south part of the Reaves survey. The subsequent letters of McManus to Danielson, in which he offers to trade 420 acres of land of the Reaves survey for a boat, are, in the first place, incompetent to vary or explain the explicit terms of the conveyance he had previously made to Parry, or that which, with equal explicitness, he had subsequently made to Danielson. But had these letters been admissible, they could not help the defendant in error, for they did not describe or identify the 420 acres to which they related. The evidence that Danielson paid taxes from 1877 to 1886 on 420 acres of land in this survey, if admissible, would be equally indefinite. The question here, in short, is not what R. O. W. McManus intended to convey, but what he actually did convey. In determining this we are restricted to the language of his deed, and since, as we have seen, this is wholly without ambiguity, no extraneous evidence can aid in its construction. This question has been several times be-

the payment of interest the water company should remain in possession of the rentals, tolls, and revenues as fully as though the deed of trust or mortgage had not been made, and free from the control and intervention of the trustees. If the action under review be under the authority of such mortgage and pledge, jurisdiction fails, because Moores, a citizen of Indiana, would in such case be an indispensable party.

But the ordinance under which the franchise was granted provided that there should be paid to such trustee, as the grantee or his assigns may elect, the rentals in question, which rentals shall be devoted by such trustee to the payment of interest charges on the bonds. Taking this provision of the ordinance, in connection with a certificate by the city that the Farmers' Loan & Trust Company has been designated as such trustee, no default having occurred in the payment of interest, we are of the opinion that the trust created by the ordinance is separate from the trust created by the mortgage; from which it follows that Moores, not named in the ordinance trust, is not an indispensable party, and that the suit was rightly brought by the Farmers' Loan & Trust Company without joining him.

The original ordinance, however, was not to the Seymour Water Company, but to Willet E. McMillan, his heirs and assigns, McMillan subsequently assigning the same to the Seymour Water Company. The Farmers' Loan & Trust Company, of course, derives its title from the ordinance and trust agreement between the city of Seymour and McMillan. It is insisted that the Seymour Water Company is assignee of McMillan, whose citizenship is not averred, and from this argued that jurisdiction in the federal court cannot be maintained. Without discussing this question, we are content to rest our conclusion in favor of jurisdiction upon the authority of *Superior City v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914.

The judgment of the Circuit Court is affirmed.

KRUGER v. CONSTABLE et al. (two cases).

(Circuit Court of Appeals, Second Circuit. March 10, 1904.)

No. 123.

1. FEDERAL COURTS—WAIVER OF JURY—FINDINGS—REVIEW ON ERROR.

Where writs of error are prosecuted in cases tried to the court on stipulation waiving a jury trial, as authorized by Rev. St. U. S. § 649 [U. S. Comp. St. 1901, p. 525], providing that under such circumstances the court's findings of fact shall have the effect of a verdict of a jury, the court of appeals is limited to reviewing exceptions taken to the admission or exclusion of evidence, and to rulings on question of law.

2. DEEDS—WARRANTY OF TITLE—EVIDENCE.

In an action for breach of a warranty of title, a prior contract for the sale of the property, though inadmissible to contradict or vary the terms of the deed containing the warranty, was competent to show that the grantees, prior to the execution of the conveyance to them, knew of the existence of a certain map which included the property conveyed.

3. SAME.

In an action for breach of a warranty of title, certain deeds and mortgages made by plaintiff's grantors were admissible, as bearing on the

question of an alleged dedication by plaintiff's grantors while in possession of the property.

4. SAME—PROCEEDINGS IN OTHER COURTS—RECORD—EFFECT.

The proper admission, in an action for breach of a warranty of title, of the record of certain certiorari proceedings in a state court, did not render evidence in such proceedings admissible to prove the facts as against the parties to the case at bar.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 116 Fed. 722.

These two causes come here upon writs of error to review the judgments entered therein, dismissing the complaints in actions brought to recover damages for breach of warranty of title.

J. Delahunty, for plaintiff in error.

Jacob F. Miller, for defendants in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. These cases were heard and determined by the court upon a written stipulation, filed with the clerk, waiving a jury trial, under Rev. St. U. S. § 649 [U. S. Comp. St. 1901, p. 525]. The court has filed an exhaustive opinion reviewing all the facts, and finding that, upon the evidence, there is no proof to support the cause of action. Such finding has the same effect as the verdict of a jury. Rev. St. U. S. § 649; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Hathaway v. Cambridge National Bank*, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004.

On these writs of error, therefore, this court is confined to a review of exceptions taken to the admission or exclusion of evidence, or to rulings upon questions of law. Rev. St. U. S. § 700 [U. S. Comp. St. 1901, p. 570]; *Walker v. Miller*, 59 Fed. 869, 8 C. C. A. 331; *Mercantile Trust Co. v. Wood*, 60 Fed. 346, 8 C. C. A. 658.

Two exceptions only were taken in the course of the trial. One was founded upon an objection to the introduction of a prior contract for the sale of the property in question, on the ground that said contract was merged in a subsequent deed to plaintiff's grantors. This evidence was not admissible to contradict or vary the terms of the deed, and it does not appear that it was admitted for any such purpose. It was clearly admissible to show that the grantees, prior to said conveyance to them, knew of the existence of a certain map which included said lots.

The other exception is founded upon a formal objection to the introduction of certain deeds and mortgages made by plaintiff's grantors. This evidence was admissible as bearing upon the question of an alleged dedication by plaintiff's grantors while in possession of the property. This exception, however, is not discussed in the brief, and was not referred to in the argument of counsel.

Counsel for plaintiff does not question the correctness of the rulings of the court upon the questions of law, but only contends that the findings are not supported by the evidence. In view of the stipulation, these facts are not open to review in this court. The fatal error on

which his contention is based is that, because the record of certain certiorari proceedings in the New Jersey courts was properly admitted in these cases, the evidence therein is admissible to prove the facts as against the parties herein.

Independently of these considerations, however, we have examined the record and are satisfied that, in any view of the case, the conclusion reached by the court below was correct, and that there was no proof of a dedication of the land in question before the execution and delivery of the deeds to plaintiff's grantor.

The judgments are affirmed.

UNITED STATES v. BLENDIAUR.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1904.)

No. 973.

1. PUBLIC LANDS—FOREST RESERVES—LANDS SUBJECT TO BE SET APART.

The 15 townships of land in the Bitter Root Valley, Mont., formerly occupied by the Flathead Indians, which by Act June 5, 1872, c. 308, 17 Stat. 226, providing for the removal of the Indians therefrom, were made subject to sale, and to which the homestead laws were extended by Act Feb. 11, 1874, c. 25, 18 Stat. 15, became a part of the general public domain, and, as such, were subject to Act March 3, 1891, c. 561, 26 Stat. 1103 [U. S. Comp. St. 1901, p. 1537], authorizing the President, by proclamation, to set apart forest reservations in "public lands."

2. SAME—CONSTRUCTION OF STATUTE—MEANING OF WORDS "PUBLIC LANDS."

The words "public lands" are not always used in the same sense in acts of Congress, and should be given such meaning in any act as comports with its purpose and intent.

In Error to the District Court of the United States for the District of Montana.

For opinion below, see 122 Fed. 703.

This action was instituted by the United States to recover from the defendant the sum of \$28, the value of 20 trees alleged to have been wrongfully cut by him on certain lands situate in the Como Reserve, in the Missoula Land District, in the state of Montana. The defendant, in his answer, denies that plaintiff was the owner of the land upon which the trees were cut; denies all damages charged against him; and, for an affirmative defense, alleges that the lands described in the complaint are not, and since the 5th day of June, 1872, have not been, public lands, and that neither the President of the United States, nor any officer thereof, has the right, power, or authority to set apart as, or declare the lands mentioned in the complaint to be, a part of any forest reserve; that the said lands are embraced within the 15 townships above the Lo Lo Fork of the Bitter Root River, in the Bitter Root Valley, referred to in the act of Congress approved June 5, 1872, c. 308, 17 Stat. 226, as such 15 townships have been definitely fixed and determined by the survey and maps of the said Bitter Root Valley approved by the Department of the Interior; that on the 3d day of February, 1892, an order was transmitted by the Commissioner of the General Land Office to the register and receiver of the United States land office at Missoula, Mont., purporting to reserve from disposition, under the general laws of the United States, certain lands in the Bitter Root Valley, embracing the lands described in the complaint herein, and designating the said lands as the "Lake Como Forest Reserve," and that, save for the said order, no act was ever done or performed by the President of the United States, or by the Land Department, creating or purporting to

create any forest reserve embracing said lands; that on or about July 14, 1899, the Commissioner of the General Land Office addressed a letter to the receiver of the United States land office at Missoula, Mont., directing the said officer not to dispose of certain lands in the Bitter Root Valley embracing the lands mentioned in the complaint herein, and purporting to set apart and reserve the same, pending the determination of the advisability of including the same in the Bitter Root Forest Reserve, but defendant avers that no action has ever been taken by the President of the United States, or by the Land Department of the government, to embrace or include the same in the said Bitter Root Forest Reserve. Defendant further avers that he is, and at all times herein mentioned was, a citizen of the United States, over the age of 21 years, and that he has never entered any lands under the provisions of the homestead act, and that on the 15th day of July, 1899, he settled on the lands mentioned in the complaint herein with the intention at that time to enter the same and acquire title to the same under the provisions of the homestead laws of the United States; that, with a view to the perfection of his settlement upon the said lands, and to enable him to construct a house thereon and to establish his residence thereon, he cut down certain trees growing thereon, intending to use the logs which might be hewn therefrom to construct a residence for himself upon the said land, and that the said trees so cut down were used by the defendant on the said land in constructing his said residence, and that the trees so cut down are the trees referred to in the complaint herein as having been on the said land wrongfully and unlawfully cut down, and that the use of the same in the construction of his said residence constitutes the conversion and disposition of the same referred to in the complaint; and that the entry so as aforesaid made by the defendant upon the said lands for the purpose of making a settlement thereon, with a view to acquire title to the same under the homestead laws of the United States, constitutes the entry complained of in the complaint, and, by reason of the facts aforesaid, the defendant denies that his said entry was wrongful or unlawful, or that his cutting of the said timber was wrongful or unlawful, or that he converted the same. To this answer the plaintiff interposed a demurrer upon the grounds "that the affirmative allegations contained in said defendant's answer did not, nor did either or any of them, state facts sufficient to constitute a defense to the cause of action set out in plaintiff's complaint herein." The court below overruled this demurrer. The plaintiff declined to file any replication to the answer, and elected to stand upon its demurrer, whereupon the court ordered the complaint dismissed. From the judgment of dismissal the plaintiff sued out a writ of error to this court, assigning as error: "(1) The court erred in overruling the demurrer interposed by the plaintiff to the affirmative matter set up in defendant's answer. (2) The court erred in rendering judgment in said cause against said plaintiff and dismissing said action."

Carl Rasch, U. S. Atty., and Fred A. Maynard, Sp. Asst. U. S. Atty. E. E. Hershey and T. J. Walsh, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Did the court err in overruling the demurrer to the answer? Was the land described in the complaint subject to homestead entry on the 15th day of July, 1899, when defendant entered thereon for the purpose of making a settlement under the homestead law, as alleged in his answer, or had the land at that time or prior thereto been legally set apart and reserved as a forest reservation?

Section 24 of the act of March 3, 1891, reads as follows:

"That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in

any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof." 26 Stat. 1103, c. 561 [U. S. Comp. St. 1901, p. 1537].

The contention of appellee is that the land in question could not be legally set aside as a part of a forest reservation, because the lands in the Bitter Root Valley above the Lo Lo Fork were not "public lands," but had been previously set apart for a special purpose, to wit, the right of homestead entry under the provisions of the act of June 5, 1872, and the act approved February 11, 1874, and the appropriation act of June 22, 1874, the respective provisions of which read as follows:

Act of June 5, 1872, c. 308, 17 Stat. 226:

"Section 1. That it shall be the duty of the President, as soon as practicable, to remove the Flathead Indians (whether of full or mixed bloods), and all other Indians connected with the said tribe, and recognized as members thereof, from Bitter Root Valley, in the territory of Montana, to the general reservation in said territory (commonly known as the Jocko Reservation), which by a treaty concluded at Hell Gate, in the Bitter Root Valley, July sixteenth, eighteen hundred and fifty-five, and ratified by the Senate March eighth, eighteen hundred and fifty-nine, between the United States and the confederated tribes of Flathead, Kootenai, and Pend d'Oreille Indians, was set apart and reserved for the use and occupation of said confederated tribes."

Act of February 11, 1874, c. 25, 18 Stat. 15:

"Section 1. The time of sale and payment of pre-empted lands in the Bitter Root Valley, in the territory of Montana, is hereby extended for the period of two years from the expiration of the time allotted in the act entitled 'An act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley, in the territory of Montana,' approved June fifth, eighteen hundred and seventy-two.

"Sec. 2. That the benefit of the homestead act is hereby extended to all the settlers on said lands who may desire to take advantage of the same."

Appropriation act of June 22, 1874, c. 389, 18 Stat. 173:

"For the second of ten installments to be paid, under direction of the President, to the Flathead Indians removed from the Bitter Root Valley to the Jocko Reservation, in the territory of Montana, five thousand dollars: provided, that the proceeds of the sales of land in Bitter Root Valley, Montana Territory, referred to in the second section of the act of Congress approved June fifth, eighteen hundred and seventy-two, entitled 'An act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley, in the territory of Montana,' shall be paid into the Treasury of the United States in the same manner that other moneys derived from the sale of other public lands are now paid in: and provided further, that in lieu of the amount provided to be set apart therefrom by the act of Congress of June fifth, eighteen hundred and seventy-two, hereinbefore referred to, there shall be annually appropriated out of any money in the Treasury of the United States not otherwise appropriated, the sum of five thousand dollars, for the period of ten years, to be expended under the direction of the President, in the manner deemed for the best good of the Indians who have been removed from Bitter Root Valley: and provided further, that no part of said sum shall be paid to any Indian of said tribe who shall not have settled upon the Jocko Reservation."

Lands to which a homestead claim may attach must necessarily be a part of the general public domain, and must be unappropriated lands not held back or reserved for any special or public purpose. It will

be admitted, for the purposes of this opinion, that prior to the order made on February 3, 1892 (set forth in defendant's answer), the lands in the Bitter Root Valley above the Lo Lo Fork were subject to homestead entry, and that the rights of parties who had entered in good faith for the purpose of making a settlement thereon could not be divested by said order. But the withdrawal of the lands for forestry purposes was not in violation of any of the provisions of the act of June 5, 1872. The lands were ceded by the Indians, and their sale was directed by said act. There was no reservation of the lands or of any interest therein to the use of the Indians—only an appropriation arising from the sale. That appropriation was satisfied by the act of June 22, 1874, from the general funds of the Treasury. The government had the power and could at any time thereafter reserve the lands for any public purpose. They were subject to reservation for public purposes, the same as other public lands. The contention of appellee that they were not public lands, because these words indicate only such lands belonging to the United States "as are subject to sale or other disposition under general laws" (*Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769; *Bardon v. R. R. Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714; *Barker v. Harvey*, 181 U. S. 481, 491, 21 Sup. Ct. 690, 45 L. Ed. 963), cannot be sustained. The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In *United States v. Bisel*, 8 Mont. 20, 30, 19 Pac. 251, the court, after referring to the decisions in *Wilcox v. Jackson*, *Newhall v. Sanger*, and other cases, said:

"There is no statutory definition of the words 'public lands,' and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use."

See, also, *Heydenfeldt v. Daney G. & S. M. Co.*, 10 Nev. 290, 314; *Id.*, 93 U. S. 634, 640, 23 L. Ed. 995; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; *Minnesota v. Hitchcock*, 185 U. S. 373, 393, 22 Sup. Ct. 650, 46 L. Ed. 954; *McFadden v. Mountain View M. & M. Co.*, 97 Fed. 670, 680, 38 C. C. A. 354; *State v. Kennard (Neb.)* 78 N. W. 282; *Rierson v. St. Louis & S. F. Ry. Co. (Kan. Sup.)* 51 Pac. 901.

The title to the land in question was, at the time of the passage of the act of March 3, 1891, in the government. The land was a part of the public domain, and was public land of the United States, within the true intent and meaning of those words, as used in section 24 of said act, and continued in that condition up to the time the orders were issued setting aside and reserving said land as a part of the forest reserve, and thereafter was not subject to homestead entry. Blendiaur,

therefore, was at the time he cut the trees in question a mere trespasser upon the land. His answer stated no defense to the action, and the demurrer interposed thereto should have been sustained.

The judgment of the District Court is reversed.

BATON ROUGE & B. S. PACKET CO. et al. v. GEORGE.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,276.

1. SHIPPING—PILOTS—EMPLOYMENT—CONTRACTS.

Where a steamboat was engaged in the regular coasting trade on inland rivers, a contract for the employment of a pilot for the term of one year, at the rate of \$100 per month, payable weekly by the master of such vessel, was reasonable and binding on the vessel.

2. SAME—APPEAL—FINDINGS OF DISTRICT JUDGE—REVIEW.

On a libel in admiralty for breach of a contract for the employment of a pilot, a finding by the District Judge, on conflicting evidence, that a time contract was in fact made, would not be set aside on appeal as contrary to the weight of evidence.

Appeal from the District Court of the United States for the Eastern District of Louisiana, in Admiralty.

The following is the statement of the case and the opinion of the District Judge:

This is a libel in rem by George George, who avers that he was employed as pilot on board the steamer Julien Poydras for the term of one year, at the rate of \$100 per month, payable weekly; that under the contract he performed his duties as pilot from September 20, 1901, until December 23, 1901, when the vessel was laid up and the libelant was discharged. He sues for the balance of his wages under the contract, viz., for \$898.87. The claimant answered denying that the contract was for a term of one year, and averred that the employment was a hiring at will, and not for a definite period, and that all wages due him were paid to him on his discharge. The evidence showed that libelant earned as pilot on another vessel \$480.32 between his discharge in this case and September 20, 1902.

PARLANGE, District Judge. It is perfectly clear that the libelant had a binding contract with the boat for a fixed term, as claimed by him, and that he was discharged without cause. The master has admitted the contract. This contract was a reasonable and proper one under the circumstances disclosed by the evidence, and the boat should be held to it.

The contract was executed in part. Its continuation and completion was prevented by the boat, and not by any act or omission of the libelant.

It is clear that the libelant is entitled to recover the damages which the breaching of the contract has caused him, and that he has a lien on the boat for such damages. Among other cases, see *The Wanderer* (C. C.) 20 Fed. 655, by Circuit Judge Woods, concurred in by Mr. Justice Bradley; *The Mary Elizabeth* (C. C.) 24 Fed. 397, by Circuit Judge Pardee; *The Oscoda* (D. C.) 66 Fed. 347, by Judge Cox; Judge (now Mr. Justice) Brown in *Scott et al. v. The Ira Chaffee* (D. C.) 2 Fed. 401, especially at pages 401 and 403.

But the wages which the libelant earned after his dismissal from the Julien Poydras must be deducted from the aggregate claimed by him in his libel. Two adjudicated cases were cited in behalf of the libelant, in which it was held that certain set-offs to mariners' wages would not be allowed. These authorities are sound, but they do not apply. This is not a suit for mariners' wages; it is a suit for compensatory damages for the breach of a contract. The deductions should be made. See Judge Benedict in *Fee et al. v. Orient Fertiliz-*

ing Co. (D. C.) 36 Fed. 509. Notice *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406, especially at pages 361, 362, 115 U. S., and pages 94, 95, 6 Sup. Ct., 29 L. Ed. 406.

There will be a decree in favor of the libellant for the aggregate claimed by him, less the amount he earned, within the term of the contract, after his discharge from the Julien Poydras.

Bernard Bruenn, for libellant.

John D. Grace, for Claimant Baton Rouge & Bayou Sara Packet Co.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is an appeal from a decree in rem to enforce a time contract for the employment of a pilot on the steamboat Julien Poydras, running in the regular trade on the Mississippi and Atchafalaya rivers. That contracts for a reasonable time can be made for the employment of pilots on boats engaged in making regular trips in the coastwise trade is settled in this circuit by *The Wanderer* (C. C.) 20 Fed. 655, and *The Mary Elizabeth* (C. C.) 24 Fed. 398.

The only open question on this appeal, therefore, is whether such a contract was made between the libellant, George George, and the master of the Julien Poydras. On this question the evidence is not only confused, but very conflicting, and, if the case were before us as an original proposition, we might well find on the evidence adduced that the alleged contract is not sufficiently proven. As the case is now before us on appeal, however, we find that the learned District Judge, reviewing the question in an opinion transmitted with the record, has found that the contract was proved, and, as he says, "admitted by the master." To now hold otherwise would be merely to substitute our conclusion on evidence for that of the District Judge when we are by no means satisfied that error can be predicated on his finding.

Under these circumstances, the majority of this court are of opinion that the decree appealed from should be affirmed; and it is so ordered.

FLORENCE COTTON OIL CO. V. ALABAMA TOWBOAT CO.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,305.

1. ADMIRALTY—MARITIME CONTRACT—BREACH—DAMAGES.

A contract by the master of a steamboat to collect and transport certain cotton seed from one port to another within a reasonable time, for freight specified, is a maritime contract, a breach of which entitles the shipper to recover damages in admiralty.

2. SAME—LIBEL—EXCEPTIONS—PARTIES.

Where a libel in admiralty was filed against a boat and barge for breach of a maritime contract, parties other than the intervening claimant were not entitled to file exceptions thereto.

¶ 1. Admiralty jurisdiction as to matter of contract, see notes to *The Richard Winslow*, 18 C. C. A. 347; *Boutin v. Rudd*, 27 C. C. A. 530.

See Admiralty, vol. 1, Cent. Dig. §§ 156, 164, 165.

Appeal from the District Court of the United States for the Northern District of Alabama.

Pillans, Hanan & Pillans and John T. Ashcraft, for appellant.
Cooper & Foster, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This was a libel filed by the appellant against the steamboat Gladys and the barge attending said steamboat, known as "Barge R5," alleging that the master of the said steamboat Gladys loaded on board the said steamboat and the barge attending said steamboat, known as "R5," certain cotton seed, which was received in good order and condition, and which, as libellant charges, he agreed to deliver in good order and condition at a landing in Tennessee river, in the city of Florence, known as "Sweet-water Landing," unto libellant, it paying freight therefor; and libellant attached and made part of its libel a copy of certain telegrams and letters, as constituting the contract of carriage. The libel further charges that on or about the 2d day of March, 1899, the said steamer Gladys brought to Lock 7, in the Mussel Shoals Canal, the said cotton seed, and left the same loaded upon said barge, and exposed to the weather, and failed and refused to deliver the same unto libellant until on or about the 15th day of April, 1899, and that when so delivered on said 15th day of April the said cotton seed was not in the same order and condition as when received, but had been damaged by long exposure to the weather, the damage amounting to \$620. The libellant further averred that the steamboat and her barge were in the Tennessee river, within said district, and within the jurisdiction of the court, and it prayed for process in rem against the Gladys and the barge attending the steamboat Gladys, and their condemnation and sale to pay libellant's claim, with interest and costs, and for such further and other relief as, in law and justice, it should be entitled to receive.

The exhibits to the libel, made part of same, as constituting the contract of carriage, consist of letters and telegrams which passed between the libellant and Joseph Ringemann, Jr., manager, which letters are found on pages 3 to 5 of the record, inclusive. From these it appears that the libellant on February 2d stated that it had seed at Lamb's Ferry and a lot more near the ferry, which it could not get ready for this trip, and other to be brought from along the canal, and offered to contract with Mr. Ringemann, whom it addressed as manager, for the transportation of this seed at a named price per ton, which letter was answered by him by telegraph and post (both telegram and letter bearing date the 4th of February) accepting the libellant's proposition, and requesting libellant to have the seed sacked and ready along the line where they could get them for transportation, declaring that "we make this request because we expect to bring down other freight and want to take enough barges to carry out all we can get, * * * and as we have good prospects for more work between here and Florence we will agree to carry the rest of your seed also. In fact we are figuring to put a

regular boat in the trade between here and there. What do you think you can offer us in the way of business?" Next in order was a telegram from libelant on the 6th of February to Ringemann, notifying him of about 1,000 bags being at Lamb's Ferry, which they supposed to be all filled. And an answer by Ringemann on the same day notifying that the boat would start on a round trip next morning, and expressing a hope that the seed would be ready, "as we will not have as much lumber as we at first thought, in fact we may not get any and in that case less than one thousand sacks would fail to make a trip. We are very anxious to handle all the seed on this river for some one," etc. "* * *" and if you cannot send some one to buy it we will be compelled to bring them this way in order to keep them from going by some other boat." In a postscript to this letter, Mr. Ringemann, who signed it as manager, asked libelant to call upon one McClure and ask him "if we can handle his corn on this trip down." The next letter is from libelant, dated 23d February, expressing surprise at the seed not being brought down as agreed, and reply from Joseph Ringemann, Jr., manager, dated 27th February, declaring that by the time the letter arrives the boat (the Gladys) will be delivering libelant's seed, and suggesting other business in Elk river. According to the libel, it was under this that the master received the seed for transport.

Process having issued upon the libel, and the steamer and barge having been seized, and notice duly given, a claim was filed, verified by Joseph Ringemann, Jr., the manager, with whom the contract of carriage had been made, alleging that the "Alabama Towboat Company, E. S. Ringemann," was the owner of the steamer Gladys and barge R5, against which the libel was filed, and thereupon, bail having been given, the vessel was released. This occurred May 10, 1899; the libel having been filed and process issued 21st April, 1899. On June 2, 1899, the Alabama Towboat Company, as claimant, filed a brief answer, verified by Joseph Ringemann, Jr., as manager of the Alabama Towboat Company, in which answer a traverse was made of all the averments of the libel, and an alternative defense that, if the libel was true, the vessel was not liable, because "at the time of the commission of said acts the said steamer and barge were in the possession and control of the Rodman & Ringemann Company, who held the same under lease from claimant." To so much of this answer as sought thus to confess and avoid, exceptions were filed on 23d of March, 1900, but these were never acted upon by the court.

A great mass of testimony was taken by affidavit and deposition, which will be found extending from page 17 to page 88 of the record, and an agreement for a hearing was filed, but not acted on; and then, on the 25th of April, 1902, there were filed exceptions to the libel, not in the name of the claimant, but by counsel signing for "libelee," which exceptions were in the nature of demurrers, and assigned, among others, these grounds:

"(1) That the libel does not state a cause of action coming within the admiralty jurisdiction of the court. * * * (3) That it fails to set up a contract whereby libelee agreed to carry said cargo of seed from Lamb's Ferry

to Sweetwater Landing. (4) The contract which said libel purports to set out imposes no obligation on libelee to carry said cotton seed from Lamb's Ferry to Sweetwater Landing. (5) The contract which said libel purports to set out by the correspondence annexed thereto is a different contract from that declared on in said libel. (6) That there is nothing in the contract set out in the said libel which imposes upon the libelee the duty of delivering said cotton seed in good condition."

In this state of the record, the case was heard upon the exceptions to the libel, and it was agreed that a decision thereon might be rendered in vacation; and thereafter, on June 12, 1903, considerably more than a year later, the trial judge sustained the exceptions numbered 1, 3, 4, 5, and 6, and by further order decreed the dismissal of the libel. From this decree, summarily disposing of the case without a hearing on the merits, this appeal is taken.

The libel, while subject to criticism, shows a maritime contract within the admiralty jurisdiction of the court, a breach thereof, and a right to damages. The proceedings were irregular, in allowing to be filed and in hearing exceptions to the libel presented on the part of any other than an intervening claimant.

The transcript is unnecessarily padded by including 82 pages of alleged testimony not submitted to or considered by the court.

The decree dismissing the libel is reversed, and the case is remanded, with instructions to strike from the files the exceptions filed on the 25th day of April, 1902, in the name of "libelee," and thereafter proceed according to admiralty rules and procedure. Neither party to recover costs on this appeal.

CHAFFEE v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1904.)

No. 1,643.

1. CONTRACTOR'S BOND—DISCHARGE OF SURETY—AMOUNT RESERVED TILL COMPLETION OF BUILDING—UNTIMELY PAYMENT.

The fact that the owner pays a building contractor the per cent. of the contract price which, under the contract, should have been reserved till the completion of the building, does not release a surety on the contractor's bond, given to secure prompt performance of the work, and also the moneys due laborers and materialmen, from liability to the laborers or materialmen.

2. SAME—ACCEPTANCE OF ADVANCES BY MATERIALMAN.

A materialman does not discharge a surety on the contractor's bond, given to secure moneys due laborers and materialmen, by receiving acceptances from the contractor, and thereby extending the time of payment, where the acceptances have not been paid, and it does not appear that the contractor was solvent when they were made and insolvent when they were due, or that the extension resulted in loss or injury to the surety.

3. SAME—EXTENSION OF TIME.

An extension of time to a contractor by a materialman, who might in the first instance have fixed the time of the maturity of his claim without the knowledge or consent of a surety on the contractor's bond given to secure moneys due laborers and materialmen, does not release such surety.

¶ 2. Discharge of surety on building contract by change in obligation or duty of principal, see note to *United States v. Walsh*, 52 C. C. A. 427.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Martin Langdon, for appellant.

James McCabe (E. G. McGilton, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. This was a suit in equity brought by the United States Fidelity & Guaranty Company, the surety on a bond of the Omaha Building & Construction Company to the state of Nebraska, which was conditioned that the building company would comply with the terms and conditions of a contract between it and the state, and would well and truly pay for all material and labor entering into, or employed in the construction of, an addition to the insane hospital of the state, which the building company undertook to construct. The purpose of this suit was to enjoin the appellant, Clarence L. Chaffee, among others, who had furnished materials to the building company which had been used in the erection of the structure, from bringing an action at law upon the bond, and to compel its cancellation and surrender. The fidelity company obtained a favorable decree in the court below, which its counsel seek to sustain in this court upon two grounds.

They say that the fidelity company was released because the state paid to the building company, before it was due, the 15 per cent. of the contract price which by the terms of the agreement between them was reserved until the completion of the work. But minor changes in the contract or in its execution made by the principal parties to it without the knowledge of the laborers or materialmen who furnished the work and supplies to construct the building do not release the surety from his liability to the laborers or materialmen under a bond of the nature of that in suit, which has two functions—first, to secure to the owner of the building a prompt performance of the contract; and, second, to secure to the laborers and the materialmen the payment for the work and materials which they bestow upon the building. *United States, to Use of Anniston Pipe & Foundry Co., v. National Surety Co.*, 92 Fed. 549, 552, 34 C. C. A. 526, 529.

In the second place, they say that the fidelity company was released from its obligation to pay Chaffee because after his claim became due he received acceptances for it from the building company, and thereby extended the time of its payment. But the acceptances were not paid; there is no pleading and no evidence that the building company was solvent when they were made, and insolvent when they were due, or that the extension of the time of payment which they effected resulted in any loss or injury to the fidelity company; and the mere extension of the time of payment of his claim by a laborer or by a materialman, who could in the first instance have fixed the time of its maturity without the knowledge or consent of the surety, does not release the latter from liability to pay it under a bond of the character of that here in suit. *United States Fidelity &*

Guaranty Co. v. United States, etc., 24 Sup. Ct. Rep. 142, 48 L. Ed. —, filed December 7, 1903.

The decree below is reversed upon the authority of the two cases cited, and the case is remanded to the court below, with instructions to enter a decree against the fidelity company for the amount owing upon the claim of Chaffee, with interest.

THE BERGEN. THE ROBERT HADDON. THE RANZA.
(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

Nos. 45, 46.

1. COLLISION—FERRYBOAT AND STEAMSHIP IN TOW—INSUFFICIENT LOOKOUT.

A finding by the District Court affirmed that a ferryboat crossing North river in the evening was solely in fault for a collision with a steamship coming up the river in tow and disabled, on the ground that owing to the insufficiency of the ferryboat's lookout she failed to see the lights of the steamship until shortly before collision, and to keep out of the way, as she was bound to do after receiving an alarm signal from the tug.

2. SAME—DAMAGES.

An award of damages for collision on the report of a commissioner considered and approved.

Appeal from the District Court of the United States for the Southern District of New York.

These are appeals from final decrees of the District Court, Southern District of New York, holding the ferryboat Bergen solely responsible for a collision between herself and the S. S. Ranza. The latter was coming up the North river in tow of the tug Robert Haddon, on a hawser, with two additional tugs assisting her, made fast to the port and starboard sides of the steamer. The Bergen was bound from her slip in Hoboken to slip at Barclay street, New York. The decision of the District Court is reported in 108 Fed. 555.

Le Roy S. Gove, for appellant.

J. Parker Kirlin, for appellee the Ranza.

Chas. C. Burlingham, for appellee the Robert Haddon.

Before LACOMBE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

PER CURIAM. We entirely concur with Judge Brown's opinion as to the maneuvers of the vessels, the rules of law applicable, and the responsibility for the collision. In the opinion as printed in the record it is stated that, up to the time the first signal was sounded, "the Haddon had been showing her green light and the Bergen her red light only." The context shows that this is an error of transcription or of printing—the colors should be reversed. This correction being made, it is unnecessary to discuss the navigation further. The Bergen was clearly in fault for the reasons stated by the District Judge, and his conclusion that no fault having any material influence on the result was committed by either of the other vessels is sound.

The appellant objects to some of the items of damage allowed by the commissioner. Five days' demurrage was allowed for detention of the vessel. It appears that, besides the repairs necessitated by the collision, other repairs were made to tail shaft and stern tube, and the

vessel was put on dry dock and there painted. She was towed to the dry dock, and lay in the slip for several days, surrounded with ice; thereafter she was docked and painted. The commissioner has carefully discussed her movements, and discriminated between detention for the repairs of collision injury and detention for painting, etc. He says:

"No cause appears for the delay in breaking up and freeing the ship from the ice, and docking and painting her, as soon as she arrived at the dry dock at 10:15 a. m. of February 12th, nor for the delay in so doing until 9:30 a. m. of February 17th, except the work of repairing the collision injuries, which did not require docking."

He found evidence of the doing of such work in successive entries in the log: "Laborers working on port bow." On the 14th, 15th, and 16th the log states that the work on port bow continued through both day and night. Evidently the greatest dispatch was used, and the time of detention made as short as possible.

Appellant criticises the evidence as not sufficient to show that the "work on the port bow had any connection with the collision damages." In view of the fact that the Bergen struck the Ranza on the port bow with such force that the bow was stove in, and of the concession by appellant that \$2,950 was the fair and reasonable value of the work and materials required to repair such damage, this criticism is without merit. The log does not state that any work was done on board on the first of the five days, but the ship lay in the slip to be repaired, and presumably shop preparation of material was required before the work on board could begin.

Since the fair cost of repairs was concededly nearly \$3,000, the two items of \$100 and of \$150, respectively allowed for surveyor's fees, are reasonable; they include, besides survey and recommendations, the making specifications and contract for repairs, and superintending and passing upon the work by both surveyors.

The commissioner allowed \$109.25 for cables to and from Liverpool. Appellant contends that this amount includes matters other than those directly concerned with the collision, such as notification of loss of propeller at sea, and arrangements for charter for next voyage. The respondent contends that the commissioner excluded such messages, and that the items which make up the \$109.25 relate solely to the collision and its sequela. The record sets forth all the messages in full (the price is 25 cents a word), and it is, of course, practicable to make a list of them—to draw off the words which deal with the collision, and make a calculation of their cost. It is not, however, to be expected that this court is to give its time to such clerical work over items trivial in amount. Even if the \$109.25 includes all the messages sent and received, the appellant concedes that it covers many dispatches concerned solely with the collision. If he wished to have eliminated from it certain items included by the commissioner, he should have prepared some tabulation which would show precisely what items make up the \$109.25, so that this court could conveniently determine whether any correction is required, and, if so, to what extent.

The decree is affirmed, with interest and costs.

BUCHANAN et al. v. BRYANT ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. February 24, 1904.)

No. 40.

1. PATENTS—INFRINGEMENT—INCANDESCENT LAMP SOCKETS.

The Lange patent, No. 434,153, for an incandescent lamp socket, claims 1 and 2, were not anticipated, and disclose patentable invention. Also held infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 124 Fed. 537.

Edward P. Payson, for appellants.

Hubert Howson, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree for an injunction and an accounting in a suit which was brought by the appellee against the appellants upon letters patent No. 434,153, dated August 12, 1892, issued to Philip Lange, for incandescent lamp sockets. The claims involved are:

"(1) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a recess in the base-plate fitting over the lugs.

"(2) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a shell extending between the lugs and the base, and held in position by pressure."

The specifications of error which relate to the defense of anticipation have not been insisted upon, and from the brief of appellants it appears that the contentions upon which they do rely are (1) that, in view of the prior state of the art, the claims sued on are both invalid for lack of invention; (2) that claim 2, at least, is void, because it contains "nothing patentable over claim 1"; (3) noninfringement of either claim.

We find nothing in this record to sustain the appellants' contention that the production of the subject-matter of these claims did not involve invention. The proofs clearly show that the sockets previously in use were unsatisfactory, and that they were practically superseded by the Lange sockets; and while such facts do not in all cases necessarily import invention, we think that under the circumstances of this case the inference that the inventive faculty, and not merely the skill of the calling, was exercised, cannot be avoided. The construction of a socket to meet practical requirements, presented a problem of much difficulty, and it was to that problem that Lange directed his attention. As stated in his specification, his object was "to simplify and improve the mechanical construction of the device, and thereby lessen its parts and increase its durability," and this object he attained by the assembling of the three main parts

or division of the structure—the base, the mechanism, and the exterior shell—into one unit mechanically, in a convenient, strong, and serviceable manner. As complainant's expert correctly explained, claims 1 and 2 "have particular reference to those features of the construction by which the several parts are adapted to one another and held together." Claim 1 "is addressed to the union of the socket-base with the base-plate of the interior mechanism by means of the lugs, * * * and into which the screws are threaded, and through which they pass into the recesses in the base-plate whereby the interior mechanism is held in position, whether the exterior shell is present or not, and permitting the removal of the latter, while the base-plate, with its connection and the wires leading thereto, remain undisturbed"; and claim 2 "is evidently directed to the method of holding the exterior shell by clamping it in position between the lugs and the base, whereby a strong gripping pressure is exerted to hold the shell against displacement by rough handling, the weight of the shade, and the like, while permitting it to be quickly and readily removed by the simple loosening of the two screws." The beneficial result achieved was a construction in which a base of thin sheet metal could be used, while at the same time providing a satisfactory means of uniting and fastening the several parts; and this was accomplished, not by borrowing anything from the prior art, nor by applying to it the skill of a mechanic or electrical engineer, but by the conception and adoption of means which the existing art, as disclosed by the prior patents adduced by the defendants, did not have nor suggest. We are satisfied that the views of the complainant's expert respecting them are correct, and, accepting his testimony, without expanding this opinion by quoting it, it results that we cannot affirm the appellants' proposition that "the Lange apparatus did not involve any act of invention, or anything more than the expected skill of the calling, applied to the existing art."

Each of these claims is for a combination, and, though it is true that several important elements are common to both of them, yet claim 1 calls for a recess in the base-plate fitting over the lugs, while claim 2 does not; and claim 2 not only contains the first mention of a shell, but also defines the particular shell intended as "a shell extending between the lugs and base, and held in position by pressure." Hence it appears that the two claims are certainly not identical, and, in our opinion, the difference between them is, with reference to the patent law, a substantial and material one. As has already been said, claim 2 is directed to the method of holding the exterior shell by clamping it in position between the lugs and base, whereby a strong gripping pressure is exerted to hold the shell against displacement; and this the specification makes perfectly plain. It says:

"The screws, b, pass freely through the flange of the base, and screw into the lugs, and by means of them the outer shell * * * may be held firmly between the flange of the base and the lug. * * * When the screws are tightened, they pinch the shell between the flange of the base, a, and the lugs, b, holding them securely in position."

The feature here referred to is, we think, a manifestly important part of the invention. It is not, as has been argued, merely functional. It is constructive, the construction for which it provides being a socket in which the shell of claim 2 is held in position by pressure of the screws mentioned in both claims. Therefore we cannot agree that claim 2 "contains nothing patentable over claim 1."

The appellants' propositions upon the question of infringement are that "the appellants' apparatus is not an infringement, * * * because, so far as claim 1 is concerned, it has neither the recess, b³, nor any equivalent thereof," and because, as to claim 2 it "does not rely upon pressure to hold its shell in position, but upon a bayonet joint." It is true that the appellants' recesses appear to be shallower and wider than those shown in the patent in suit; but that they actually exist, and, notwithstanding their apparent differences, serve the same purpose as those of the patentee, and accomplish that purpose in substantially the same way, though perhaps not so efficiently, we think is obvious. Therefore, though not proportionally and in shape the same, in all that is essential they are identical. The testimony of complainant's expert upon this subject is convincing; and from his elucidation of the prior art, which we agree with the court below in approving, it clearly appears that it exhibits nothing which would justify us in so limiting this recess feature of the Lange construction as to admit of the appropriation of the entire combination of which it is an element, by any one ingenious enough to devise such merely colorable changes in that feature as are relied upon by these defendants to relieve them from the charge of infringement.

As to the contention that in the appellants' apparatus pressure is not relied upon to hold the shell in position, we need only say that an inspection of that apparatus, and examination of the evidence, leaves us in no doubt that the court below was right in finding that the shell is, in fact, held in position by pressure, and we adopt the statement of the learned judge of that court that "inspection of the two sockets will show at once, * * * that there is scarcely any room to dispute that in each the shell is held in place by the same means, and that the bayonet joint of the defendants' socket would be ineffective without the screws." Indeed, this was, in effect, admitted by Mr. Proctor, a witness for the defendants below. He testified that it is the duty of the wire man in putting up the defendants' sockets, after he has fitted the shell to the cap, to screw up the screws as far as they will go; that, if the screw is tightened as much as possible, the shell will be held tightly between the lugs and the flange of the cap; and that "the purpose of screwing up these screws as far as they will go is to hold all the parts of the socket together as firmly as possible."

For the reasons stated, we are of opinion that the Circuit Court was right in holding that the claims in suit were valid, and that they had been infringed by the appellants, and therefore the decree of that court is affirmed, with costs.

UNITED BLUE-FLAME OIL STOVE CO. v. SILVER & CO. et al

(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

No. 68.

1. PATENTS—PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

An order granting a preliminary injunction against infringement, or requiring the defendant in the alternative to give a bond, where such bond has been given, so that defendant's business is not disturbed, will not be reviewed on the merits on appeal in advance of the hearing on full proofs.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from an order of the Circuit Court, Eastern District of New York. The suit is the ordinary one for infringement of patent. Complainant moved upon affidavits for an injunction pendente lite. The order appealed from directs that injunction issue against defendants until further order of the court, restraining them from making, etc., oil burners constructed as described in the patents sued upon: "provided, however, such injunction shall not issue in case the defendants file a bond for \$10,000, with satisfactory sureties, within ten days from date hereof, to secure complainant in that amount for future damages upon final decree which may hereafter be awarded against them."

Stephen J. Cox, for appellants.

A. S. Pattison, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Upon the record presented it is not altogether clear that complainant was entitled, in advance of final hearing, to an injunction immediately stopping manufacture and sale of the devices complained of. The order below has not interfered with such manufacture and sale, but has only required defendant to give security to respond, in the event of complainant's ultimate success, for whatever interim damages may accrue. Such security has been given, and defendant's business remains undisturbed. We do not feel disposed to modify such order, nor to discuss the issues presented here on ex parte affidavits in an opinion which might constrain the judge to whom at final hearing the same issues may be differently presented.

The order of the Circuit Court is therefore affirmed, with costs.

¶ 1. Review of interlocutory decrees granting or continuing injunctions in patent cases in Circuit Court of Appeals, see notes to Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co., 3 C. C. A. 572; Southern Pac. Co. v. Earl, 27 C. C. A. 189; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 484.

See Patents, vol. 38, Cent. Dig. § 606.

L. E. WATERMAN CO. v. McCUTCHEON.

SAME v. FORSYTHE et al.

(Circuit Court of Appeals, Second Circuit. January 6, 1904.)

Nos. 6, 32.

1. PATENTS—INFRINGEMENT—FOUNTAIN PENS.

The Waterman patent, No. 293,545, for a fountain pen, having an ink duct provided with one or more longitudinal fissures formed in its walls for facilitating the passage of the ink through said duct, is not infringed by pens having a reed or strip within the duct to produce capillary action, in connection with the walls of the duct, it being shown that such pens were in use prior to the invention of the patent.

Appeals from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 121 Fed. 107.

These are appeals from decrees of the Circuit Court, Southern District of New York, dismissing bills of complaint for alleged infringements of United States patent No. 293,545, February 12, 1884, to L. E. Waterman for a fountain pen. The court construed the claims of the patent closely, and held that the devices complained of did not infringe.

Walter S. Logan, for appellant.

O. R. Mitchell, for respondent McCutcheon.

W. B. Whitney, for respondent Forsythe.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. It is unnecessary to write an opinion, since we concur substantially with the reasoning and conclusions of the judge who heard the cause in the Circuit Court. We are inclined, however, to rest the conclusion that the patented device must be construed so closely as not to include defendants' pens upon the pens, R, R, etc., whose prior use was abundantly proved, rather than upon the patents under which those pens were made. The literature of the art shows ink ducts in which are inserted separable reeds or strips in such manner that between them and the walls of the duct there are longitudinal spaces small enough to permit of the capillary action which the complainant's "fissures" provided for. In the prior patents, however, these reeds or strips are prolonged for the entire length of the ink duct, and the tip brought into contact with the pen. Each reed or strip thus performs two functions—it co-operates with the side walls of the duct to produce capillary action, and, being vibrated in the act of writing, it conveys an agitating motion to the ink. In the prior pens, R, R, etc., however, the tip contacting with the pen is eliminated, and the vibrator or agitator method of assisting the ink duct is abandoned, and the only function left for the reed or strip is the co-operation to produce capillary action.

In view of the proof that such pens were in actual use before Waterman's improvement was made, we concur in the opinion, and affirm the decrees below, with costs.

BURDON WIRE & SUPPLY CO. v. WILLIAMS.

UNITED WIRE & SUPPLY CO. v. SAME.

(Circuit Court, D. Massachusetts. March 1, 1904.)

Nos. 1,188, 1,589.

1. PATENTS—VALIDITY AND INFRINGEMENT—JEWELERS' PLATED WIRE.

The Burdon patent, No. 381,527, for a process of manufacturing compound ingots for seamless plated wire, for use in the jeweler's art, by placing a base metal core within a seamless shell of gold, leaving an annular space between them into which is forced a tubular sleeve of solder, the whole being then heated until the solder is fused, uniting the core and shell with a uniform thickness of the same, was not anticipated, and is valid. Such patent is infringed by the use of a process which is substantially the same in principle, mode of operation, and the effect produced, the only difference being in the manner in which the three parts of the product are assembled, as by inserting the sleeve of solder into the shell and driving the core in afterward, which is merely a variance in the mode of using the same process, and one which is described as such in the specification of the patent.

2. SAME—ABANDONMENT.

The question whether a patentee has abandoned any part of what he has described in his patent is largely one of intention, and the fact that while the specification of a process patent describes two or three ways of performing one of the steps of the process which are equivalent but one is mentioned in the claims does not constitute an abandonment of those not so mentioned.

3. SAME—UTILITY—EVIDENCE.

Upon the question of the utility of a patented device or process, the fact that it was the first to achieve practical and commercial success is of weight.

4. SAME—INFRINGEMENT—PROCESS.

Infringement of a process patent is not avoided by reversing one of the mechanical steps of the process, where the purpose and result of the step is the same, as by expanding an inner tube, instead of compressing an outer one, for the purpose of bringing the two into close contact.

5. SAME—PROCESS FOR MAKING PLATED WIRE.

The Meyer patent, No. 445,814, for an improvement in the process of the Burdon patent, No. 381,527, for manufacturing ingots for seamless plated wire, construed, and held infringed.

In Equity.

Wilmarth H. Thurston, for complainants.

Horatio E. Bellows, for defendant.

HALE, District Judge. This is a bill in equity to restrain the infringement of letters patent No. 381,527, dated April 24, 1888, to Levi L. Burdon, and letters patent No. 445,814, dated February 3, 1891, to George U. Meyer. The original suit was brought by the Burdon Wire & Supply Company, the assignee of the patents in suit. The patents were afterwards assigned to the United Wire & Supply Company, and a supplemental bill was brought by that company asking to be substituted for the Burdon Wire & Supply Com-

¶ 3. Utility, extent of use, and commercial success as evidence of invention, see note to *Doig v. Morgan Mach. Co.*, 59 C. C. A. 620.

pany as complainant in the case. The action of record may be taken in the case of the supplemental bill, as this bill shows the present parties to the controversy. The two patents are alleged in the bill to be capable of conjoint use, the Meyer patent being alleged to be a step supplemental or additional to the method which forms the subject of the Burdon patent.

The court will first direct its attention to the Burdon patent, No. 381,527. The invention in this patent relates to the manufacture of compound ingots for seamless plated wire for use in the jeweler's art. The first duty of the court is to inquire into the state of public knowledge at the time in reference to the art. In the former manufacture of plated wire, a flat sheet of gold was plated upon a flat block of base metal; the ingot so formed was rolled down to a convenient thickness; the flat product thus obtained was cut into strips about an inch wide; each of these plated strips was then drawn up into a tube, bringing the two longitudinal edges together. This plated tube was subsequently drawn down into plated wire. This plated tube necessarily had a longitudinal seam where the two edges came together, and this seam, as the case shows, was necessarily present in the plated wire which was drawn out from the plated tube. To prepare this seamed wire for use in the art, the seam was sometimes soldered up with silver solder, and sometimes was left without solder. The record discloses the objections which appear to the use of this seamed wire, either in its soldered or in its unsoldered form. In either case the seam was unsightly, and injured the appearance of the chains and other articles made from the wire. Devices had to be employed to conceal the seam whenever possible. All wire made in this way was necessarily hollow. The complainant claims that the patentee was the first to produce seamless plated wire having a base metal interior, and an exterior of gold or other precious metal without seam, a wire which for all practical purposes in commerce is claimed to be as good as a solid gold wire, and has had so constant an increase in its use that it has completely supplanted the old seamed wire. This wire is made from the compound ingot manufactured by the process which forms the subject of the patent. The patent relates only to the formation of a cylindrical ingot by employing a seamless tube or shell of precious metal with a solid cylinder of base metal within the seamless shell, the wire drawn from these ingots being without any longitudinal seam. In making the cylindrical ingot, it was found absolutely necessary that the two parts composing the ingot, namely, the seamless shell and the cylindrical core, should be soldered firmly together. It was found also to be necessary that the shell and core should be united with a thin film of solder extending uniformly throughout the entire adjacent surfaces of the shell and the core. If the film of solder were not uniformly thin, the subsequent reducing and drawing-out process would form blisters, or produce a tearing away of the shell from the core. And so the proper soldering together of the shell and core became an important problem in the art. The complainant claims that the patentee addressed himself to this problem for years; that in his 1884 patent, No. 294,722, he invented the method

of inserting a base metal core within a seamless gold shell, the shell extending beyond the core to form a chamber. In this chamber he placed loose solder, and then subjected the ingot to heat, and so fused the solder and caused it to run down into an annular space between the core and the shell. The complainant claims that the patentee did not by this method obtain a perfectly soldered ingot, for the reason that the solder would not, in running down, distribute itself with uniform thickness throughout the adjacent surfaces of the shell and core. The patentee's next invention is found in his 1885 patent, No. 327,655; in which his method consists in covering the surface of the cylindrical base metal core with solder filings, and fusing it upon the core, then turning this solder-covered core in a lathe to remove the surplus solder and make a uniform surface, then inserting this solder-covered core within the gold shell, and subjecting the whole to heat, to fuse the solder and unite the shell and core. The complainant says that neither of these methods proved successful in producing an ingot having a core and shell properly united, or in making a seamless plated wire for commercial use. His next invention was embodied in the patent in suit.

In order to find the thought in the mind of the inventor and get the exact scope of his invention, let us examine the specification. He sets out by saying that, in the manufacture of jewelry or other articles in which plated stock is employed, the quality of the goods produced, especially when plated wire is used, depends in a great degree on the care exercised by the workmen in concealing as far as possible the longitudinal seam, which had generally been considered unavoidable in the making of plated wire. He then proceeds:

"The object of my present invention is to produce a soldered compound ingot adapted to be drawn down into seamless wire, the latter being free from 'blisters' and other imperfections as developed in wire produced from ingots as heretofore usually made. To this end I preferably take a core of base metal of suitable dimensions and wrap a thin layer or unbroken sheet of solder around it. I next place the same within and snugly fitting a seamless tube or shell of fine metal, adding at one end of the ingot, if desired, a chamber in which to place loose solder. The whole is then submitted to the action of heat to fuse the solder, thereby producing a compound ingot in which the core and seamless shell are united by an unbroken film of solder, as will be hereinafter set forth and claimed."

In the description of his drawings and of his ways of assembling the three parts, namely, the seamless shell, the sleeve of solder, and the cylindrical core, he says:

"The interior surface of the gold shell is * * * covered with borax, and the core then placed centrally therein, thereby forming an annular space between the adjacent surfaces. * * * A shell or tube of solder is then forcibly inserted into the annular space to the lower end of the core, and the whole then subjected to the action of heat exceeding the fusing point of the solder.

"Practically I obtain the best result by vertically suspending the ingot and revolving or twisting it around while in the furnace, thereby uniformly heating its surface. After the ingot is removed from the furnace it is found that the contiguous surfaces of the shell and core are united throughout their length by a uniform thickness or film of solder. Solder loosely placed in the chamber serves to insure the filling of the annular space therewith as the fusing progresses.

"In lieu of forcing the tube of solder into position, as before described, it may be first inserted within the gold shell, and the core then placed in position therein, and forced some under a light pressure, without departing from the spirit of the invention."

It will thus be seen that his specification describes three ways of assembling the three parts: First, by wrapping the sheet of solder around the core, whereby it is bent into a sleeve surrounding the core, and then inserting the core and the sleeve of solder together into the seamless shell; second, by placing the core centrally within the seamless shell, and then forcibly driving the sleeve of solder into the annular space between the shell and core; third, inserting the sleeve of solder inside the seamless shell, and then inserting the core within the sleeve of solder and driving it in.

The two claims are as follows:

"(1) The improved method herein described of making compound ingots, the same consisting, first, in preparing the surfaces of the base metal core and the seamless gold shell to unite with solder; next, introducing the core within said shell, thereby forming an annular space between them; then inserting a sleeve of solder into said annular space; and, finally, subjecting the whole to a high temperature, which fuses the solder and unites the core and shell with a uniform thickness of the same.

"(2) The improved method of making compound ingots, which consists in inserting a cylindrical base metal core having a slightly reduced diameter within the outer or gold shell, the surfaces thereof having been previously prepared to be united by solder, and having a chamber formed at the upper end; then inserting a thin sleeve of silver or other suitable solder between the core and shell and placing loose solder in said chamber; and, finally, placing the whole within a suitably prepared and heated furnace, thereby fusing the solder and uniting the core and outer shell with a uniform thickness of the same, the ingot, after withdrawal from the furnace, being adapted to be rolled and drawn down to produce seamless filled plated wire."

On examination of the proceedings in the Patent Office relating to the granting of this patent, it will be found that, in addition to the two claims now in the patent prescribing a method of making the ingots, there was a third claim for the product produced from the ingot, namely, for the wire resulting from the new method, describing this wire as a new article of manufacture. The Patent Office required a division of the application between the method and the article claimed, taking the ground that the article did not appear to differ from that shown in prior patents. The applicant accordingly eliminated the third claim of his patent, leaving the two claims now in the patent, striking out the parts of the specification describing the product, and inserting the first paragraph which we have quoted with reference to the object of the invention, a way of assembling the parts, and a description of the chamber, and the fusing process. Thus, by following historically the progress of the patent through the Patent Office, we see the reason why the patentee describes in his claims the method of assembling the parts which he has mentioned second in his specification, namely, that, when he drew the claim, this method of assembling the parts, by introducing the core within the shell, thereby forming an annular space between them, and then inserting a sleeve of solder into the annular space, was the first method which he had mentioned in his specification—the method

which now appears first found its way into the patent in its progress through the Patent Office, as we have above described.

The defenses set up are that the patent is invalid, and that it is not infringed. The defendant cites as anticipatory an old English patent to Richard & Radisson of 1864. The material part of this patent is as follows:

"We cast silver or gold into an ingot, which we pierce through the center of its length with a hole, into which we run rose or refined copper or other suitable metal. Afterwards, when the solidification is complete, this compound ingot is rolled or drawn down until it is reduced to the dimensions required for the wire to be produced, the wire being subjected to the annealing and other operations of wire drawing. The copper in the interior of the ingot is drawn down, together with the exterior metal, the two metals forming but one and the same body. The interior metal may be introduced into the ingot in any other suitable manner, as, for example, by electrotype processes, or by introducing mechanically, or by the aid of solder, a metallic core into the ingot, or by casing silver or gold around an interior core. We do not limit ourselves to the use of copper for forming the core of the ingot, as other metals may be employed for this purpose."

It will be seen that the only reference to solder is in the phrase "or by the aid of solder," referring to the method of putting the base metal core into the ingot. This cannot be held to be anticipatory of the method patent which provides for the cylindrical tube, the base metal core, and the sleeve of solder, and the adjusting or assembling them together. This reference to the use of solder is too general and indefinite to infringe the patent in suit if it had come after, and, coming before, it cannot be held to have anticipated it. The patent at bar is a process patent. This old English patent cannot be held to disclose or even to suggest its process. In speaking of vague prophesies in certain English patents, Judge Shipman, in *Westinghouse Air-Brake Co. v. Railway Co.*, 88 Fed. 263, 31 C. C. A. 529, says:

"The prophetical suggestions in any patent of what can be done when no one has ever decided by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements."

The defendant further says, in citing the prior art, that Palmer & Capron were the first in the United States to make seamless gold-plated ingots; that they used the product in finger rings, and made merchantable goods, as early as 1878. When we examine their method, we find that it related only to making finger rings, and did not relate to the making of compound ingots for the manufacture of seamless plated wire. It cannot be found that solder was employed in any way in the process marked out by these patents. The Kaufmann patent is cited and relied upon by the defendant. Kaufmann, by his patent of 1882, describes a method of making seamless drawn or rolled plated wire by forming a disk-shaped blank of composition stock and gold plate or gold alone, drawing the same into the shape of a hollow cylinder with inferior metal, and finally drawing or rolling the cylindrical blank into the proper shape and thickness. He does not disclose any method of uniting the shell and

core together by solder or by any other means. He cannot be held to have anticipated the method of Burdon in the patent in suit.

We have already alluded to the Burdon 1884 patent and the Burdon 1885 patent. The characteristic feature of the 1884 patent was that the solder was placed in the chamber at the upper end of the ingot, with the intention that, when the ingot was fused, the loose solder in melting would flow down into the annular space between the shell and core, and would thus properly unite the parts. But it was found that under this method the solder did not flow down uniformly. It is ingeniously urged by the defense that a sleeve of solder is thus formed simultaneously with the fusing process, and that thus the three elements are combined as in the patent in suit. We do not think that this fusing of the loose solder into a sleeve can be held to take the place of the unbroken sheet of solder which forms one of the three essential parts of the invention of the patent in suit. In this 1884 patent there never existed the uniform, unbroken sleeve of solder which forms an essential part of the Burdon patent in suit. Nor does the 1885 patent show the sleeve of solder in any form. It is claimed by the complainant that it was by reason of the inadequacy of these patents of 1884 and 1885 to effect the desired result that the patentee was led to invent the process disclosed in the patent in suit; and the testimony upon this point is forcible and persuasive. It is urged by the defendant that the art of flat plating as shown in the Kaufmann patent and in other patents contains all the necessary elements of cylindrical plating, and may be urged as anticipatory. The case shows that nothing in the flat-plating art furnished any guide, precedent, or suggestion as to how cylindrical plating could be accomplished, or how seamless cylindrical compound ingots could be made. The artisans who were thoroughly acquainted with the state of the art at that time were interested to have seamless plated wire, but they were unable to produce such wire by means of anything derived from the flat-plating art. Even if a sheet of solder were used in the flat-plating art, the method of assembling the base metal, the sheet of solder, and the precious metal was merely by laying one upon the other and clamping them tightly together. This method furnished no helpful suggestion for the art of cylindrical plating. The problems presented in the two arts were entirely dissimilar. We cannot find that there is anything in the prior art which can be successfully taken as anticipatory of the patent in suit, or which can render it invalid.

Does the defendant infringe this patent? The defendant says he makes his ingot in the following way: A hollow, seamless gold tube is cast and swaged on a mandril; into this gold tube is inserted a sheet of compound solder. Then a base metal tube is placed inside the solder, within the gold tube, as a running or sliding fit, the parts having been previously fluxed. A plug is then drawn longitudinally through the inner or base metal tube, expanding the latter, and pressing the soldered sheet tightly against the gold or outer tube, the object of this expansion being to prevent blisters. The compound tube is then heated to fuse the intermediate solder, and finally reduced on a mandril to its proper size and thickness. This

completes the compound gold-plating shell. It will be seen that the defendant's method of assembling the parts is substantially the third method described in the specification of the patent in suit. The sheet of solder is placed inside the tube, and then the base metal is forced inside the solder. The defendant claims, as a matter of patent law, that the complainant must be held to the method of assembling the parts described in the claims of the patent. He insists that the patent describes three processes and three inventions, but that the claim uses only one of the processes and one invention, and hence that the other two processes are abandoned, and that the defendant has the right to use every one of those abandoned processes. We do not think so. The patent is a process patent, which is sufficiently defined to be a mode of treatment of materials to produce a given result. The thought of the inventor is to make an ingot by assembling the three parts—the core, the seamless shell, and the solder. The gist of the invention consists in using a sleeve of solder as one of the parts to be brought together, and in bringing the three parts into the proper relative position. Although the claim describes the method of bringing the three parts together by placing the core within the seamless shell and then forcibly putting the sleeve of solder into the annular space between the shell and the core, it does not show any intention of abandoning the other ways described in his specification of bringing the three parts together. The other two ways mentioned in the specification are clearly equivalents of the way mentioned in the claim. The three ways of bringing the parts together are not three inventions; if they could be held to be three distinct inventions, then the law with reference to abandonment might be properly urged; but they are three ways of accomplishing the purpose described in his process.

In the case of *Reece Buttonhole Mach. Co. v. The Globe Company*, 61 Fed. 958, 10 C. C. A. 194, Judge Putnam has with great clearness stated the doctrine of equivalents. The patent in the *Reece Case* was for a buttonhole sewing machine. In such a machine there must be a relative movement between the bedplate or work support and the stitching mechanism, in order that the stitching mechanism may follow the contour of the buttonhole. The claims of the patent were for a machine in which the stitching mechanism traveled with relation to the work support. The patent did not describe any other form of machine. In the defendant's machine the work support was made to travel with relation to the stitching mechanism. It was contended that the claims were limited in terms to a machine in which the stitching mechanism traveled, and that therefore the defendant's machine did not infringe. Judge Putnam decided in the Court of Appeals that the defendant's construction was the equivalent for that claimed in the patent, and that it therefore infringed it, under the doctrine of equivalents. In the *Reece Case* no other form of machine was shown, except a machine in which the stitching mechanism traveled with relation to the work support. But the court said that, though no other form of machine was mentioned, a form of machine in which the work support was made to travel with relation to the stitching mechanism was clearly an equivalent of the

construction described in the Reece patent. In a very recent case, *Electric Smelting & Aluminum Company v. Pittsburg Reduction Company* (C. C. A.) 125 Fed. 937, Judge Coxe says:

"Various other limitations upon the claims are urged by which the defendant seeks to avoid infringing. They are of the same general nature, and proceed upon the same initial fallacy, namely, that in a generic process patent every phenomenal observation during operation and every minute detail described must be read into the claims, and that the least departure from the claims as so construed avoids infringement. Neither position is tenable. In a patent like Bradley's the claims should be as broad as the invention, and, even if unnecessary and unreasonable limitations are incorporated in the claims, the court should interpret them liberally, and not permit the defendant to escape who reaches the same result by analogous means, though he may employ additional elements and improved mechanical appliances."

In *Boston & R. Electric St. Ry. Co. v. Bemis Car Box Company*, 80 Fed. 287, 25 C. C. A. 420, Judge Putnam has applied the principles of the Reece Case to a case involving a much more limited field for the doctrine of equivalents.

In *Lepper v. Randall*, 113 Fed. 629, 51 C. C. A. 338, the court, Judge Dallas, held that it was not necessary to decide whether the patent was a primary one, and said:

"For in no case is a patentee to be denied protection commensurate with the scope of his actual and distinctly described invention by wholly excluding him from the benefit of the doctrine of equivalents. That doctrine, therefore, should have been applied in this case, for it is plainly obvious that the departures made by the defendant from the patent in suit are merely formal, and of such character as to suggest that they were studied evasions of those described in the claim in issue."

In *Bundy Company v. Detroit Time-Register Company*, 94 Fed. 540, 36 C. C. A. 391, Judge Lurton, for the Court of Appeals, said:

"To be entitled to the benefit of the doctrine of equivalents, it is not essential that a patent shall be for a pioneer invention in the broad sense of that term. If his invention is one which marked a decided step in the art, and has proven of value to the public, he will be entitled to the benefit of the rule of equivalents, though not in so liberal a degree as if his invention was of a primary character."

The case at bar does not present so wide a field for the doctrine of equivalents as the Reece Case. The patent in suit, while within its scope presenting a primary invention, is not in so broad a field as the great patent involved in the Reece Case, but it clearly presents a field wherein the doctrine of equivalents may be fairly and fully invoked. In this patent the claim describes one way of assembling the parts, namely, by placing the core within the shell, forming an annular space between them, and then inserting the sleeve of solder into the annular space; but in the specification two other ways are mentioned for assembling the parts. It must be held that the two other ways mentioned in the specification are mere variances in the mode of using a single method or process, as was held in *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860. In the Reece Case a form of machine not mentioned in the specification was held to be an equivalent, but in the patent in suit the patentee should not be prevented from claiming an equivalent by the fact that he has mentioned it in the specification. He must be held not to have described

any other invention, but merely a variance in the use of the one process invention which he has described in his claim. It is not a case where the doctrine of abandonment can be successfully invoked. The question of whether a patentee has abandoned any part of what he has described in his patent is a question very largely of intention. Robinson on Patents, §§ 352, 353. There is nothing in the specification in the case at bar to indicate an intention on the part of the inventor to surrender to the public any part or element of his invention. Where an inventor has framed his claim to include some immaterial elements in his patent, and has not made a claim as broad as his real invention, he cannot hold as an infringement a process which omits such step without substituting an equivalent therefor; but the case at bar does not present an instance of this kind. If the patentee had described an invention in his specification, and then had not referred to it in his claim, he might be held to have abandoned it. But Burdon described three ways of performing one of the steps of his method, and these three ways, under the doctrine which we have invoked, are clearly equivalents one for the other. The defendant has used one of these ways; he has thus used an equivalent way in place of the way referred to in the claim. In *Tilghman v. Proctor*, 102 U. S. 730, 26 L. Ed. 279, the doctrine of equivalents is applied to a process patent. In that case the court say:

"The patentee showed one method in which the heat could be applied; that was all that was necessary for him to do. If it could be applied in any number of different methods, it would not affect the validity of that patent as a patent for a process."

The case at bar presents a distinct process patent. The different ways of bringing the three parts together are ways which work substantially to accomplish the same result; the variances are merely in matters of form, and do not belong to the substance of the process. It will be seen that the defendant performed the cylindrical plating process twice; he first soldered the seamless gold shell to a tube of base metal, thereby forming a gold-plated seamless shell; he then soldered the seamless gold-plated shell to the solid cylindrical core of base metal. The defendant urges that a tube of base metal is not a metal core, within the meaning of the claim of the patent in suit; but it appears to have been manipulated for the purposes of the core in the process; and the use of it in the way it is used by the defendant must be held to be an infringement, just as much as the other use which he makes of the core of base metal. It is suggested with much force that, so far from not having infringed at all, he has in his process infringed twice. It cannot be that the use of a "hollow brass core" is any different in principle from the use of a solid base metal core. It must be held in the case at bar, as in *Mowry v. Whitney*, *supra*, that the processes of the defendant and the complainant are substantially the same in principle, mode of operation, and in the effect produced.

The defendant further urges that the only utility in the patent in suit is in the chamber described in the second claim. We cannot come to this conclusion. The use of this chamber is clearly supplementary to

the use of the sleeve of solder as described in both claims. The use of the chamber alone had been found in the patentee's earlier patents to have been insufficient to reach the object which he was attempting to reach, namely, the uniform distribution of solder. He uses the sleeve of solder for this purpose, and uses the chamber as supplementary to this purpose.

As to the utility of the whole patent, the case shows that this is the first patent in the art which has achieved practical success and been put into extensive use; that other attempts had resulted in failure. In *Tannage Company v. Donallan* (C. C.) 93 Fed. 812, Judge Colt says:

"As a practical and commercial method * * * it has proved very successful, and may be said to have revolutionized this branch of the tanning art. * * * In the construction of a patent of this character and in harmony with what we believe to be the principle and purpose of the patent laws of the United States, the court is naturally inclined to sustain it, unless it clearly appears to be invalid under the law."

We refer to a case very recently decided—*Union Biscuit Company v. Peters* (C. C. A.) 125 Fed. 601. This case, just decided in the Eighth Circuit, puts with clearness the familiar principle of law that the utility of a device cannot prove that it is a patentable invention, but that it is of course entitled to weight when that question is doubtful. The court says:

"If a doubt arise, in the construction of a patented article or device, whether the inventive faculty has been exercised, the fact that the article in question has gone into general use, that there is a demand for it, and that it seems to possess great utility, is entitled to great weight."

In the case at bar, some weight should be given to the fact that this invention has proved to be of great utility; that the invention has achieved practical success and gone into general use. Applying the principles which we have discussed, we conclude that the patent must be held to be valid, and that it is shown to have been infringed by the defendant.

We now come to the examination of the second patent in suit, the Meyer patent, No. 445,814. This Meyer patent is claimed to be an improvement upon the Burdon patent in suit. For the purpose of properly uniting two pieces of metal with a thin film of solder extending evenly and uniformly over the adjacent surfaces of the pieces to be united, the parts must be brought into close relation, and the air must be excluded as thoroughly as possible, in order to prevent blisters or bubbles and other imperfections. The purpose of the Meyer patent is to provide a close fit between the parts. In the old flat-plating art this could be done by clamping the parts together; the problem was an entirely different one in the art of cylindrical plating. Meyer invented an effective way of tightening the parts in the cylindrical ingot by subjecting the ingot to the action of a draw-plate, or of rollers, prior to subjecting the ingot to heat to fuse the solder. This patent in suit is for a method involving the employment of this additional step in connection with the method of the Burdon patent. He says in his specification:

"In forming ingots for seamless plated wire a seamless tube or shell of precious metal, or a shell formed of inferior metal plated on the outside with

precious metal, is secured to the core by solder interposed between the core and the seamless tube or shell, and the tube or shell is united to the core by fusing the solder in a furnace. As the so-formed ingots have to be drawn or rolled out lengthwise into wire or plates, it is important to use as little solder in the ingot as possible, and also to interpose the solder uniformly of even thickness between the core and the shell.

"The object of my invention is to secure these results by the cheap and certain step in the process of firmly drawing or rolling the shell on to the solder-covered core, metal to metal, so that when the solder is fused the liquid solder cannot flow from one part of the ingot to another, and thus produce unequal distribution of the solder."

He states, further, that he forms around the core a sheet of solder, thereby forming the sleeve of solder of the Burdon patent; that, after this solder-covered core has been inserted into the seamless shell, he then draws said shell down firmly upon the solder by passing the combined core, solder, and shell through one or more holes in a draw-plate or between suitable rollers; and that, after the tube has been drawn down close to the core, he then subjects the so-prepared ingot to heat to melt the solder, and thus firmly secures every part of the interior surface of the shell to the core. His claim is as follows:

"The herein-described process of making ingots for seamless wire, the same consisting in bending and drawing around the prepared core a sheet of solder, inserting the solder-covered core into a prepared tube of plating metal, forcing the plating tube into close contact with the solder-covered core by contracting the diameter of the tube, and then subjecting the so-formed ingot to heat to melt the solder to unite the tube to the core, as described."

It must be seen that the patentee was dealing primarily with an ingot having a solid core, and that he found it convenient to use means, which would force the shell "down on to the core," and that he thus reduced or contracted the diameter of the shell. The gist of his invention appears to have been in the words of the claim, "forcing the plating tube into close contact with the solder-covered core." But the defendant says he does not infringe this patent, because in effecting this result he is dealing with a hollow core, and he adopts the plan of drawing a tapering plug through the inside of the hollow brass core or base metal tube, which enlarges the hole in the base metal tube, causing the same to press the solder very closely against the hollow tube, also enlarging it. The object, as his testimony shows, is the same as is the object of Meyer, namely, "to bring all the parts as closely together as possible." Where he does not use the hollow core, he uses a base metal solid core of larger diameter, and thus expands the shell. The means employed by the defendant are thus plainly a reversal of the process of Meyer. The defendant's position is that the claim refers to "bending and drawing around the prepared core a sheet of solder," and to "inserting the solder-covered core into a prepared tube of plating metal." The defendant urges that the claim is limited to that particular way of assembling the three parts composing the ingot; that the defendant does not employ that particular way of assembling the parts, but that he assembles them by first inserting the sleeve of solder into a seamless shell of plating metal, and then inserts the core into the solder-lined shell. He further insists that the Meyer claim does not cover a process for forcing the plating members into contact by a relative change in the diameter of the parts, but is limited to a contact at-

tained by forcing the plating tube upon the core "by contracting the diameter of the tube." The thought of the inventor in the Meyer patent, the characteristic step of that patent, is "forcing the plating tube into close contact with the solder-covered core." The Reece Case and other cases which we have discussed upon the question of equivalents are decisive of the principles of this case. We refer also to the case of *United States Peg Wood S. & L. B. Company v. Sturtevant Company* (C. C. A.) 125 Fed. 382, in which this court, in referring to the Reece Case, alludes to the fact that the defendant, by reversing a described arrangement, cannot evade the spirit of the specification and claims. In *Dowagiac Mfg. Company v. Minnesota Moline Company*, 118 Fed. 141, 55 C. C. A. 91, the court said:

"By changing the form of complainant's combination, and not essentially varying the principle or mode of operation pervading the original invention, defendants cannot escape infringement."

In the case at bar, the method which the defendant has used presents an equivalent of the method of the patent in suit, although it shows a reversal of one of its processes.

The defendant says, further, that the Meyer patent has been anticipated. He cites first the Smith patent, No. 427,924. The method of this Smith patent involves the use of a tapered shell and a tapered core, resulting in the production of a tapered ingot. The purpose of the Meyer patent is, as we have described, to force the plating tube into close contact with the solder-covered core. The purpose of the Smith patent was, by the shape of his core and shell, to squeeze out the surplus solder during the fusing operation. The purpose of the Smith patent being different from the purpose of the Meyer patent, we cannot hold that the Smith patent anticipates the Meyer patent. The Meyer patent of 1890 is urged also as an anticipation. This patent does not relate to a method of making seamless plated wire or ingots, but to a method of making seamed plated wire and seamed ingots; it is in the flat-plating art, and has no relation to the art of cylindrical plating. We have already held, in discussing the Burdon patent, that the art of cylindrical plating is a different art from that of flat plating. The problem presented to the mind of the inventor of bringing the three parts together in flat plating is a distinctly different problem from that relating to bringing these parts together in cylindrical plating. There is no disclosure in the flat-plating art of the method of this Meyer patent which involves the employment of an outer seamless shell, an inner cylindrical core, with interposed solder, and the forcing of these parts in a close contact, as the result of which operation the parts will remain in close contact during the fusing. We must hold that the Meyer patent in suit is valid, and that it has been infringed by the defendant.

The decree in respect to both patents in suit must be for an injunction and for an accounting.

WESTON ELECTRICAL INSTRUMENT CO. v. JEWELL et al.

(Circuit Court, S. D. New York. March 2, 1904.)

1. PATENTS—INFRINGEMENT—ELECTRICAL MEASURING INSTRUMENT.

The Weston patent, No. 392,387, for an electrical measuring apparatus, was not anticipated, and shows patentable invention; also *held infringed*.

In Equity.

William Houston Kenyon, for plaintiff.

De Witt C. Tanner, for defendants.

WHEELER, District Judge. This suit is brought for an alleged infringement of patent No. 392,387, dated November 6, 1888, and granted to Edward Weston, for an electrical measuring apparatus. The defenses are anticipation, lack of patentable novelty, and non-infringement.

It seems to be a principle of electrical and magnetic philosophy that a direct current of electricity passing through a movable coil situated in a magnetic field will move the coil against steady less resistance in the field in proportion in distance to the strength of the current. The measurements will remain the same while the magnetic field remains permanent. By arranging such a coil in such a field so as to be moved by the passing of such a current through it, with a pointer attached to the coil, and moving over a proper scale of units of force, the strength of the current may be measured.

In this invention a magnetic field is provided by an elliptical magnet, with concave magnetic pole-pieces forming a large part of a circle, in which is independently placed a soft-iron core centered with the circle of the pole-pieces so as to leave a uniformly narrow space between the concave surfaces of the pole-pieces and the core, and which is spanned above and below by brass bridge pieces making the magnetic field permanent, and in which a coil wound around a frame of diamagnetic metal pivoted on arms on the bridge pieces, with springs connecting the ends of the coil with the binding posts, so that an electric current will pass from one binding post of the instrument through one spring and the coil and the other spring to the other binding post of the instrument, and move the coil in proportion to the strength of the current. A pointer is attached to the frame on which the coil is wound, and is poised upon the bridge pieces at the center of the arc of the magnetic field, and is moved over a scale graduated to the proper units by a current through the coil, and shows the extent of the movement of the coil produced by the current passing through it, and thereby measures and indicates the strength of the current. The diamagnetic metal upon which the coil is wound operates as a damper to stop vibration and steady the movement of the pointer to its place on the scale. The parts are so adjusted in relation to each other as to operate in any position, like a watch; and the whole may be, and in use is, placed in a case of such size as to be carried about and used by any one mechanically skilled in electrical and magnetic devices.

There are 20 claims, of which the 3d, 4th, 7th, 8th, 12th, 13th, 14th, 15th, 17th, and 18th are alleged to have been infringed, in which the operation of a permanent magnet and an electrical coil, movably supported in the field of the magnet with diamagnetic metal connected to and inclosed by the coil to steady the motion of the coil, are in various forms and combinations with other parts described and set forth.

There are set out and relied upon as anticipations the Thompson graded galvanometer; the Thompson balance; the Siemens electro-dynamometer; the Siemens pivoted needle instrument; the Ayrton and Perry pivoted needle instrument; the Ayrton and Perry magnifying spring instrument; the Deprez-d'Arsonval mirror galvanometer; the Deprez-Carpentier pivoted needle instrument; the inventor's patent, No. 334,145, dated January 12, 1886, for a volt indicator; the Cardew hot wire volt meter; and a Colby tangent galvanometer.

The patentee did not discover that a coil in a magnetic field would be moved by a current through it against lesser uniform resistance through distance in proportion to the strength of the current, nor that this proportion would remain constant while the field should be kept permanent, nor that the movement of the coil would be steadied to place by diamagnetic metal within it. What he did invent was the arrangement of proper devices in an instrument for producing, measuring, and indicating such a movement of the coil. His invention would not be anticipated by the use of any or all of these principles in some other mode or modes, but only by using them in his mode. Neither will the use of each and every part of all his devices in some one or more descriptions or structures before amount to such anticipation as to defeat the patent, unless substantially his arrangement is found in some one of them operating in the same way to produce substantially the same results.

Of all the alleged anticipations relied upon, the one that seems nearest to this invention is the inventor's own prior patent, No. 334,145. The other instruments and descriptions severally contain and set forth parts of the devices of the patented invention combined in more or less different ways for the general purpose of this patented instrument; but in no one of them is there set forth a coil wound upon such a frame mounted on pivots with counter acting springs carrying the current in such an arc-shaped magnetic field, nor the combinations of any of the parts of the patent in suit to as great an extent as that patent. If that patent does not anticipate this invention, it seems clear that none nor all of the others will. That patent shows a field of a magnetic system differently formed, in which a coil of wire wound about diamagnetic metal is suspended in torsional springs, and made to move in the field by an electric current through the coil against the force of the springs, and to indicate the movement by a pointer on a scale. In an instrument of that patent may be found a coil moving in a permanent magnetic field protected in the same way; but the high torsional suspending wires for the coil prevent making the instrument compact, or capable of operation, except in a level position, and it was

not a practicable electric measuring instrument for use in many places where such instruments are desired, and where that of this patent can be used.

It does not seem necessary to more particularly notice the construction or operation of the other preceding devices or descriptions relied upon. The patent in suit seems to be an improvement over the prior patent by mounting the coil on pivots in an arc-shaped magnetic field between the pole-pieces of a horse-shoe magnet and a soft-iron core, instead of suspending the core upon the torsional wires in the magnetic field of the other patent.

That this new arrangement of the coil upon pivots in this form of magnetic field, which would be by the arrangement of the bridge pieces permanent, was a great improvement on all or any prior electric measuring instruments, is very plain and obvious from an observation of the things which had gone before. It involved invention of high order, and resulted in great success. Neither the anticipations relied upon, nor the alleged want of patentable novelty, seems to defeat or affect the validity of the patent for this improvement.

The patent, therefore, seems to be valid as to all the claims in which that improvement is set forth in the various combinations specified in each. The defendants' instrument seems to have that combination, and by its use to infringe the patent through those claims. The contest is principally as to the validity of the patent, and the plaintiff appears to be entitled to a decree for this infringement.

Decree for the plaintiff.

EISELE v. ODDIE et al.

(Circuit Court, D. Nevada. March 21, 1904.)

No. 733.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—RESIDENCE—DOMICILE—PRIMA FACIE EVIDENCE.

Where plaintiff brought suit in a federal court sitting in Nevada against citizens of such state, the fact that plaintiff was living in Nevada at the time the suit was brought, while prima facie evidence that he was a citizen of that state, was not conclusive of such fact.

2. SAME—BURDEN OF PROOF.

Where, in an action in the federal court, jurisdiction was based on diverse citizenship, and defendant claimed that plaintiff had changed his domicile from another state to the state where the action was brought, the burden of proving such change was on defendant.

3. SAME.

To effect a change of domicile there must be residence in the new location, with an intention to remain there.

4. SAME—EVIDENCE.

Where plaintiff brought suit in a federal court sitting in Nevada against citizens of that state, and alleged that he was a resident of California, and

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

¶ 2. See Courts, vol. 13, Cent. Dig. §§ 885, 886.

testified that he had left California and gone to Nevada for his health, but intended to return, and considered California as his home, such testimony was sufficient to establish diverse citizenship, in the absence of proof to the contrary.

5. TORTS—PLEADING—DAMAGES.

In an action for tort, damages for injuries which do not necessarily result from defendant's wrongful act, but flow therefrom as a natural and proximate consequence, cannot be recovered unless specially pleaded.

6. SAME—BREACH OF THE PEACE—POSSESSION AND DESTRUCTION OF PROPERTY—MOB VIOLENCE—ACTIONS.

Where plaintiff was deprived of the possession of a lot and his tent and personal property thereon by acts and appearances of defendants tending to inspire plaintiff with a just apprehension of violence and intimidation, and calculated to cause a breach of the peace, plaintiff was entitled to recover such damages as he sustained therefrom in an action on the case.

7. SAME—ABANDONMENT OF PROPERTY.

Where plaintiff was compelled by force to sign an agreement renouncing all right to a certain lot on which he had lived in a tent for a period of six months, and bound himself to vacate the same within ten days, and he thereafter slept in a dug-out constructed in another place for two nights, during which time his effects still remained in the tent, to which he was returning, when defendants destroyed the same, plaintiff's acts did not constitute an abandonment of the lot on which the tent was located.

8. SAME—AMOUNT IN CONTROVERSY.

The amount or value in controversy stated in plaintiff's complaint is the sole test of federal jurisdiction, so far as concerns courts of the first instance.

9. SAME—DAMAGES—DUTY TO LESSEN.

Where defendants wrongfully and by force ejected plaintiff from certain land on which he was living in a tent, destroyed and burned the tent, carried certain of his goods to a poor person, to be used as fuel, and scattered the remainder on the ground, plaintiff owed defendants no duty to gather such fragments, but was at liberty to leave them and recover such damages as he sustained by their loss.

Action to Recover Damages for Wrongful and Unlawful Acts and Injuries.

The amended complaint avers: That plaintiff is a citizen of California, having his domicile in Inyo county, in that state. That defendants are citizens and residents of the state of Nevada. That the matter in controversy in this action, exclusive of interest and costs, exceeds in value the sum of \$2,000. That on the 20th of January, 1902, at Tonopah, Nye county, this plaintiff was in the actual and peaceable possession of lot No. 11 in block D, a certain tent and other improvements upon said lot, together with certain household furniture, bed and bedding, \$135 in the currency of the United States, a large amount of clothing, books, certain valuable papers, family photographs, canvas, and other personal property. That while he was so the owner and in possession of said property the defendants, "with a multitude of people, riotously, with violence and strong hand, and by force of arms, wrongfully and unlawfully entered thereon, and assaulted plaintiff, and in a rude, angry, and threatening manner forcibly ejected plaintiff, and put him out of said land and tenements, and threatened to expel plaintiff from the town of Tonopah," to the damage of plaintiff in the sum of four thousand dollars. And for a separate and distinct cause of action alleges: That defendants, in the manner stated in the first count, unlawfully entered on said lot, and appropriated

¶ 8. Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

to their own use and carried away and destroyed 10 bills of the currency of the United States of the value of \$135; one tent, \$45; and then enumerates divers small articles such as stools, chair, table, bedstead, clothing in a sack, books, reading matter, etc.; "a Bible, \$200; family photographs, \$200; gold spectacles presented plaintiff by his mother, \$100; confectionary receipts, \$20; papers of plaintiff's home estate, \$30; valuable private letters, \$100; valuable documentary papers, \$150—the entire value of said personal property being \$991; and that said Bible, family photographs, gold spectacles, confectionary receipts, papers of home estate, private letters, and documentary papers have no special value except to plaintiff, and plaintiff has thereby been damaged in the sum of nine hundred and ninety-one dollars"; and demands judgment against said defendants and each of them: "(1) For the sum of four thousand dollars damages under the first cause of action stated; (2) for the sum of nine hundred and ninety-one dollars damages under the second cause of action stated."

The defendants, in their amended answer, virtually deny each and every allegation in the complaint. They deny that at the time of the alleged entry plaintiff was in possession of the premises, or any part thereof, or that any articles of personal property, except the tent, were on said premises; deny that they or any of them, with a multitude of people or otherwise, except defendants Booth and Butler, entered said premises at all; and allege that one Mrs. McGregor was at said time the owner, and one Clay Peters the lessee, of said premises, and said Clay Peters was in the actual possession thereof; that defendants Booth and Butler entered said premises upon and by authority of said owner and lessee.

The testimony on behalf of the plaintiff tended to establish the allegations of the complaint, except as to his ownership of the property. A wide latitude was allowed both parties in the introduction of testimony. The record shows, among other things, that the plaintiff went upon the lot and moved into the tent June 15, 1901, and continuously remained in the possession thereof until the acts hereinafter stated occurred. About the 20th of December, 1901, Clay Peters, Dr. Hudgens, and others notified him that a committee had been organized to remove him from the premises, and informed him that he had better get off the lot. On January 7, 1902, plaintiff signed a paper, which reads as follows: "Know all men by these presents, that I, Chris Eisele, hereby renounce all claim, right, or title of any kind or nature to the ground upon which the tent in which I am now living is situated in Tonopah, Nev., and I hereby agree and bind myself to vacate said ground within ten days from the date of this instrument. Dated this 7th day of January, 1902. C. C. Eisele. Witness: A. L. Hudgens." He did not leave at the time stated. He gave the reasons why he did not leave, and said, "I did agree to go when a man put a shotgun under my nose." About January 17th he had a talk with the defendant Oddie, and told him he would leave the ground, as he had heard that the committee was going to pull his tent down. On the 18th he moved some wood and provisions, stove, blankets, and some clothing. On the 18th he was fixing up a dug-out to go into. He slept at the dug-out on the 18th and 19th. He further testifies that all the things mentioned in his complaint were on the lot January 20th; that the defendant Booth broke open the door of his tent and entered it. He remonstrated. forcible and threatening words were used by some of the defendants. Plaintiff went away, got his dinner, returned, and "saw from the looks of things they were going to destroy the tent." He remonstrated, and said the tent could be removed without breaking it. The defendant Booth had a shotgun, and informed plaintiff that he had better get away, or it would be worse for him. Plaintiff called on Oddie to "stop this," and his request was met by laughter. There were a number of people present. The defendants put a rope around the tent, attached it to a wagon, dragged it a short distance, when it collapsed, "and the tent and its contents spilled out," and were set on fire and burned up. Then the defendants "came back with the wagon, and put the balance of the stuff laying on the ground in the wagon." Plaintiff begged the driver to haul the things to the "dug-out." Some of the defendants said they would take care of that, and one of them said to plaintiff, "Now you get out of town within four hours." What was hauled away in the wagon was given to a widow lady for fuel.

The testimony of the defendants tended to support the allegations of the defendants' answer, except as to the alleged possession of the premises by Clay Peters. Other testimony is referred to in the opinion.

See 120 Fed. 995.

N. Soderberg and A. Chartz, for plaintiff.

Campbell, Metson & Campbell and Kenneth M. Jackson, for defendants.

HAWLEY, District Judge (orally). It is claimed by defendants that plaintiff cannot maintain this action. 'This contention is based solely upon the ground that the testimony offered on behalf of plaintiff is wholly insufficient to sustain the action. The specific grounds of this contention are: (1) That diverse citizenship has not been established; (2) that the action cannot be sustained as an action of forcible entry; (3) that it cannot be sustained as an action in trespass quare clausum fregit. In connection with these points it is argued that the plaintiff's own evidence shows "that he had abandoned his possession" of the lot and tent.

1. Upon the trial plaintiff testified that he was a gardener by occupation, and had resided in Inyo county, Cal., for about 29 years; that in June, 1901, he left Inyo county, and went to Tonopah, as much for his health as for any other purpose, as the doctors advised him that it would be good to get out in the hills. "Q. At the time you left Inyo county, what intention did you have about returning? A. I intended to return. That is the only place I would live—in the state of California—and I have always said so. Q. Have you ever had, during the last twenty-nine years, any residence except Inyo county, California? A. No, sir; only during the short time I have been in Tonopah, and been delayed here. Q. Your home during all those years has been in Inyo county? A. Yes, sir. Q. And it is there now? A. Yes, sir; that is my residence, my home." The cross-examination did not bring out any fact in opposition to his testimony in chief. In June, 1901, the plaintiff was an actual, bona fide resident and citizen of Inyo county, Cal. According to his sworn testimony, he did not abandon his residence there. He left to go to Tonopah, Nev., with intent to return to Inyo county, Cal. The mere fact that he sold his gardening tools before leaving Inyo county does not, of itself, prove that he left without intent to return. The circumstance that he took most of his clothing with him is of little significance one way or another. The fact that plaintiff was a laborer with but little means, and owned no dwelling or land, and was without any family, is a matter proper to take into consideration, with other matters, as to his intention, but does not, of itself, justify the court in declaring that it was not his intention to return in the face of his positive evidence upon this point. Citizenship, not the place of residence, is the test of jurisdiction. The fact that plaintiff was living in Nevada at the time this suit was brought was prima facie evidence of his citizenship here, but it is not conclusive. A person may be a citizen of one state or country and reside for the time being in another. *McDonald v. Salem Flour-Mills Co.* (C. C.) 31 Fed. 577; *Collins v. City of Ashland* (D. C.) 112 Fed. 175, 178, and authorities there cited. In *Chiato*

vich v. Hanchett (C. C.) 78 Fed. 193, this court held that "a defendant who is a citizen and resident of another state than that of the plaintiff is entitled, under the act of 1887-88 [Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508)], to remove to the federal court a suit brought against him in the state court, although at the time the suit was commenced and the petition for removal filed he was temporarily residing in the state where suit was brought." The place where a person lives is taken to be his domicile until facts adduced establish the contrary. *Anderson v. Watts*, 138 U. S. 694, 706, 11 Sup. Ct. 449, 34 L. Ed. 1078; *Tracy v. Tracy*, 62 N. J. Eq. 807, 810, 48 Atl. 533. The question of a change of domicile is mostly one of intention of the party, as to which his declarations must control, unless overthrown by acts inconsistent with them. Where a change of domicile is alleged, the burden of proving it rests upon the party making the allegation. To effect a change of domicile, there must be residence in the new locality, and intention to remain there. *Mitchell v. United States*, 21 Wall. 350, 353, 22 L. Ed. 584; *Desmare v. United States*, 93 U. S. 605, 609, 23 L. Ed. 959; *Marks v. Marks* (C. C.) 75 Fed. 321, 324; *Succession of Simmons* (La.) 34 South. 101, and authorities there cited.

In *Chambers v. Prince* (C. C.) 75 Fed. 176, the court said:

"A party may be a resident of a place, and yet not domiciled there; for, while he is resident there, still if he does not intend to make that his permanent place of abode, but has always the 'animo revertendi,' there can be no doubt that the mere fact of his residing for the time being in a place does not establish a domicile at the place of residence. A man always retains his domicile if he leaves it 'animo revertendi.'"

In the present case some portions of the testimony, if left to a mere inference, might seem unreasonable, but there are no facts stated that are inconsistent with the sworn statement of the plaintiff that it was his intention to return to California.

In *Sharon v. Hill* (C. C.) 26 Fed. 337, 342, the court discussed the question herein involved at some length. Among other things, it said:

"'Citizenship' and 'residence,' as has often been declared by the courts, are not convertible terms. *Parker v. Overman*, 18 How. 141 [15 L. Ed. 318]; *Robertson v. Cease*, 97 U. S. 648 [24 L. Ed. 1057]; *Grace v. American Cent. Ins. Co.*, 109 U. S. 283 [8 Sup. Ct. 207, 27 L. Ed. 932]; *Prentiss v. Barton*, 1 Brock. 389 [Fed. Cas. No. 11,384]. (Numerous other cases might be cited upon this point.) Citizenship is a status or condition, and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become such citizen by mere residence. The residence and the intent must coexist and correspond; and though, under ordinary circumstances, the former may be sufficient evidence of the latter, it is not conclusive, and the contrary may always be shown; and when the question of citizenship turns on the intention with which a person has resided in a particular state, his own testimony, under ordinary circumstances, is entitled to great weight on the point."

In that case it was admitted that the plaintiff had resided in California for a great number of years, but he testified "that he never intended to become a citizen of California, or cease to be a citizen of Nevada." In commenting upon the whole testimony, the court said:

"The evidence only proves that the plaintiff was generally an inhabitant of this city (San Francisco) for a few years before the commencement of this

suit. But when we consider that the plaintiff swears positively that he never intended to become a citizen of this state, and that no act of his while here is inconsistent with such purpose, * * * the mere fact of the plaintiff's bodily presence here for one or ten years, under the circumstances, is of very little moment in determining his citizenship."

The testimony given by the plaintiff is, in my opinion, sufficient to show a diversity of citizenship between the parties.

2. Can this action be sustained upon the testimony given by the plaintiff? This question is not, as claimed by defendants, whether it can be sustained as an action of forcible entry and unlawful detainer, or for trespass quare clausum fregit. There were doubtless several remedies afforded plaintiff by the law of which he might have availed himself. He could have brought an action of forcible entry and unlawful detainer, and prayed for restitution. Cutting's Comp. Laws Nev. §§ 3822, 3823. Forcible entry and unlawful detainer is an indictable offense as a misdemeanor in every state in which common-law crimes are recognized, and also in states where by statute it is made a criminal offense. 9 Ency. Pl. & Pr. 25, 45; Ex parte Webb, 24 Nev. 238, 241, 51 Pac. 1027. The testimony in such cases would, of course, have to be applicable to the relief sought. But the answer to defendants' contention that the action cannot be maintained because the complaint did not demand restitution of the property, which is the main remedy of an action of forcible entry and unlawful detainer, the recovery of damages being merely incidental thereto, is found in the fact that this is not an action pure and simple of forcible entry and unlawful detainer, either civil or criminal, or of an action of trespass quare clausum fregit, although in several respects it is somewhat analogous thereto, especially in the fact that possession, not title to the property, is alone involved, and that force was used by defendants in making an entry upon the premises. In actions for forcible entry the title to the property is not in issue either in civil or criminal proceedings, and, as a general rule, the question of possession is alone involved, and the title cannot be inquired into. It is a summary proceeding, in which an actual peaceable possession of the premises must be shown to have been forcibly taken away or invaded by the defendant; and, when this is shown, the law will restore the possession to the party complaining, even if the defendant be in fact able to show a title. The reason of this rule is that, if a party have a paramount title to property which is in the actual possession of another, who persists without a valid right in retaining that possession, he shall not do himself justice by force, for this would be contrary to the law of the land, but he shall apply to the courts of justice provided for such purposes, where his rights will be recognized and enforced. In the present case it clearly appears that plaintiff was deprived of the possession of the lot and tent by acts and appearances tending to inspire a just apprehension of violence, and calculated to cause a breach of the peace. The books are full of cases where it has been said that actual physical force is not necessary; that it is always sufficient if the entry is attended with such a display of force as manifests an intention to intimidate the plaintiff, or deter him from defending his rights, or to excite him to repel the invasion of his possession and thus bring about a breach of the peace.

The character of this action must be determined by the pleadings. It is an action to recover damages for the alleged wrongful and unlawful acts charged to have been committed by the defendants to the plaintiff's injury. It presents some unusual and unpleasant features and peculiar facts, and in this respect may be said to be exceptional in its character. But the right to recover damages for wrongs and injuries is well settled. The plaintiff, having different remedies, may select the form of action which will give him the relief he seeks. The original complaint was defective (*Eisele v. Oddie* [C. C.] 120 Fed. 695), because it did not apprise the defendants of the nature of the claims against them, and the extent thereof. A statement of the injuries, with a general averment of the sum as to the damages, would only authorize the recovery of such damages as would naturally and ordinarily follow from such injuries. The complaint was amended to make it more specific, especially so as to set forth causes of special damages; the general rule being that special damages, which are the natural, but not necessary, result of the injury complained of, must be specifically alleged. Such injuries do not necessarily result from the defendants' wrongful act, but flow from it as a natural and proximate consequence; hence they must be specially alleged, in order that the defendant may have notice thereof, and be prepared to meet the same upon the trial. 5 Ency. Pl. & Pr. 719. This case furnishes the necessity for the strict enforcement of this rule. As was said by the court in *Pueblo v. Griffin*, 10 Colo. 366, 367, 15 Pac. 616:

"If from any peculiarity in the circumstances or situation of the injured party other loss accrued to him thereby, such peculiarity must be alleged and proven to justify the recovery of such damages."

There was no demurrer to the amended complaint, upon which the action was tried. Its sufficiency is not questioned. The only legal objection made by the defendants is to the sufficiency of the evidence to sustain it.

3. Was the plaintiff in possession of the lot and tent at the time the defendants, with a multitude of people present, forcibly removed the tent and burned it? It is claimed that "plaintiff's own evidence shows that he had abandoned his possession," first, because of his written agreement renouncing all claim or right thereto, and promising "to vacate said ground in ten days"; and, second, because he left the premises on January 18, 1902, and never slept in the tent thereafter, the removal of his tent occurring on January 20th. The fact that plaintiff had agreed to leave and surrender his rights within 10 days, and did not do so, although he had started to remove his goods and chattels, and had slept in a dug-out for two nights, did not deprive him of the possession of the premises. The testimony shows that some of his effects were still in the tent, and he was on his way there, and was present when the removal occurred. There cannot be any abandonment of the property while the party is in possession of any part of it. *Mitchell v. Carder*, 21 W. Va. 277, 285, and authorities there cited. Plaintiff was not a mere intruder upon the premises. He had been in the actual possession of the premises for a period of six months. The specific acts which are required to constitute a sufficient possession

are dependent upon the conditions and circumstances of each case; but the controlling principles applicable to all cases are embodied in the general statement "that any overt act indicating dominion and a purpose to occupy, and not to abandon, the premises, will satisfy the requirements as to possession." Vol. 13 Am. & Eng. Ency. Law (2d Ed.) 746. In actions for forcible entry and unlawful detainer it has been held—in line with the rule above stated—that actual residence upon the premises is not always necessary. *Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589. This case is also an interesting one upon the question as to what constitutes force. And that continuous presence is not required. *Giddings v. The '76 Water Co.*, 83 Cal. 96, 23 Pac. 196; *Sittoh v. Sapp*, 62 Mo. App. 197, 205. Locking the doors of a house and taking the key constitutes, in ordinary cases, evidence of an actual possession of the house or lot upon which it stands. *Haley v. Palmer*, 9 Dana, 321; *Sitton v. Sapp*, supra; *Davidson v. Phillips*, 9 Yerg. 93, 30 Am. Dec. 393.

4. In reply to the suggestion of counsel that the proofs do not show that the value of the property in controversy exceeds \$2,000, it is only necessary to say that the general rule is that, so far as concerns courts of the first instance, the amount or value stated in the plaintiff's complaint is the sole test of jurisdiction. *West v. Woods* (C. C.) 18 Fed. 665, and authorities there cited; *Hill v. Gordon* (C. C.) 45 Fed. 276; *Western Union Tel. Co. v. White* (C. C.) 102 Fed. 705, 707; *Butters v. Carney* (C. C.) 127 Fed. 622. There are no exceptional facts in this case which take it out of this general rule.

5. Upon the merits but little need be said. Conceding that the defendants, who claimed to be acting for the real owners of the lot, under all the circumstances of this case, might have had the right to enter upon the premises and peaceably remove the plaintiff therefrom, yet neither they nor the other defendants had any right to remove him by force, or to destroy his property. The law was clear, and the courts were open for the protection of the owners of the property, if, as defendants contend, the plaintiff had no legal right thereto. The committee consisting of defendants and others had no right to take the law into their own hands. It may be that some of the acts and conduct of the plaintiff, his situation and surroundings, as well as other circumstances in the case, may have caused the belief on the part of the defendants that he was not acting in good faith in asserting ownership to the lot and tent, and that his promises could not be relied upon, and induced them to hasten the proceedings in a summary way, without any actual intent on their part to proceed in a wanton or malicious manner. These matters may be considered in mitigation of some of the damages. But all the acts of the defendants were without authority of law, and were of a character which cannot be sanctioned in a court of justice, however meritorious their motives or intent may have been. In whatever way or manner the cause of action may be treated, there could be no justification or excuse for the conduct of defendants. The burning of the tent and contents of itself shows the result that is so often liable to happen when self-constituted committees assume the right to enforce the law in their own manner. The excitement produced by a multitude of people proceeding in a riotous

manner always has a tendency to result in an utter disregard of the law. Hence it is that statutes are passed and actions at law maintained to prevent such injuries or wrongs as were committed in this case, regardless of any question as to the real ownership of the property.

As to the damages that should be allowed. The plaintiff was certainly very liberal as to the value of the heirlooms, the Bible, family photographs, gold spectacles, private letters, and documentary papers, and also of the value of the damages he sustained by the "wrongful invasion of his constitutional rights." There was extravagant testimony on both sides, and a substantial difference of opinion, and some conflict, especially as to what articles were in the tent at the time of its removal and destruction; but these things need not be discussed. The indignities, insults, and insinuations, partaking of the nature of threats against the plaintiff, should not be entirely ignored. One other point should be noticed. The plaintiff testified that he left \$135 in bills in a box in the tent, and that it was taken and destroyed by the defendants. The defendants at the trial sought to question this fact, but I am not prepared to say that the plaintiff's testimony upon this point was so unreasonable as to make it unworthy of belief. The most that could be said in favor of defendants would be that they did not see it, and did not know or believe it was there. Without further comment, I quote, as applicable to this case, the language of the court in *Eten v. Luyster*, 60 N. Y. 252, 260, where the question was presented as to whether or not the leaving of money in a stable was so unreasonable that the defendants ought not to be charged with its destruction. In that case the court instructed the jury:

"It is for you to consider all the circumstances of this case, and, in view of the testimony as to this man's position and habits, and his manner of conducting business, and in the light of all the evidence before you, to pass upon the probability or improbability of an intelligent man in his condition keeping his money in this way. It is not for me to say that a man should have done so and so with his money. It is for you to judge whether he took such a course as a man in his class of life, in that kind of business, and with his opportunities for knowledge, would reasonably take under such circumstances. You are to be guided by the facts and circumstances in determining this question."

The court, in discussing the question as to the character of damages which the plaintiff was entitled to recover, said:

"The plaintiff owed no duty to the defendants, and was not called upon to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendants left them, and look to the latter for their value. They were out of his possession by the tortious act of the defendants, by whom, and whose acts, they were lost or destroyed. The plaintiff complains of the pulling down and destruction of his building and the taking and conversion of his personal property, as well as the damages sustained by a loss of his business. The latter claim was excluded from the consideration of the jury by the court, but evidence of the other items of loss and damage were clearly within the allegations of the complaint, and admissible. For all loss occasioned by the trespass, whether in the destruction of the chattels or the loss of money that was kept upon the premises, the plaintiff was entitled to recover. That the money was kept in an unusual place did not take it out of the protection of the law, or affect the liability of the defendants for their tort. They acted at their peril, and must respond for the consequences. The loss of the money, although the defendants may not have sus-

pected its presence, was the direct and necessary consequence of the acts of the defendants."

Considering all the facts and circumstances of this case, I assess the damages at \$500. Upon filing the proper findings of fact herein, let judgment be entered in favor of plaintiff for the sum of \$500, and for costs.

UNITED STATES v. POST.

(District Court, S. D. Florida. February 9, 1904.)

1. POST OFFICE—USE OF MAILS TO DEFRAUD—ELEMENTS OF OFFENSE.

In a prosecution for the use of the mails for the furtherance of a scheme intended to defraud, the government is bound to prove beyond a reasonable doubt a plan or contemplated series of actions for the purpose of defrauding another by deception, artifice, false promises, or pretenses; that a part of the plan must be the use of the mails for the purpose of effecting the same; and that the party charged deposited or caused to be deposited in the mails some letter or paper in the execution of such plan.

2. SAME—FRAUDULENT INTENT.

In a prosecution for the use of the mails with intent to defraud in the use of an alleged power of mental healing, defendant's fraudulent intent is a question of mental condition, not provable as an ordinary fact, but is to be found by the jury from the attendant and surrounding circumstances.

3. SAME—BURDEN OF PROOF OF POWER TO ACCOMPLISH WHAT WAS PROMISED.

Where, in a prosecution for the use of the mails with intent to defraud, in the exercise of an alleged power of mental healing, defendant claimed that she was able, by the mere emanations of her own mind, to impart such power to another residing at a great distance, and through a second person, not present, to a third person, also absent, without such third person's knowledge, such claim being contrary to well-settled and accepted natural laws, the burden was on the defendant to establish the existence of such power; but if it was found that defendant believed she could accomplish what was promised, or there was any doubt that she knew she could not, that doubt should be considered in defendant's favor, and a verdict of acquittal rendered.

4. SAME—WEIGHT OF EVIDENCE.

Where, in a prosecution for fraudulent use of the mails in furtherance of a scheme to defraud by mental healing, certain witnesses testified that they were treated for diseases and helped by defendant through emanations of her mind, while they were totally ignorant of defendant's acts and doings, such phenomena being contrary to nature and not explainable under any natural principle or known laws, this evidence might be rejected by the jury, though uncontradicted.

5. SAME—WITNESSES—PREJUDICE.

The relations, feelings, and prejudice toward accused or between her and the witnesses can only be considered by the jury when it appears that such feeling of animosity has been such as to influence their testimony.

6. SAME—EVIDENCE.

In a prosecution for using the mails in furtherance of a scheme to defraud, consisting of the practice of an alleged power of mental healing, evidence of one of defendant's employes in regard to the manner of conducting her business and as to the classes of cases in which treatment was undertaken and money received was admissible.

¶ 1. Matter in furtherance of fraud as nonmailable, see note to *Timmons v. United States*, 30 C. C. A. 86.

¶ 2. See *Post Office*, vol. 40, Cent. Dig. §§ 55, 85.

Henry T. Campbell, Asst. Atty. Gen., and Joseph N. Stripling, U. S. Dist. Atty.

Otis T. Green and Bisbee & Bedell, for defendant.

LOCKE, District Judge (charging jury). The law upon which the indictments in this case are based is, in substance, "If any person, having devised any scheme to defraud, to be effected by opening or intending to open correspondence through the United States mail, shall, for executing such scheme, deliver any letter, book, writing, circular, pamphlet, or advertisement in any post office of the United States, he shall upon conviction be punished." Under this law the defendant herein, Helen Wilmans Post, stands charged under four indictments. The first indictment (No. 141) alleges, in substance, that she had devised a scheme and artifice to defraud by holding out that she had discovered and perfected a method and process by which she could cure every form of disease and weakness and poverty; intending by such representations to induce persons to send her money for the purpose of receiving treatment by such method; fraudulently intending to convert the same to her own use without intending to cure them, or to bring financial success; and as a part of such scheme she did, in papers, etc., advertise and represent that she could and would administer such treatment; which scheme was to be effected by means of the post-office establishment; and that in the executing and conducting such scheme she mailed, or procured to be mailed, a letter on the 21st of March, 1900, to one Mrs. B. B. Ricker, at South Lake Wier, Fla. The second indictment (No. 160) in substance charges the same offense, except that it states that at and before the time of committing the offense she did not intend to administer any treatment for any disease or weakness by said method or process, and did not intend to cure any person; that such scheme was to be effected by means of the post-office department, and that in carrying out said scheme she mailed a certain letter to Mrs. C. S. Faulk, at Milton, Fla. The third indictment (No. 161) charges, in substance, the same offense, viz., the same artifice and scheme to defraud, and that the same was to be effected by advertising through the mails in various papers and pamphlets that she could treat and cure persons affected with disease for the sum of \$3 per week or \$10 per month; and when devising such scheme and artifice she did not intend to administer any treatment for any disease by said method, or any other method, and did not intend to cure any person who might apply to her, but intended to defraud such person of such sums of money as should be sent to her without rendering any service therefor; and in the carrying out of such scheme a certain letter was caused to be placed in the post office of the United States at Seabreeze. The three first indictments therefore charge, in substance, that the defendant had devised a scheme to defraud, which scheme consisted; as is fully set forth, of making false and fraudulent representations as to her ability and power to cure persons by a so-called "absent treatment," without intending to give such treatment, or to cure persons, as she had promised to do. The fourth indictment (No. 176) charges the same scheme, viz., in substance, that she did fraudulently assume and pretend to

practice absent treatment, by which means she would cure all diseases, old age, poverty, liquor habit, and all undesirable conditions, for a certain amount per month, through the instrumentality of some second person, though the fact of such alleged treatment through the second person was unknown to the third person (no matter at what distance from each other or from her), and that she could and would send the third person through the second person her vitalizing power and healing thoughts for the cure of all disease by the second person holding the third person receptive to and in close relation with her thoughts; that she did represent by letters and various publications and circulars caused to be published and circulated that she could and would cure all such persons; that she deposited such papers and publications, or caused the same to be done, in the mails of the United States for the furtherance of such fraudulent scheme, pretending that her healing thoughts could and would be transmitted through a second person to a third person, and cure him or her, which representations were false, and well known to her to be false, at the time of making them, and that she was not capable of performing them—by which fraudulent scheme she acquired and converted to her own use large sums of money; and that in the furtherance and execution of such scheme to defraud, at the time of committing such offense, she mailed and caused to be mailed numerous newspapers and advertisements, and sent through the post-office establishment divers and sundry letters, with the intent to induce sundry persons to open correspondence with her, and to fraudulently obtain money therefrom; and that it was well known and understood by the said defendant to be a deceit and fraud; and that after the engagement for such treatment sent through the mails of the post-office establishment the name of Helen Wilmans Post was not written by her, but was written by a typewriter, and by her employés, stenographers and clerks, it thereby being her intention to defraud persons sending her money of said money without giving or intending to give any equivalent therefor, and without being able to give or intending to give such treatment, or to cure patients and persons as she represented that she could and would do; and that in executing the said scheme she caused to be mailed in the post office at Seabreeze, Fla., a certain letter addressed to Mrs. C. S. Faulk, Milton, Fla.

There are three elements to each offense as charged: First. There must be a scheme, a plan, a contemplated series of actions for the purpose of defrauding some one; that is, with the purpose of wrongly obtaining money by deception or artifice, by false promises or pretenses. Secondly. A part of this plan must be to use the mails of the United States for the purpose of carrying it out. Thirdly. The party charged must have deposited, or caused to be deposited, in the mails, some letter or paper in the execution of this plan. Each of the elements must be proven beyond a reasonable doubt. Reversing the order of statement of these elements, and considering the last first, viz., the mailing of the letters, there is no conflict of evidence. The publication of the advertisements, circulars, and papers has been fully shown, and the only question remaining is whether there was a scheme to defraud. This depends upon your finding upon the intent of the

defendant at the time of her making use of the mail for the purpose of advertising. There is no question of the efficacy of mental healing, but only the fraudulent intent of the defendant in not intending to render any treatment as promised. The only question necessary for you to pass upon is whether you are satisfied by the evidence that the defendant, in devising the scheme, did not intend to render any so-called treatment, such as she had advertised to do. The question of criminal or fraudulent intent is a question of mental condition, and cannot be proven the same way as ordinary facts, but may be found from attendant and surrounding circumstances sufficient to satisfy the jury that the accused had or had not the intent charged. The testimony for the prosecution in this case has shown the defendant's usual manner of conducting her business—almost entirely by clerks—the handling of the mail, and the keeping up of the correspondence, and the character of the promises and declarations of her ability to perform; and it is thereby claimed that she did not give any affirmative treatment, contending therefrom that she never intended to do so. The so-called treatment, as advertised by the defendant, consisted in sending out so called "healing thoughts" "drawing the thoughts of the patient to her without any effort of theirs," and "taking care of their condition," whatever it was, with a promise "to treat them with great power and faithfulness." This is the positive, direct, and affirmative treatment which the defendant promised and engaged to give. Does the testimony show whether or not, at the time of making such promises and sending out such circulars, she intended to give such treatment? The foundation of the contention of the government is that what was promised to be done could not have been intended, because the fulfillment was known to be impossible by the means proposed by the defendant, viz., the transfer of the power of her thought to the person of the patient with a curing influence sufficient to accomplish the changes in condition that were declared could be accomplished, and particularly in the cases of treating a third person unawares of such contemplated treatment through a second party.

The contention of the defendant is that what she had promised was to be performed by the discovery of a new law of mental healing, by which healing thoughts can be sent out for the purpose of cure.

There are well-settled and accepted natural laws, a recognition of which is justified by the long experience of men, the knowledge of everyday life, as well as by the studies and experiments of ages. Of these we may take cognizance—the laws of gravitation, cohesion, of optics, the phenomena of electricity, etc. But when one contends that he has made new discoveries in science or art, opposed to the general experience of man for ages, and directly in conflict with the generally accepted rules, and seeks to gain money or secure profit thereby, the burden of the proof of the truth of such discovery is upon the party making the claim, and the truth of such contention must be satisfactorily proved before it can be accepted. The contention of the defense is that the defendant can and could do everything that she promised to do; that she had the ability to send healing thoughts to any distance, and in any direction, not only to affect the mind of those desiring treatment so as to effect their physical cure, change the color of their hair, cure cancer,

consumption, and pneumonia, and kindred diseases, but also to affect the cure of other parties who have no knowledge of such treatment, and are neither desirous for nor informed of it. There is not involved in this case the question of the influence of the mind over the physical health of the same person, nor the beneficial effects of hopeful and cheerful thoughts, even though produced by natural suggestion through the senses by another. The contention of the defendant, through all of her published works, is that she can actually send, not by suggestions by letter, but by emanations from her own mind, such power as will, after passing through the mind of a second person, influence the physical condition of a third person; and it is also in testimony that such power is not claimed as pertaining particularly to the defendant, but that it can be taught to any class in a four-weeks course. I have no hesitation in saying to you that this power is not recognized as a natural law by the experience of mankind, and that she is attempting to establish a new and unrecognized law of nature, and therefore the burden rests upon her to satisfy you that she possessed such power, and could do what she promised and advertised to do. It is for you, therefore, to inquire whether you are satisfied that the contention of the defendant that she can send her thoughts out to indefinite distances, and so affect the bodies of others as to produce physical changes, as she advertised to do, is true.

What is the evidence of the defense to establish such a law of nature? The general idea and principle upon which justice is administered in courts is that testimony given under oath is to be accepted as true until contradicted; but there are certain exceptions to this rule. Where such testimony of itself is directly contrary and in opposition to the well-established laws of nature, accepted by all men from the experience and study of ages, such testimony may be properly ignored without contradiction. The court has permitted several parties to testify as to their relations with the defendant. Although they, in terms, testified that they had been treated by the defendant and cured, it at the same time appeared that these parties were at great distances—hundreds, and sometimes thousands, of miles—from the defendant, and totally ignorant of her acts and doings at the time they alleged the defendant treated them. Such testimony was so contrary to the well-established rules of evidence and natural laws that it could not be accepted as stated. They had no knowledge of the whereabouts, actions, doings, or thoughts of the defendant, but, on the contrary, everything shows that they were so situated that their testimony regarding any acts or doings of hers could only be admitted to have the force of stating that they had physical troubles, applied to and corresponded with the defendant, and recovered their health, and informed her of it. If any phenomena or pretended result of any new idea or new discovery in science which is contrary to nature as recognized can be explained and accounted for upon natural principles and known laws, rather than by those which are in opposition to such, the natural explanation should be accepted, and such phenomena or results rejected as evidence of the pretended discovery. Therefore if you should believe from the evidence that the cures or improvement of the patients so testified to might have resulted from the hopeful condition of their

own mind, although suggested by the letters from the clerks of the defendant, or from any natural limitation or course of the disease, and not from any thoughts emanating from the mind of the defendant, you are not bound to accept such evidence as sustaining the contention of the defendant. If you so find, and find that the testimony of the several witnesses who claimed that they had been improved or cured cannot be accepted to establish the existence of this law, it will be seen that this wonderful power which she claims in her testimony to possess has no support except in her own uncorroborated declarations. Are these sufficient to satisfy you that under the circumstances, and to the extent she claimed and promised, she could and would cure? In examining this question all natural laws and your own knowledge and experience can be considered. There is no test by any natural law of this power of sending health-giving thoughts. The natural and recognized scope of the mind is to generate and transmit, or perceive and recognize, thoughts of intelligence, of knowledge, judgment, will, and action. For the transmission of such thoughts there are certain tests, and it can be determined to a certainty whether such intelligence can be conveyed or transmitted. Experiments are constantly being tried by mental scientists to ascertain whether such intelligent power can be transmitted from mind to mind, but that such transmission can be made has not been accepted as a natural law, and the few cases which are claimed to have occurred are accepted with doubt, and considered extraordinary and unusual personal experiences, and not in conformity with any general law. If the defendant contended and testified that she had communicated to one in Europe an intelligent thought, a thought of knowledge or action, of what she knew or of what she was doing, would such testimony be accepted without corroborative evidence, or an examination and test by natural laws? How far, then, are you satisfied of the truth of her statements as to her transmitting healing thoughts, which statement can in no way be examined or tested by natural laws or legal evidence?

The three first indictments only charge that the defendant claimed that she could cure persons by direct treatment of themselves, and that she did not intend to treat them. In these indictments such intent is the very essence and substance of the charge. There is no question of the sufficiency or efficacy of mental healing, but only the intent of the defendant not to render any treatment as promised. Of this you must be satisfied beyond a reasonable doubt. If you find upon that point that she did not intend to give any such treatment, your verdict upon these three indictments will be "Guilty"; but, unless you are so satisfied, it will be "Not guilty."

The fourth indictment (No. 176) charges that the offense consisted more especially in promising to cure third persons without their knowledge, or without direct influence upon them, by treating through an intermediate person, and that she could not so cure them, and that she knew she could not, and that she did not intend to cure patients by such treatment. There are therefore two questions presented by this indictment upon which the findings of the jury must rest: First, her ability to cure as promised and advertised by such means; and, secondly, her knowledge and intent in regard to such cures. The in-

dictment charges that the defendant's pretensions to cure were false, and she knew them to be so, and that she received money without intending to give treatment or any equivalent therefor. The knowledge of the party at the time of making a promise or holding out an inducement for profit or gain is a good test of the intent of the party making it. No sane person of reasonable judgment can be considered as intending to do that which he at the time knows is and will be impossible for him to do. Therefore, if it is found that at the time the defendant promised as is charged, that she could and would cure as she said she would, she knew she could not so cure, her intelligence may be inquired into to determine whether or not she intended to give treatment or any other equivalent for what she had promised. And if you find and believe that what the defendant claimed she could do is so contrary to the laws of nature that it was impossible, and that the defendant has failed to satisfy you of the truth of the powers she claimed, and that, therefore, she could not do what she pretended she could, and she did not believe she could, but knew that she could not, you will, upon that indictment, return a verdict of guilty. If you find that she could, or honestly believed she could, do what she advertised and promised, or if there is a reasonable doubt in your mind as to her knowledge and intent, you will return a verdict of not guilty.

In examining the case you are the sole judges of the credibility of the witnesses; that is, you will determine just what of the testimony you will accept. You are to determine any conflict, and from what you consider the truth reach your verdict. The relations, feelings, and prejudices of witnesses toward the defendant, or between the defendant and the witnesses, can only be considered when it appears that such feeling of animosity has been such as to influence the testimony.

During the trial I was requested to strike out all the testimony of Dora Dayton in regard to the manner of conducting the business, and as to the classes of cases in which treatment was undertaken and money received. I must deny that motion. It was the personal knowledge of a party particularly cognizant of the manner of conducting the business, and as such was material and relevant, and you will consider it. You have the publications, promises, and advertised pretensions of the defendant's powers to cure under all the circumstances; numerous letters, with her indorsements as to what she could and would do; the testimony of money received; and the letters mailed as charged—all of which may be considered.

And, finally, I charge you that, after considering all the testimony and evidence, if upon the three first indictments (Nos. 141, 160, and 161) you find that the defendant at or about the time laid in the indictments had devised a scheme to defraud as charged, and that a part of that scheme was to use the United States mails for the purpose of inducing people to send her money, and that she so used the mails, and that she made false statements as to her powers to cure patients, and promises that she would treat them, and that at the time of devising such scheme she did not intend to give them the treatment she had promised, and that in the execution of such scheme she mailed,

or caused to be mailed, the letters charged in the indictment, you will find the defendant guilty. If there is a reasonable doubt in your minds upon any one of these points, you will find the defendant not guilty.

If, upon the fourth indictment (No. 176), you find that the defendant, at or about the time laid in the indictment, had devised a scheme to defraud as charged, and that a part of the scheme was to use the United States mails for the purpose of inducing people to send her money, and that she so used the mails, and that she made false statements in regard to her ability to cure one person through the mind of another person, and false promises that she would cure persons through some other person, and that it was impossible that she could so cure one person through another, and that at the time of making such promises she knew that she could not so cure them, and that in the execution of this scheme she mailed or caused to be deposited for mailing the certain envelope and letter charged in the indictment, you will find the defendant guilty. If you have a reasonable doubt upon any of these points, you will find the defendant not guilty. A reasonable doubt is a doubt derived from the evidence or lack of evidence in the case, such as would influence or control you in the important business and transactions of your own.

EDISON v. THOMAS A. EDISON, JR., CHEMICAL CO.

(Circuit Court, D. Delaware. March 24, 1904.)

No. 235.

1. EQUITY—JURISDICTION—LIBEL.

A mere libel or defamation of business reputation, unaccompanied by threats, intimidation or coercion, or by any direct attack upon property or conduct of business, or by any direct or indirect creation of liability on the part of the complainant, is not within the equitable jurisdiction of the circuit court of the United States.

2. SAME—DEMURRER.

A demurrer does not admit the truth of general allegations of fraud, but only the facts set forth as constituting the alleged fraud and all reasonable deductions from them. And where a bill avers a legal inference which the facts stated therein do not justify, a demurrer, while confessing the facts, will not be considered as admitting the correctness of the inference.

(Syllabus by the Court.)

In Equity.

Howard W. Hayes, for complainant.

William B. Whitney, for defendant.

BRADFORD, District Judge. The questions for decision arise on a general demurrer to a bill brought by Thomas A. Edison, a citizen of New Jersey, against the Thomas A. Edison, Jr., Chemical Company, a corporation of Delaware. The bill, among other things, alleges:

"That your orator is an inventor by profession and is engaged in the manufacture of various articles invented by him, and in the manufacture of various

¶ 2. See Pleading, vol. 39, Cent. Dig. §§ 527, 533.

commercial articles by the use of machinery and methods invented by him: that he has taken out numerous patents in the United States and other countries of the world and is well known as an inventor throughout the business and scientific world; that among his other inventions he invented the phonograph; the incandescent light system, the quadruplex telegraphy, the telephone transmitter, the fluoroscope, the mimeograph, the kinetoscope, the magnetic concentration of ore, the phono-phlex system of telegraphy, and the nickel-iron storage battery, and also many other inventions of less importance: that he has taken out many patents for the said inventions and improvements thereon, both in the United States and other countries throughout the world; • that on account of his numerous inventions and his reputation in the business and scientific world the use of his name in connection with any invention or any manufactured article greatly enhances the value of that article in the public mind; that his business practice in regard to his many inventions and the patents taken out covering the same, has been sometimes to sell the inventions and patents outright, sometimes to dispose of the same to corporations in which he became interested, and sometimes to manufacture or sell or use the inventions himself in his own business; that he maintains and carries on a large and well equipped laboratory at West Orange, New Jersey, in which he employs from time to time from thirty to eighty workmen engaged in experimenting and developing, under his supervision, his various inventions, and also for the production of new industrial processes and inventions; that a considerable part of the value in the public mind of his inventions depends upon the reputation that he has built up with the public as an inventor of useful and valuable devices and processes, and that if the public should consider that the devices and processes invented by him were of little value, the income that he would derive from the selling or working the devices and processes invented by him would be very materially decreased. * * * That on account of the various electrical, mechanical and other inventions and discoveries of your orator your orator has for a long past been referred to in the public press and by popular usage by the name 'Wizard,' and that said name Wizard has been for so long a time associated in the public mind with your orator, that the said name, if used in connection with any new device, appliances or invention, is at once associated in the public mind with your orator."

It appears from the exhibits that Thomas A. Edison, Jr., was one of the original incorporators of and a subscriber to the capital stock of the defendant, taking 250 shares of the 500 shares with which the defendant was authorized to commence business; the other two original incorporators and subscribers being Franklin Everhart and Gardner W. Kimball, taking respectively 247 and 3 of the remaining shares. The bill further alleges:

"That immediately after its organization the defendant herein proceeded to sell and manufacture ink tablets under the name 'Wizard Ink Tablets,' and are continuing so to do; and also are manufacturing and selling to the public a device called a 'Magno-Electric Vitalizer' and advertises the same extensively throughout the public prints, which said advertisements are so worded as to falsely and fraudulently lead the public to believe that your orator is the inventor of the said device, while the truth is that your orator is in no way connected with the invention of the said device and has no knowledge of it, but charges the same to be worthless and to be simply a means for obtaining money from the public for a worthless article by the misuse of your orator's name and by taking advantage of your orator's reputation as an inventor, and your orator presents as exhibits in connection with this bill three advertisements of the said alleged device cut respectively from the New York Sunday Herald of November 9, 1902, New York Sunday Sun of November 9, 1902, and Ainslee's Magazine (a monthly magazine circulating in the United States) for the month of November, 1902, marked 'Exhibit B,' 'Exhibit C' and 'Exhibit D' respectively. That after your orator's attention was called to the said advertisements in Ainslee's magazine, your orator caused a letter to be written to the said Thomas A. Edison Jr. Chemical Company asking for

their advertising matter, and in reply a letter was received dated October 24th, 1902, the printed and engraved heading of which shows the advertising of the Wizard Ink Tablet above referred to, and your orator presents as an exhibit with this bill of complaint the said letter from the Thomas A. Edison Jr. Chemical Company dated October 24th, 1902, marked 'Exhibit E.' That your orator has a son named Thomas A. Edison, Jr., who is now about thirty years of age; that your orator's said son was employed by your orator in your orator's various interests for a short time; that since that time your orator's said son has had no regular occupation, but as your orator is informed and believes, partially supports himself by trading on his name and by selling the use of his name to various unprincipled persons, who use the said name for the purpose of defrauding the public; that your orator's said son while he was in your orator's employ made no practical inventions, and your orator is satisfied that he has made no invention since that time."

The bill further alleges that the above mentioned son of the complainant has sold to certain persons, stated to have had connection with the incorporation of the defendant, including the above named Franklin Everhart, the use of the name Thomas A. Edison, Jr., "for the purpose of enabling the said persons to defraud the public by the use of the name Edison," and "that your orator's said son has never invented any ink or ink tablets and has never invented any such device as that described as 'Magno-Electric Vitalizer' in the said advertisements or any similar device." The bill further alleges:

"That the said actions of the said Thomas A. Edison, Jr. Chemical Company and its officers, agents and employees deceive and defraud the public and greatly injure your orator's reputation as an inventor by passing off on the public said ink tablets and Magno-Electric Vitalizer as the invention of your orator when the same have not been invented or manufactured by your orator, and your orator is in no way connected with the manufacture or sale of the same; which injury and damages to your orator cannot be adequately compensated for by an action in a court of law."

The complainant includes in his prayers one for an injunction as follows:

"That the said defendant, its officers, attorneys, agents and employees may be restrained by the injunction of this court from using the name Edison in connection with or as a part of its corporate title or in connection with its business, or its letter heads or advertisements circulated or published by it; and from using the word 'Wizard' in connection with the said ink tablets manufactured and sold by it and from holding out in any way that your orator is the inventor of or in any way connected with the said ink tablets so sold or manufactured by it and from holding out in any way that your orator is the inventor of, or in any way connected with, the said Magno-Electric Vitalizer so sold or manufactured by it and that a provisional or preliminary injunction may be issued restraining the said defendant, its officers, attorneys, agents and employees as aforesaid during the pendency of this suit."

Reference is made to a suit heretofore brought in this court by the complainant herein against the Edison Chemical Company, a corporation other than the defendant herein, in which a decree was entered prior to the filing of the present bill. The parties, however, were different, and the decree was entered by consent. That case cannot operate as an estoppel against this defendant nor in any manner prejudicially affect it. The bill nowhere alleges that the complainant manufactures or sells any articles resembling those manufactured and sold by the defendant, or that those manufactured or sold by the latter are in their appearance or nature such as to indicate that they were manu-

factured by the complainant. There is no charge of unfair competition in trade or of violation of a trade-mark. Briefly stated, the bill proceeds on the assumption that, the value of the complainant's inventions largely depending upon his widespread reputation as a scientist and unusually successful inventor of valuable devices and processes, any fraudulent practices by the defendant causing the public to believe that worthless or inferior articles, devices or processes made or sold by the defendant were, contrary to the fact, made or sold by the complainant, not only are a fraud upon the public but injuriously affect the complainant's reputation and income and constitute a wrong which should be restrained in equity at his instance, there being no adequate remedy at law. The above assumption requires as one of its essential constituents that it should appear from the bill and exhibits made part thereof, that the defendant has resorted to some fraudulent means causing or tending to cause the public to entertain such false belief. The articles which the complainant charges the defendant with fraudulently passing upon the public are a device known as a Magno-Electric Vitalizer and certain ink tablets called and put forth by the defendant as Wizard Ink Tablets. Aside from the exhibits, the bill clearly does not sufficiently charge any fraudulent practice by the defendant tending to deceive the public with respect to the origin, ownership or control of the Magno-Electric Vitalizer. While the bill avers that the advertisements relating to the Magno-Electric Vitalizer "are so worded as to falsely and fraudulently lead the public to believe that your orator is the inventor of the said device," an examination of the exhibits containing those advertisements does not bear out the averment. In Exhibit B it is stated that,

"The Magno-Electric Vitalizer is the invention of a son of the Wizard of Menlo Park and one of the first great products of the skill of Thomas A. Edison, Jr., a young man who bids fair in older years to be a worthy successor of his world famed father. * * * It is being placed on the market by Mr. Edison's own company, the Thomas A. Edison, Jr. Chemical Co., 19 Stone St., New York."

Exhibit C, referring to the Magno-Electric Vitalizer, says:

"Its inventor is none other than Thomas A. Edison, Jr., son of that great wizard who has given to the world so many wonders. * * * Mr. Edison, Jr., who has been termed a true son of his father, has long been laboring on the problem which he has finally solved with the Magno-Electric Vitalizer. * * * It is being placed on the market by Mr. Edison, Jr.'s own company, The Thomas A. Edison, Jr. Chemical Co., 16 Stone Street, New York."

Exhibit D states:

"The Wizard of Menlo Park has, indeed, been a Moses in his time. But he could not accomplish everything, and he left one room in the House of Science in which Thomas A. Edison, Jr., has labored and experimented for years in perfecting the Magno-Electric Vitalizer. * * * It Is Being Placed On The Market by Mr. Edison's own Company, The Thomas A. Edison, Jr. Chemical Co., 16 Stone Street, New York."

These advertisements, as exhibits in support of general charges of fraud effected through advertisements, must be taken as qualifying and limiting such charges to the contents of the exhibits made part of the bill; and when so taken I fail to find in any of them any statement calculated to cause an ordinarily prudent and intelligent person

to believe that the Magno-Electric Vitalizer therein mentioned was invented, manufactured or sold by the complainant, but, on the contrary, much to exclude such a belief. There is nothing in any of them to confuse or confound, in the mind of any such person, the complainant either with his son, Thomas A. Edison, Jr., or the defendant, with respect to the production and sale of the device. Exhibit E is a letter received from the defendant in reply to a letter caused by the complainant to be written to the defendant asking for its advertising matter. In this exhibit the letter-head of the defendant sets forth in bold type its name—"The Thomas A. Edison Jr. Chemical Co."; and locates its factory at Cambridgeport, Mass., and its office and sales-rooms at 31, 33 & 35 Stone Street, New York. The bill states that the complainant "maintains and carries on a large and well equipped laboratory at West Orange, New Jersey." The letter-heading of exhibit E discloses a connection of the word "Wizard" with ink tablets, and refers to the defendant by its proper name as "Manufacturers of the Celebrated Wizard Ink Tablet." The bill alleges that this heading "shows the advertising of the Wizard Ink Tablet above referred to." But there is nothing in exhibit E connecting the word "Wizard" with the Magno-Electric Vitalizer, nor does the bill in any manner base upon exhibit E any charge of fraud so far as that device is concerned.

The next question relates to the use by the defendant of the word "Wizard" in connection with the ink tablets manufactured and sold by it. Does the bill sufficiently charge any fraudulent employment of that term by the defendant causing or tending to cause the public to believe that such tablets were manufactured or sold by the complainant? The bill alleges that by reason of his inventions and discoveries "your orator has for a long time past been referred to in the public press and by popular usage by the name 'Wizard,' and that said name Wizard has been for so long a time associated in the public mind with your orator, that the said name, if used in connection with any new device, appliances or invention, is at once associated in the public mind with your orator," and "that immediately after its organization the defendant herein proceeded to sell and manufacture ink tablets under the name 'Wizard Ink Tablets,' and are continuing so to do," and "that the said actions of the said Thomas A. Edison, Jr., Chemical Company and its officers, agents and employees deceive and defraud the public and greatly injure your orator's reputation as an inventor by passing off on the public said ink tablets and Magno-Electric Vitalizer as the invention of your orator when the same have not been invented or manufactured by your orator, and your orator is in no way connected with the manufacture or sale of the same." The above statements, together with exhibit E above referred to, include all the allegations relative to the use by the defendant of the word "Wizard." It is unnecessary and would be improper to consider in this suit the allegations relating to the use of the name "Wizard" by the Edison Chemical Company, a corporation other than the defendant, and by certain individuals named in the bill, in connection with the manufacture and sale of ink, ink tablets and ink powder. The bill does not

aver that the complainant is the only person who has "been referred to in the public press and by popular usage by the name Wizard," or that such name has been associated in the public mind with the complainant exclusively; or that such name had not, before and during the time of the occurrence of the several matters set forth in the bill, been used in connection with one or more articles of merchandise; or that the defendant at any time stated or advertised that the ink tablets it was selling were manufactured by the complainant. On these points the bill should have been clear and explicit. The nature of this suit peculiarly required particularity of averment. As before stated, it does not involve the violation of a trade-mark, or any unfair competition in business. If sustainable at all, it must rest on the ground of fraud. A demurrer does not admit the truth of general allegations of fraud, but only the facts set forth as constituting the alleged fraud and all reasonable deductions from them. So, too, where a bill avers a legal inference which the facts stated therein do not justify, a demurrer while confessing the facts will not be considered as admitting the correctness of the inference. It is true that it is alleged in paragraph 13 that "the said actions" of the defendant "deceive and defraud the public and greatly injure your orator's reputation as an inventor," &c. Fraud upon the public and injury to the complainant thus appear to be a deduction or inference made by the complainant from "the said actions." The allegations to which "the said actions" have reference do not include any direct, positive and definite charge of fraud. So far as the defendant is concerned it does not appear that the charge of fraud under the bill as framed is anything else than an unauthorized inference. But I am unwilling, especially in view of the liberality with which amendments are allowed in the United States courts, that the dismissal of the bill should be based solely on the foregoing considerations. Wholly aside from them the bill is fatally defective. As before stated, it has nothing to do with trade-marks or unfair competition in business. Putting the case made by the bill and demurrer in the most favorable light for the complainant, and disregarding the objections above discussed, it amounts in principle to this, viz., that the defendant by advertisements or otherwise knowingly and falsely informs the public to the detriment of the business reputation of the complainant and consequent impairment of his income, that the Magno-Electric Vitalizer, and ink tablets, in which the defendant deals, are of the manufacture of the complainant, notwithstanding the fact that the latter is in no way connected with the manufacture or sale of such articles or devices. But the bill does not charge the defendant with menace, intimidation or coercion of any kind toward customers of the complainant, or with any direct attack upon his property or conduct of his business; nor does it allege that the acts complained of have created or, if repeated, will create any liability on the part of the complainant to third persons. Further, the case as presented is, indeed, one only of constructive, indirect or implied libel or defamation by the defendant of the business reputation of the complainant and consequent diminution of his income. To hold that on the facts admitted by the demurrer the complainant is entitled to the relief he prays would establish a dangerous precedent,

calculated to produce confusion in the business world, open wide a door to fraud and result in much greater evil to the public than that suffered by the victims of the defamation. In *Adriance, Platt & Co. v. National Harrow Co.* (C. C.) 98 Fed. 118, Judge Coxe used language peculiarly appropriate in this connection, as follows:

"The doctrine upon which the bill relies is an exotic of recent origin which has received but scant favor in the courts of this country. The moment it becomes a recognized branch of our jurisprudence courts of equity will be urged persistently to intrude into the affairs of trade and dictate the language in which merchants shall advertise their wares. It will foster a system of vexatious judicial parentalism which will create more evils than it will cure. Commerce needs no such factitious aid."

The case now in hand, being one merely of libel or defamation of business reputation, unaccompanied by threats, intimidation or coercion, or by any direct attack upon property or conduct of business, or by any direct or indirect creation of liability on the part of the complainant, is not within the equitable jurisdiction of this court. While the decisions are somewhat inharmonious, I am satisfied by an overwhelming weight of authority that this court has no jurisdiction to enjoin the publication of a mere libel or slander, and, consequently, no authority to grant the relief prayed. It is unnecessary to discuss the authorities on this point. To cite a few of them is sufficient. *Prudential Assurance Co. v. Knott*, 10 Ch. App. Cas. 142; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310; *Whitehead v. Kitson*, 119 Mass. 484; *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165; *Kidd v. Horry* (C. C.) 28 Fed. 773; *Baltimore Car Wheel Co. v. Bemis* (C. C.) 29 Fed. 95; *New York & R. Cement Co. v. Coplay Cement Co.* (C. C.) 44 Fed. 277, 10 L. R. A. 833; *Fougeres v. Murbarger* (C. C.) 44 Fed. 292; *Balliet v. Cassidy* (C. C.) 104 Fed. 704; *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310. I find nothing in *Lewin v. Welsbach Light Co.* (C. C.) 81 Fed. 904, *Farquhar v. National Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755, or *Edison v. Hawthorne*, 108 Fed. 839, 48 C. C. A. 67, all decided in this circuit, inconsistent with the conclusion reached.

The demurrer must be sustained and the bill dismissed with costs.

THE GLENOCHIL.

HARRISON v. HUGHES et al.

(District Court, D. Delaware. March 2, 1904.)

No. 594.

1. ADMIRALTY—DECREE—INTEREST—APPEAL.

Where a final decree of the district court sitting in admiralty in the third judicial circuit divides damages and costs equally between the libellant and the respondents, no allowance of interest being "specially directed" pursuant to paragraph 4 of rule 30 of the circuit court of appeals (90 Fed. clxviii, 31 C. C. A. clxviii), and on appeal such decree is simply "affirmed with costs" by the circuit court of appeals, the district court there-

after is without authority to allow interest on the final decree; and no interest can be recovered thereon unless the circuit court of appeals so modifies or amends its affirmatory decree as to include interest.
(Syllabus by the Court.)

In Admiralty.

See 125 Fed. 860.

John F. Lewis and Francis C. Adler, for libelant.

Robert Penington, for American Surety Co. of New York.

BRADFORD, District Judge. This is an application by the American Surety Company of New York as stipulator for the respondents, Hughes Brothers & Bangs, to pay into the registry of this court the amount of the final decree rendered by this court, and affirmed by the circuit court of appeals, against the respondents and in favor of the libelant, Albert Harrison, Master of the British Steamship *Glenochil*, together with a certain further amount representing interest on the final decree; such further amount to be repaid to the surety company should it be determined that the libelant is not entitled to such interest. The libel was filed February 16, 1898, for the recovery of damages resulting to the steamship from her running on the new breakwater off Lewes, Delaware, and after the evidence had been taken and returned the court held that both sides were in fault, and, consequently, decreed that the libelant recover from the respondents one-half of his damages and costs (110 Fed. 545), and referred the computation of the same to a commissioner. Upon the coming in of the commissioner's report and after hearing and disposing of exceptions to the same, this court finally decreed, February 7, 1903, that the libelant recover from the respondents and their stipulator, the above named surety company, the sum of \$37,383.48, being one-half of the total damages resulting from the accident, together with one-half of the total costs of the case. The libelant on the same day, and the respondents on February 16, 1903, severally prayed an appeal which was duly allowed and perfected. Both appeals were heard together by the circuit court of appeals which, September 3, 1903, affirmed the decree of this court in all respects. 125 Fed. 860. The mandate from the appellate court bears date October 9, 1903, and was filed on the next following day. Aside from endorsements, it is as follows:

"UNITED STATES OF AMERICA,

ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

United States Cir-
cuit Court of
Appeals.

Third Circuit.

To the Honorable the Judges of the District Court of
the United States for the District of Delaware.

GREETING:

Whereas, lately in the District Court of the United States for the District of Delaware, before you, or some of you, in a cause between Albert Harrison, Master of the British Steamship '*Glenochil*,' Appellant and Eugene Hughes, James Hughes, Charles Hughes and Anson M. Bangs, co-partners trading as Hughes Brothers and Bangs, Appellees, wherein the decree of the said District Court entered in said cause is in the following words, viz. :-

'And now, to wit, this seventh day of February, A. D. 1903, the above cause having been heard upon pleadings and proofs, and the argument of the Proc-

tors for the respective parties having been had, and the opinion of the Court having been filed directing that the Master of the Steamship Glenochil, the libellant, recover one-half of the damages and costs, and the Commissioner to assess the damages having filed his report, and the exceptions thereto having been disposed of by the court, it is now ordered, adjudged and decreed by the court that the libellant recover of and from the respondents, Eugene Hughes, James Hughes, Charles Hughes and Anson M. Bangs, co-partners trading as Hughes Brothers and Bangs, and the American Surety Company of New York, their stipulators, the sum of thirty six thousand five hundred and two dollars and sixteen cents, together with one-half of all costs in the case as taxed by the Clerk (the total costs amounting to \$1762.75), amounting to the sum of eight hundred and eighty-one dollars and thirty-two cents, making a total of thirty-seven thousand three hundred and eighty-three dollars and forty-eight cents.

As by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And that the Respondents Eugene Hughes, James Hughes, Charles Hughes and Anson M. Bangs, co-partners trading as Hughes Brothers and Bangs, as Appellants, and Albert Harrison, Master of the British Steamship 'Glenochil,' as Appellee, having taken an appeal from the decree entered in said cause.

And Whereas, in the present term of March, in the year of our Lord one thousand nine hundred and three, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

Philadelphia, September 8, 1903.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said Appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the Ninth day of October, in the year of our Lord one thousand nine hundred and three.

Wm. H. Merrick,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit."

The proctor for the libellant objects to the granting of the present application on three alleged grounds: First, that the final decree of this court in favor of the libellant should be construed as bearing interest from February 7, 1903, the date of its rendition, until it shall be fully paid; and under no circumstances should the court permit anything less than the unpaid amount of such decree together with interest thereon as above stated to be paid into court. Second, that the relationship of the surety company to this case as stipulator for the respondents is not such as to entitle it, under any circumstances, to pay into court the amount of the decree against them. Third, that the surety company has not asked leave to pay absolutely and unconditionally into court the full amount finally decreed to be due from the respondents to the libellant. First, is it true that the final decree of this court in favor of the libellant, either by its own force or by virtue of the decree of the circuit court of appeals affirming it, bears interest from February 7, 1903? The decree as rendered in this court is wholly silent on the subject of interest on its amount. The record nowhere discloses any claim or demand for the allowance of interest on the decree until paid or for any other period. Nor does interest in

any manner enter into or form part of the decree except in so far as allowed as part of the damages sustained. Nor does it appear that in the circuit court of appeals interest on the decree was either asked or suggested. The circuit court of appeals in affirming the decree does not expressly or by implication allow interest on the amount of the decree so affirmed. It simply ordered, adjudged and decreed "that the decree of the said district court in this cause be, and the same is hereby affirmed with costs." Under these circumstances, in order to relieve the libelant from the imputation of laches, it must be assumed that there was a waiver on his part of whatever right to interest on the decree he might otherwise have had. Certainly no assignment of error on either side raised the question of interest on the decree. In fact the word "interest" does not occur in any of the assignments of error.

Assignments 7 and 8 on behalf of the libelant are as follows:

"7. In finding that the damages and costs should be divided, and in not finding that the libelant was entitled to recover full damages and costs.

8. In entering a decree awarding the libelant the sum of thirty seven thousand three hundred and eighty three dollars and forty eight cents, being one half the damages and costs sustained by the libelant, and in not entering a decree awarding the libelant full damages and costs."

Assignment 14 on behalf of the respondents is as follows:

"14th. In entering a decree against the respondents in favor of the libelant for half damages and costs."

There is thus nothing either in the assignments of error or in the presentation of the case to suggest the idea that either of the parties had in contemplation the allowance of interest on any decree which should be rendered; but on the principle of *expressio unius exclusio est alterius*, enough to indicate the contrary. It may fairly be assumed that if either party had desired an allowance of interest on the decree that some effort would have been disclosed to have its allowance "specially directed by the court." But this case as presented to this court does not require for its proper decision reliance upon either waiver or laches. Rule 30 of the circuit court of appeals of the third circuit is controlling. Before, however, discussing the applicability of that rule it should be observed that the essential equities of the case as determined both by the circuit court of appeals and this court, and as affected by the action of the parties themselves, completely refute the contention on the part of the libelant that any interest should have been or should be allowed to him on the amount of his decree. This court determined, and was sustained in that determination, by the circuit court of appeals, that both parties having been in fault for the accident should equally be burdened with the amount of the pecuniary liability resulting therefrom, and that neither should bear a greater burden than the other. That such was the intent of both courts is clear from their decrees and is too obvious to be arguable. All the damages in the case having been sustained by the steamship Glenochil and having, with costs, been equally divided between the parties, cross-appeals were taken. In fact, the libelant was the first to take an appeal from the decree of the district court. Under these circumstances it cannot with any justice or propriety be claimed that the libelant is

entitled to interest by reason of any delay in the enforcement of the decree below, such delay having been initiated by the libellant himself.

Rule 30 of the circuit court of appeals for the third circuit (90 Fed. clxviii, 31 C. C. A. clxviii) is as follows:

"30.

Interest.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court."

There is no ground on which it can successfully be claimed that either this court or the appellate tribunal "specially directed" that interest should be allowed either on the decree as rendered by this court or as affirmed by the appellate court so as to bring the case within paragraph 4 of rule 30 relating exclusively to cases in admiralty. Rule 30 of the circuit court of appeals for the ninth circuit is identical in terms with rule 30 of the circuit court of appeals of the third circuit so far as paragraph 4 relating to appeals in admiralty is concerned. In *Hagerman v. Moran*, 75 Fed. 97, 21 C. C. A. 242, the circuit court of appeals for the ninth circuit held that, when the decree of a circuit court making no provision for interest, is affirmed by a mandate which is also silent on the point, the lower court has no power to allow interest. It appeared in the case that a decree was entered in the court below in favor of several persons for \$33,419.57 principal, and \$18,239.87 interest, making an aggregate of \$51,659.44. There was no provision in the decree of the court below providing for the payment of interest on the moneys due thereon from and after its date. On this point the decree was silent. An appeal having been taken to the circuit court of appeals the decree of the lower court was affirmed with costs to the appellees. After the mandate from the appellate court was entered in the court below the appellees paid the full amount of the decree as originally entered in the sum of \$51,659.44, and took from the appellants a "receipt for that amount, in which it was acknowledged that the sum so paid was in full payment of the decree, principal and costs, but did not include interest thereon from its date, and that the question whether said decree or any portion thereof should bear interest was contested between the parties, and reserved for the decision of the circuit court." Judge Gilbert in delivering the opinion of the court, among other things, said:

"The very terms of rule 30 contemplate that the lower court, in the entering of its decree, has been silent both as to the payment of interest and the rate thereof. But we find an insuperable objection to the allowance of interest in this case from the fact that the mandate from this court to the circuit

court on the former appeal contained no provision for its payment. Rule 30 is a rule for the guidance of this court only. It is not a rule of the circuit or district courts. The method by which the successful litigant in a case in this court may acquire the interest which is contemplated by the rule, is only through the mandate of this court directing its allowance in the court below. In entering the decree in the present case upon the mandate from this court affirming the prior decree of the circuit court, the lower court was guided solely by the terms of the mandate, and could go no further than its provisions directed. The mandate simply affirmed the former decree, and ordered payment of the appellees' costs on the appeal. In interpreting the decree and order affirming the same, and determining the rights of the judgment creditor thereunder the court below had before it an original decree making no provision for interest, and a mandate from this court affirming the decree, but likewise silent concerning interest."

In *Boyce v. Grundy*, 9 Pet. *275, 9 L. Ed. 127, it was held that an affirmance by the Supreme Court of a decree in equity without allowance of interest or damages in such decree was equivalent to a denial of any interest or damages thereon. Mr. Justice Story delivering the opinion of the court, among other things, said:

"Another objection to the decree is, that it decrees the sum of \$496.46, intended, as is understood (though not so stated in the decree), as interest upon the original sum decreed in the circuit court, viz., \$2,065.28, in 1826, from the time of the rendition thereof to the affirmance in the Supreme Court, in January term, 1830. We are of opinion, that there is error also in this part of the decree. By the judiciary act of 1789, c. 20, § 23 [1 Stat. 85] the supreme court is authorized, in cases of affirmance of any judgment or decree, to award the respondent just damages for his delay. And by the rules of the supreme court, made in February term, 1803, and February term, 1807, in cases where the suit is for mere delay, damages are to be awarded at the rate of ten per cent. per annum on the amount of the judgment, to the time of the affirmance thereof. And in cases where there is a real controversy, the damages are to be at the rate of six per cent. per annum only. And in both cases interest is to be computed as part of the damages. It is, therefore, solely for the decision of the Supreme Court, whether any damages or interest (as a part thereof) are to be allowed, or not, in cases of affirmance. If, upon the affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages; and the circuit court, in carrying into effect the decree of affirmance cannot enlarge the amount thereby decreed; but is limited to the mere execution of the decree, in the terms in which it is expressed. A decree of the circuit court, allowing interest in such a case, is, to all intents and purposes, quoad hoc, a new decree, extending the former decree."

In *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799, it was held that where a decree of the circuit court sitting in admiralty was affirmed in the Supreme Court by a divided court, interest could not be calculated upon the decree. Mr. Chief Justice Taney in delivering the opinion of the court said:

"The decree was affirmed here by an equal division of the Justices of this court; and the decree of affirmance was entered by the Clerk for the sum awarded by the Circuit Court and costs, and did not give interest on the amount decreed by the court below. The mandate was issued according to the decree; but it was not filed or proceeded on by the appellee, because he supposed that, under the eighteenth rule of this court he was entitled to interest upon the sum recovered in the Circuit Court from the date of the decree, and that its omission was a clerical error. * * * But the judgment is correctly entered, and the mandate conforms to it. And the mistake on the part of the appellee has arisen from supposing the eighteenth rule to be still in force and to be applicable to cases in admiralty. But it never applied to admiralty cases. * * * Cases in admiralty, however, are not embraced in the sixty

second rule. It applies to cases in law and equity only. * * * In the case before us, no new judgment could be given in this court, because, upon the question of affirming or reversing the decree of the circuit court, the Justices of this court were equally divided; and the judgment was affirmed by operation of law, which from necessity affirms the judgment of the inferior tribunal when the judges of the appellate court are equally divided. Upon such affirmation the appellee was entitled to the full benefit of the decree of the circuit court, but nothing more. The court being equally divided could not change the decree of the circuit court nor exercise its discretionary power to allow interest on the decree for this would have been a new decree."

In the case of *In re Washington & Georgetown R'd Co.*, 140 U. S. 91, 11 Sup. Ct. 673, 35 L. Ed. 339, it appeared that a judgment in an action of tort was recovered in the Supreme Court of the District of Columbia, at special term. This judgment was affirmed by the general term with costs. The latter judgment was affirmed by the Supreme Court of the United States with costs. No reference was made to interest in any of the three judgments. On the presentation of the mandate of the Supreme Court to the general term it entered a judgment for the payment of the judgment of the special term with interest on it at the rate of six per cent. per annum from the time it was originally entered. It was held that the judgment on the mandate should have followed the judgment of the Supreme Court and not have allowed interest. Mr. Justice Blatchford in delivering the opinion of the court said:

"We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the special term, or whether it would have been proper for the special term, in rendering the judgment, or otherwise, to have allowed interest upon it, or whether it would have been proper for the general term to do so; but we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this court awarded no interest on its judgment of affirmance, all that the general term could do, after the mandate of this court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the general term, and directing execution of the judgment of the special term of December 18, 1885, with costs, and without interest, and of the judgment of the general term of June 28, 1886, for costs."

I am entirely satisfied on principle and authority that this court has no power, as the case now stands, to allow interest on the decree for the libellant. How far it would accord with justice or sound practice for the circuit court of appeals to allow such interest is a matter for determination by that tribunal and not by this. I am further satisfied by authority as well as principle that the relationship to this case of the surety company, as stipulator for the respondents, is such as to entitle it to pay into court the amount of the decree against them with costs, and become subrogated to all the rights and remedies of the libellant against the respondents.

The prayers of the surety company for leave to make payment into court and for such other and further relief in the premises as it may be entitled to receive do not require extended discussion. The first and fourth prayers are as follows:

"First: That your petitioner be permitted to pay into the registry of this court the full amount of the decree above mentioned, together with interest thereon at the rate of six per cent. per annum from the date of said decree

to the date hereof, and also all costs incurred in this court since the date of said decree to the date hereof, subject to the further order of this court.

* * * * *

Fourth: That if this court decide and decree that the said libelant is not entitled to interest upon the amount of said decree from the date of said decree to the date of this petition, or that the costs incurred since the date of said decree, are not properly chargeable against your petitioner, then and in that instance, the amount paid by your petitioner as interest and costs be returned to your petitioner after deducting therefrom any costs properly chargeable against your petitioner in the premises."

It will be perceived that the surety company does not pray for leave to make any absolute or unqualified payment into court of interest, to be distributed or disposed of without any judicial determination of the right thereto. The petition expressly avers that the interest and costs demanded by the libelant "is not properly due and payable by your petitioner," and states that it is "ready and willing to pay the amount mentioned in said decree, together with interest thereon at the rate of six per centum per annum, and any costs incurred since the date of said decree, if in the opinion of the court said interest and costs are properly due and payable by your petitioner as stipulator as aforesaid." If there be no right on the part of the libelant to interest I can perceive no propriety in either directing or authorizing it to be paid into court. The main question raised on the present application is whether the libelant, under the final decree of this court, as affirmed by the circuit court of appeals, is entitled to interest. Upon a full hearing and after argument by the proctors of the libelant and the surety company this court is of the opinion, and now decides, that the libelant, as the case now stands, is not entitled to any interest as claimed by him. Under these circumstances, it would be both anomalous and illogical that this court in the face of the conclusion just reached by it should direct interest to be paid into its registry in order to test by another decision the soundness of its present conclusion. But it is manifestly proper that the surety company should have an opportunity to relieve itself from any and all liability to the libelant resulting from the entry of the decree against it. The proctor for the libelant stated in open court during the progress of the hearing that he would not consent to receive or receipt for in total or partial part payment of the libelant's claim any sum of money which should not include the interest in dispute. Under these circumstances and the prayer for further relief, leave will be granted to the surety company forthwith to pay into the registry of this court the sum of \$37,383.48, awarded to the libelant by the final decrees in this cause, together with the usual incidental costs accruing after final decree, to abide the further order of the court. The propriety of such an order seems unquestionable in view of the fact that should it be hereafter determined by higher authority that interest should be paid to the libelant in addition to damages and costs, as heretofore decreed, any deficiency may be collected from the respondents or their stipulators.

It is only necessary to add in conclusion that on the payment to the libelant or into the registry of this court for the libelant by the surety company of the amount herein found due to the libelant, together with

the usual incidental costs accruing after final decree, the surety company, the petitioner will be subrogated to all and singular the remedies against the respondents which the libellant has in the premises, and may pursue the same in accordance with the rules and practice of this court in like cases.

In re BRUMBAUGH.

(District Court, D. Pennsylvania. March 30, 1904.)

No. 297.

1. BANKRUPTCY—EXEMPTIONS.

Where, after judgment had been recovered against a defendant for breach of marriage promise, he was adjudged a bankrupt, it was no ground for opposing his state exemption that he would not be able to maintain a claim for it in the state courts as against such judgment.

2. SAME.

The only question to be determined on a bankrupt's application for his exemptions under state laws is whether he is entitled to the same as against general creditors.

3. SAME—FRAUDULENT CONVEYANCES—DISCHARGE.

Where, more than four months prior to the institution of bankruptcy proceedings, the bankrupt conveyed certain property to his wife for the purpose of raising money to pay the expenses of an impending suit for breach of marriage promise, such conveyance was no ground for denying the bankrupt's discharge, under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], which requires that a fraudulent transfer, in order to prevent a discharge, must be made within four months.

4. SAME—CONCEALMENT OF ASSETS.

In the absence of proof of a clear misstatement by the bankrupt with regard to his ownership of real estate, the title to which stood in the name of his father, amounting to a concealment of assets, or a false oath, the fact that the bankrupt and his wife resided on such real estate, and that the bankrupt was the father's prospective heir, was no ground for refusing a discharge.

5. SAME—EXCEPTED LIABILITIES.

Where, though a judgment for breach of promise was by far the principal liability of a bankrupt, it was not the only one, the bankrupt could not be deprived of a discharge on the ground that the judgment was recovered on a claim constituting a willful injury to the person, and so was within the excepted liabilities.

6. SAME—EXEMPTION—WITHHOLDING DISCHARGE TO PERMIT TEST IN STATE COURTS.

Where it was contended that a bankrupt was not entitled to retain property claimed as exempt as against a judgment for breach of marriage promise, and the only way in which the judgment creditor could test the question was by proceedings in the state courts, the bankrupt's discharge should be withheld until the judgment creditor was afforded a reasonable opportunity to test her rights.

In Bankruptcy.

H. H. Waite and W. M. Henderson, for exceptant Cora A. Keim.
Samuel I. Spyker and J. R. & W. B. Simpson, for bankrupt.

ARCHBALD, District Judge. This case is here on two questions:

- (1) As to the right of the bankrupt to his \$300 state exemption; and
- (2) as to his right to a discharge.

1. On January 14, 1903, a judgment was recovered in the court of common pleas of Huntingdon county, Pa., against I. Harvey Brumbaugh, the present bankrupt, at the suit of Cora A. Keim, in an action for breach of promise of marriage. This action was begun by *capias* in trespass, on which the defendant was held to bail, and resulted in a verdict for \$9,250 damages, reduced by the court to \$5,000, on which judgment was subsequently entered. On March 12th following the defendant filed a petition in this court to be declared a bankrupt, and the same day was so adjudicated. The admitted purpose of this was to escape liability on the judgment referred to, and the only debts scheduled or proved outside of it were one of \$100 to F. G. Brumbaugh, an uncle, and another of \$150 to Juniata College, of which the bankrupt was at the time and now is president. The position taken by the exceptant is that as the bankrupt would not be entitled as defendant to claim his exemption on an execution in the breach of promise case because of its being a tort and sounding in damages, he is not entitled to have it set apart to him here. It is undoubtedly true, under the law of Pennsylvania, by which the exemption is given, that it cannot be claimed in cases of tort, but only of contract. *Kirkpatrick v. White*, 29 Pa. 176; *Kenyon v. Gould*, 61 Pa. 292; *Commonwealth v. Brown*, 17 Pa. Super. Ct. 520; *Edwards v. Mahon*, 5 Phila. 531. If, therefore, the cause of action on which judgment was rendered against the bankrupt was in its nature tortious, the exemption could not be successfully claimed or retained by him if execution were issued upon it. But that does not determine the question whether it is now to be allowed to him. This was considered and conclusively disposed of in the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, where it was held that property set apart to a bankrupt under his claim to exemption forms no part of his estate in bankruptcy, and that as a result the court has no jurisdiction to administer it or enforce against it the rights of creditors having special claims upon it, by waiver or otherwise, under the state law. It affords no ground, therefore, for opposing the bankrupt's exemption in the present instance that he would not be able to maintain a claim for it against the judgment of Miss Keim. If that be legally true of it, she has simply to issue execution and seize the property set apart to him, and the state courts will then determine her rights. But they must be worked out there, and not here; the only question which now concerns us being whether the bankrupt, as against general creditors, is entitled to his exemption, as to which there can be no doubt.

2. Several reasons are advanced for denying the bankrupt a discharge. It is charged that he disposed of certain shares of valuable stock in the Geiser Manufacturing Company on the eve of the trial of the breach of promise suit, for the purpose of stripping himself of his property, and leaving nothing out of which a judgment if recovered could be made. But a man may dispose of his property until it is taken out of his hands by due proceedings, provided he do it honestly (*Githens v. Schiffer*, 7 Am. Bankr. Rep. 453, 112 Fed. 505), and there is nothing to establish the contrary here. So far as appears, the sale was for full value, for the avowed purpose of raising money to pay

the expenses of the impending suit, and we are not to import a sinister motive without some countervailing proof. This is true even though his wife was in large part the purchaser, there being nothing to prevent her if actually and honestly such. Moreover, if there was really any fraud in the transaction, it took place more than four months prior to the proceedings in bankruptcy, and it is only where there has been a fraudulent transfer of property within that period that a discharge is barred. Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]. It may be that the trustee, in view of the strict rule which prevails with regard to transactions between husband and wife, would have been justified in instituting proceedings to avoid the sale, under section 70e of the act. 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]. But with that we are not now concerned. It is sufficient to know that there is nothing in what has been brought forward that stands in the way of a discharge. The same observation may be made with regard to the real estate on which the bankrupt resides, the apparent title to which is in his father, a man of some little means, whose only child and prospective heir he is. If there was any doubt as to who was the real owner of the property, the bankrupt or his father, it was a matter for the trustee to test, and except upon proof of a clear misstatement of the bankrupt with regard to it, amounting to a concealment of assets or a false oath, it is of no materiality here. The \$64.50 in bank attached by Miss Keim stands in much the same light. It may raise the suspicion of regularity that this fund which was released by the proceedings in bankruptcy was transferred the day before to the bankrupt's attorneys, but there must be something more than this to lay hold of before we can deny a discharge.

It is urged, however, that breach of a promise to marry is a willful injury to the person, and so within the excepted liabilities, from which bankruptcy does not relieve, and that, as the sole ground for instituting these proceedings was because of the recovery of the Keim judgment, the bankrupt should not be allowed to go free. But whatever might be the proper conclusion, if this was the case, it cannot be predicated of what we have here. While the claim of Miss Keim is by far the principal liability, it is not the only one, and even though the others are comparatively trifling, and undoubtedly friendly, they cannot be disregarded. Neither is it clear that an action for breach of promise to marry falls within the excepted liabilities, the weight of authority in fact being the other way. *In re Fife* (D. C.) 109 Fed. 880; *Finnegan v. Hall*, 6 Am. Bankr. Rep. 648, 72 Fed. 347; *Disler v. McCauley*, 7 Am. Bankr. Rep. 138, 73 Fed. 270, reversing 6 Am. Bankr. Rep. 491, 71 Fed. 949. *In re McCauley*, 4 Am. Bankr. Rep. 122, 101 Fed. 223, was in every way like the present, except as it was aggravated by seduction, and yet it was held that the bankrupt was released. But I am not called upon to decide on the effect of a discharge, and I do not. The only question is whether the bankrupt is entitled to it, and that he ultimately will be is clear. How far-reaching it will be when granted is another matter to be disposed of when it is properly raised.

There is ground, however, for the present, in withholding final action on this subject. If it be, as contended, that the bankrupt is not entitled to retain the property which he has exempted, as against the Keim judgment, on the ground that it is for a tort, the only way to test that question, as already intimated, is by proceedings in the state courts, by issuing execution, and levying upon it. But, as the legal effect of a discharge in bankruptcy would be to wipe out the liability (assuming that it is not one of those that are excepted by the act), the right to execution would be cut off if once the discharge went out. *Claster v. Soble*, 22 Pa. Super. Ct. 631. The judgment creditor has therefore a right to ask that a discharge be withheld for the present in order to enable her to test her rights in the way suggested. This was the course pointed out and sanctioned in *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, already referred to, and it will be followed here.

The exceptions to the action of the referee allowing the bankrupt his exemption, and holding that he is entitled to his discharge, are overruled. But the discharge is withheld until the further order of the court, for the purpose of allowing the excepting creditor to assert in the state court by appropriate proceedings her alleged right to subject the property exempted to execution upon the judgment which she has recovered, with leave to the bankrupt to move for his discharge unless such proceedings be taken within 20 days, or unless it be determined that the property exempted cannot be subjected thereto.

In re LUM POY et al.

(Circuit Court, D. Montana. March 23, 1904.)

1. CHINESE EXCLUSION—ARREST FOR DEPORTATION—BAIL.

A Chinese person arrested in this country for deportation under the exclusion acts may be admitted to bail by a district court or judge pending his hearing before the commissioner.

Habeas Corpus. Application for admission to bail.

Sanders & Sanders, for petitioners.

Carl Rasch, U. S. Atty.

KNOWLES, District Judge. Lum Poy, alias Charlie Lum, and Leong Quen, two Chinese persons, were arrested under warrants issued upon complaints charging them with being unlawfully within the United States, in violation of the Chinese exclusion acts and the amendments thereto. They were taken before Edward C. Russell, one of the United States Commissioners for this district, arraigned, and committed to the custody of the marshal pending an investigation into the truth of the charge pending against them. They each applied to said commissioner to be released upon bail pending the in-

¶ 1. Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

See Aliens, vol. 2, Cent. Dig. § 94.

vestigation, and said application was refused by the commissioner, whereupon they separately filed their petitions for this writ. The writ was issued, and they were brought before me to determine the question of their right to be admitted to bail pending an inquiry as to the lawfulness of their residence within the United States. The question involved being the same in both cases, I have concluded to decide them together.

Heretofore I have been of the opinion that the court or judge had no power to admit a Chinese person to bail under circumstances as are presented here. I have been of the opinion that it requires some positive provision of law to authorize admission to bail in proceedings under the Chinese exclusion acts.

In *Re Carrier* (D. C.) 57 Fed. 578, the defendant was arrested and detained as a fugitive from justice under extradition proceedings. He made application to be admitted to bail pending the investigation. Judge Hallett said:

"The matter of bail is not a question of practice. Since the time of Edward I it has been regulated by statute, and in our day bail is not allowed in any case except in pursuance of some statute."

In *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948—a case on appeal from a decision of the United States Circuit Court for the Southern District of New York—the court below entertained the same opinion and views. It has been held that an inquiry as to whether a Chinese person is unlawfully within the United States, and his detention pending an investigation as to this, is a civil proceeding, and hence the provisions of the Constitution of the United States and of the common and statute law as to enlargement on bail in criminal cases do not apply; but in the case of *Wright v. Henkel*, supra, the Supreme Court said:

"We are unwilling to hold that the Circuit Courts possess no power in respect to admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."

While this case does not decide the question as to whether a party should be admitted to bail in cases where there is no statutory authority for the same, it does leave the question in doubt. I am informed that the practice in California, Idaho, and Oregon has been and is to admit Chinese persons to bail pending an investigation into the lawfulness of their residence within the United States, and before any order for deportation has been made. I find, also, that there are decisions of the federal courts which support this practice. In *Re Ah Kee* (C. C.) 21 Fed. 701, *Re Ah Moy* (C. C.) 21 Fed. 785, 809, *Re Cheen Heong* (C. C.) 21 Fed. 791, the question was presented as to the right of a Chinese person to be admitted to bail pending an investigation as to whether he had a right to land from a vessel in a port of the United States. Justice Field, who decided the cases in his capacity of Circuit Justice assigned to the Ninth Judicial Circuit, entertained the view that there was no such right to be so admitted to bail. Judges Sawyer, Hoffman, and Sabin dissented from this

view, and expressed their views in exhaustive opinions filed in these cases. These rulings were made in 1884. In the year 1892 Congress enacted a statute providing that Chinese persons seeking to land in the United States could not make application to any judge or court of the United States in the first instance for a writ of habeas corpus for the purpose of being admitted to bail. Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319]. The case here presented is different from that presented by this act of 1892. Here Chinese persons have landed and are living within the United States, and the question is as to whether they shall be deported therefrom to the country from whence they came. In *Re Ah Tai* (D. C.) 125 Fed. 795, Judge Lowell held that a Chinese person is admissible to bail until a final order for his deportation has been made and entered.

It seems to me that in some cases there would be a great hardship in refusing bail to a Chinese person arrested on a charge of being unlawfully within this country. In one of the cases at bar one of the accused persons claims that he was born in the United States, and that he could produce evidence of that fact; but, unless allowed to go to the place of his nativity, he cannot obtain the necessary evidence to prove the facts, and that he has not the means of obtaining or compelling the attendance of the necessary witnesses to establish it. Thus, if restrained of his liberty, and detained in the custody of the marshal of this district until the day set for the hearing of his case before the proper commissioner, the door would be closed to his ever securing his liberty of residence in the country of his birth, no matter how meritorious his claim might be shown to be.

Considering the practice of the federal courts outside of the District of Montana upon this subject, and upon consideration of the hardship presented by these cases, I have concluded to recede from my former position, and to order that these petitioners be admitted to bail pending the investigation of the charge against them before Commissioner Russell.

It is therefore ordered that Lum Poy, alias Charlie Lum, and Leong Quen be admitted to bail in the sum of \$500 each pending the hearing and determination of the charge against them.

WINCHESTER REPEATING ARMS CO. v. BUTLER BROS.

(District Court, N. D. Illinois, N. D. February 8, 1904.)

No. 26,897.

1. TRADE-NAMES—UNFAIR COMPETITION—INJUNCTION—PLEADING.

A bill for injunction by the Winchester Repeating Arms Company, alleging that defendant advertises for sale "Winchester Model Single Shot Take Down Rifles," thereby securing correspondence and getting hold of customers to whom it sells guns other than those made by complainant, states no cause of action, though alleging that defendant carries no stock of complainant's rifles, it not being shown that the mail-order business

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 105; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

requires the carrying of a stock, and not being alleged that persons have bought guns of defendant believing them to have been made by complainant.

2. JURISDICTION OF FEDERAL COURTS--AMOUNT IN CONTROVERSY.

A complaint for injunction alleging that complainant's trade-name is worth in excess of \$5,000; that defendant's acts are calculated to deceive and mislead intending purchasers of complainant's product, to its "great loss, injury, and damage"; and that unless defendant's acts are checked the reputation of complainant and its rifles will still further suffer great and irreparable damage—does not show jurisdiction in the federal court, as it cannot be assumed that the trade-name will be destroyed, or that complainant's damages are in excess of \$2,000.

Matz, Fisher & Boyden, for complainant.
Leroy D. Thomas, for defendant.

KOHLSAAT, District Judge. The above suit was instituted to restrain defendant from using complainant's trade-name of "Winchester," alone or with other word or imitation or symbol likely to be confused with the same in the sale of rifles other than those manufactured by complainant, and from advertising the sale of Winchester rifles, and furnishing, in response to inquiry for rifles named in such advertisement or for Winchester rifles, any other rifle than complainant's manufacture, and from using complainant's trade-name in any connection for the sale of complainant's rifles when they have none of complainant's rifles for sale.

The bill charges that defendant is engaged in a general mail-order business, selling principally to retailers, and that it publishes a catalogue which states that Butler Bros. has for sale "Winchester Model Single Shot Take Down Rifles," meaning complainant's manufacture, while, as complainant is informed and believes and charges the fact to be, it has none for sale, and has not had for some time past, and that said advertisements show a cut or picture identical with complainant's model. It further charges that defendant has been and is in the habit of filling orders for said "Winchester Model Single Shot Take Down Rifles," received in answer to advertisements thereof by defendant, with rifles similar to complainant's, but not made by complainant, and which are of a grade lower than complainant's, thereby deceiving the purchasers and injuring the complainant's business.

There is no allegation that defendant sells or fills orders for said Winchester rifles with other rifles as and for Winchester rifles. The substance of the charge is that defendant secures correspondence by using that name in advertising, and thus gets hold of customers, and succeeds in selling guns other than those made by complainant.

It does not appear that purchasers are imposed upon further than being brought into correspondence by means of the advertisement, nor is it apparent that complainant is thereby damaged. As long as complainant's manufacture is in the market, any one may sell the same on the market, and it cannot be said to be fraudulent or unfair compe-

¶ 2. Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

tition to advertise that he will do so. While the customer may write for or order the complainant's product, still, if he is persuaded, however falsely, that defendant's gun is just as good, and is thereby induced to buy it, that is not the fraud or unfair competition upon which the court can grant an injunction. It does not appear from the bill that business known as mail-order business does require the carrying of a stock of the goods. It is charged that a catalogue is sent out, presumably based on the general market prices of merchandise, and the orders are presumably filled by purchase or otherwise, as the case may be. At any rate, these premises are not rebutted, nor is the manner of dealing disclosed. Therefore the fact that defendant carries no stock of the rifles in question is not, under the terms of the bill, evidence of any fraudulent intention. The allegations of the bill to the effect that defendant's conduct in the premises is calculated to deceive the purchasers and injure complainant is not such charge as justifies a court in enjoining defendant on the ground of fraud or unfair competition or infringement of trade-name, considered with the other allegations of the bill. Nor does complainant bring itself within the rule in such case by charging that the said acts of defendant have caused persons to believe that rifles kept and offered for sale and sold by defendant are complainant's manufacture. Mere belief is immaterial, unless acted on.

It is noteworthy that substantially all the material allegations of the bill are made upon information and belief. Surely, had there been any imposition upon customers, complainant would have discovered it. It certainly would be in position to know whether it had been injured in the premises. The foregoing reasons would be doubly cogent in case of dealings of defendant with retail dealers, as alleged in the bill.

The demurrer raises also a question of jurisdiction. The bill alleges that complainant's trade-name, "Winchester," is worth in excess of \$5,000, but makes no charge as to the amount of present or prospective damage to complainant arising out of defendant's action, excepting the statements that defendant's acts are calculated to deceive and mislead intending purchasers of complainant's product, "to the great loss, injury, and damage" of complainant, and that unless such acts of defendant are checked "the reputation of the complainant and its rifles will still further suffer great and irreparable damage." There is no averment that complainant's trade-name will be destroyed, nor that it is in jeopardy. The court cannot assume, in the absence of allegations to that effect, that the trade-name will be destroyed, or that complainant's damages are in excess of \$2,000.

It is true the danger of irreparable damages is set out, but that statement is both a conclusion and uncertain. Had the bill charged that the trade-name would be destroyed, then the value of the same would be the amount in controversy. As the matter now stands, the only amount in controversy involved is the amount of complainant's damages, present and prospective, in the premises, and they are not stated. I think it clear that the bill shows no jurisdiction in this court. *Draper v. Skerrett* (C. C.) 116 Fed. 206; *Humes v. City of Ft. Smith* (C. C.) 93 Fed. 862; *Delaware, L. & W. R. R. Co. v. Frank* (C. C.) 110 Fed. 694; *Nashville, C. & St. Louis Ry. Co. v. McConnell* (C. C.) 82 Fed. 65;

Stock Yards Co. v. Louisville & Nashville Ry. Co., 67 Fed. 35, 14 C. C. A. 290.

In brief filed by complainant's counsel it is stated: "Complainant is not prepared to admit that, by the advertisements of defendant and its substitution of inferior rifles, it is going to absolutely destroy that trade-name which years of fair dealing have built up." This is undoubtedly true, but, if there is no danger of destroying the trade-name, then it seems to me the value of the trade-name is not the amount in controversy.

The demurrer is sustained.

HARPER et al. v. PRINTING-TELEGRAPH NEWS CO. et al.

(Circuit Court, S. D. New York. February 23, 1904.)

1. CORPORATIONS—RECEIVERS—ACTION BY STOCKHOLDERS—COURTS—JURISDICTION.

Where an action was pending in a state court for the recovery of money against a corporation, in which a receiver had been appointed, and an application by stockholders to compel the receiver to sue to set aside certain modifications of a favorable contract, by which royalties payable to such corporation were materially reduced, was denied, but the court granted such stockholders leave to sue the receiver, and to bring suit in equity against certain other corporations which had been instrumental in procuring such modifications, making the receiver a party, for the same and other equitable relief, the leave so granted did not authorize the maintenance of such suit in any other court than that in which the receivership was pending.

In Equity.

George C. Lay and Edmund Keener, for plaintiffs.

Louis Marshall and Wilcox & Brodek, for defendants.

WHEELER, District Judge. The Consolidated Telegraph & News Company had a favorable contract with George Grantham Bain for royalties on Essick's and Merritt & Joy's page printing-telegraph instruments of \$10 per annum for each instrument, to be 250 in number for half of 1896, 500 for 1897, 1,000 for 1898, and increasing 500 per year until 1903, and then 3,500 per year, amounting afterwards to \$35,000 per year. The Printing-Telegraph News Company succeeded to the rights and liabilities of Bain, and by agreement with the Consolidated Company on the 8th of March, 1897, modified the contract, providing for a minimum royalty of \$6,000 annually, at the rate of \$10 each on 600 machines, and \$5 each on others up to the limit of the contract; and on the 22d of December, 1898, the same parties made a further modification, making the price of each machine, after January, 1899, \$5 per annum. The American Press Association, officered by some of the same persons as, and interested with, the Printing-Telegraph News Company, advanced \$3,000 for

¶ 1. Suits by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.

See Receivers, vol. 42, Cent. Dig. § 345.

the Consolidated Company, which was secured by, among other things, an assignment of the royalties under the Bain contract for 1897. Suit was brought by the Press Association against the Consolidated Company, in the Supreme Court of the state of New York for the county of New York, upon that debt of \$3,000, wherein the defendant Monte Hutzler was appointed receiver of all the property of the Consolidated Company, and as such receiver took possession of the property. The plaintiffs intervened in that suit, and claimed that the directors who made the modifications were interested therein adversely to the Consolidated Company and favorably to the Telegraph News Company, and had defrauded the former for the benefit of the latter, and made a request in writing of Hutzler, as receiver, to bring suit to set aside the modifications of the Bain contract, and for the recovery of the royalties due by the terms of the original contract, and requested that court to direct the receiver to bring such a suit, and proceed for that purpose. That motion was denied so far as it sought to compel the receiver to bring suit against the companies to obtain the relief set forth in that demand, but it was ordered thereupon that the petitioners be and were thereby "granted leave and authority to sue the receiver, and to bring suit in equity against the Printing-Telegraph News Co., the American Press Association, the Consolidated Telegraph & News Co., making said Monte Hutzler, receiver, a party to such suit, and adding such other defendants as may be necessary, and, in such form of complaint as they shall be advised, to set aside" these modifications of the Bain contracts and other proceedings, "and for such other relief as to a court of equity shall seem just and equitable." Thereupon this suit has been brought, in behalf of the plaintiffs, as such stockholders and bondholders, and of all others, stockholders and bondholders, similarly situated, against these companies and the receiver, praying that the first modification of March 8, 1897, be set aside, and that the Printing-Telegraph News Company be decreed to account and pay over to the Consolidated Company, or a receiver appointed by this court, the royalties provided for by the contract of May 20, 1896, with interest, and be decreed to specifically perform the original Bain contract; and that the second modification of 28th December, 1898, be set aside and declared fraudulent and void; and that the original contract be restored in full force and effect; and likewise that the Printing-Telegraph News Company be decreed to account with and pay over to said Consolidated Company, or a receiver appointed by this court, all moneys due for royalties under said original contract, and be decreed to specifically perform the original Bain contract; and for further relief.

A preliminary question has been made here as to the jurisdiction of this court of this case, pending such proceedings and receivership in the Supreme Court of the state of New York. The plaintiffs insist that the leave of that court, as granted, to bring a suit against these corporations and the receiver fully authorized the plaintiffs to bring such suit in any court that would have jurisdiction of the parties, and to bring this suit here. The defendants insist that such leave would not give any authority for bringing and maintaining such suit in any other jurisdiction than that of that court wherein that suit and the re-

ceivership are pending. That suit would draw into it all claims upon or against any property of the defendant corporation involved and which had come into the hands of the receiver, and no other court would have jurisdiction to try and determine any suit concerning such property or property rights while in the hands of the receiver as an officer of that court. This suit depends upon rights between others than the receiver, as well as between them and him, and the trial and disposition of it would involve the adjudication of such rights between the other parties, which would concern them separately from him. While the leave of that court might be full authority for bringing suit against the receiver as such, it would not confer jurisdiction upon another court to try the rights of the other parties involved, to the extent of such a decree as might be made. This suit, against the receiver alone, would afford no relief to the plaintiffs. It is only by the adjudication of other rights preceding his to the property that any relief advantageous to them could be made available. The matter necessary to be litigated to any useful purpose is not what would concern the receiver alone, but others also, on which, perhaps, his rights as receiver were or may have been involved in the decree of that court appointing him receiver. These rights are involved there, the trial of them belongs there, and these other parties object to this proceeding for the adjudication of them here, claiming that they should be subjected to no other jurisdiction than that of that court in establishing, modifying, or denying any of their rights that they may have therein. That court could grant leave to proceed against the receiver, in any matter concerning which that court had jurisdiction which appertains to it exclusively, to another court, merely because the other court might have jurisdiction otherwise but for that which it has and is maintaining. It does not appear that jurisdiction was conferred upon this court, if intended, by the leave granted there, and it may not have been intended. The relief sought here is wholly such as is involved there, and as to that relief that suit is a prior suit pending; and this court cannot, at the request of one party, take jurisdiction of it against others concerned which that court cannot devolve, if it would, upon any other court.

The nearest case to this, and the most favorable to jurisdiction, which has been cited or noticed, is *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666. In that case a suit was maintained in the Circuit Court of the United States for the District of Kentucky about church property which was involved in a chancery court of the state, and was in the hands of the marshal of the state court as receiver, but on the ground that the suit was for different relief from that involved in the chancery court, and that the suit in the chancery court was not a prior pending suit as to the relief sought in the Circuit Court of the United States. That case was somewhat criticised by Chief Justice Redfield for what it was understood to have held contrary to the general principles of the subject; but the rule that the same rights to property in the hands of a receiver in one court could not be taken jurisdiction of in a new suit in another court appears to have been well recognized, and the jurisdiction of the Circuit Court to have been maintained otherwise.

As this case is now viewed here, this court cannot proceed to make any decree that will be effective as to what is sought in respect to the modification of the contracts involved, while the suit and receivership are maintained in the state court. Jurisdiction of it cannot, therefore, be properly retained.

Bill dismissed.

HASTORF v. DEGNON-McLEAN CONTRACTING CO.

(District Court, S. D. New York. March 5, 1904.)

1. SHIPPING—CONTRACT TO RECEIVE AND DISPOSE OF EXCAVATED MATERIAL—BURDEN OF PROOF.

In making an oral contract by which libellant agreed to receive at his dumping board, and to dispose of, excavated material for a fixed price per load, it was admitted that nothing was said as to which party should pay the expense of unloading the trucks at the dump. Respondent paid such expense, and sought to set off the same against the amount claimed by libellant to be due under the contract, and introduced testimony intended to show a custom for such expense to be paid by the dump owner. *Held* that, the burden of proof being on the defendant, whether the claim was regarded as a set-off or an affirmative defense, such testimony was not sufficient to overcome the positive and uncontradicted denial by libellant that he assumed the expense, corroborated also by the further fact that no claim therefor was made by respondent until several months after performance of the contract began, although settlements were made monthly.

2. ADMIRALTY—SET-OFF.

A set-off is not cognizable in admiralty except so far as it relates to the particular transaction which is the subject of the action, and goes to reduce or overcome the libellant's demand.

In Admiralty. Suit on contract.

Louis B. Adams, for libellant.

Wilcox & Green, for respondent.

ADAMS, District Judge. This action was brought by Albert H. Hastorf against the Degnon-McLean Contracting Company to recover the sum of \$1,720 alleged to be due for the receipt and disposition of 3,440 truck loads, at 50 cents each, of excavated material from the Rapid Transit Subway, received by the libellant from the respondent at his dumping board at 44th Street, North River, in September 1902. There is no dispute as to the rate or amount, but the respondent, admitting something to be due, sought by its answer, to set off the cost of the necessary labor for receiving and unloading the material, amounting, it was claimed, to the sum of \$740.03 and the further sum of \$350, altogether \$1,090.03, and offered to allow judgment to be entered for \$629.97. At the trial, however, the claimed set-off of \$350 was withdrawn, because of a doubt of the court's jurisdiction to entertain it, as it appeared that it arose under an independent contract, and the controversy is with respect to the claimed set-off of \$740.03.

The contract was an oral one, made by the libellant in person and a

¶ 2. See Admiralty, vol. 1, Cent. Dig. § 327.

civil engineer, in the employ of the respondent. These witnesses both admit that the question of labor was not discussed between them. The question turns on whether the parties impliedly made an agreement with respect to the receiving and unloading of the trucks on the scows.

The libellant and a number of witnesses for the respondent have been examined. The libellant testifies that there was no agreement, express or implied, with respect to the labor. The respondent's witnesses show their experience with dumps and say that the owners thereof generally furnish the labor. This kind of testimony, however, does not go far towards establishing a liability of the kind at issue and, in my judgment, is inadequate where there is a positive denial of the assumption of liability. I find from the libellant's testimony, which is not overcome by any direct testimony from the respondent's witnesses, that he did deny the liability for this claim when it was first put forward by the respondent. The libellant is corroborated by the circumstance that the accounts between the parties were settled every month, without any attempt on the respondent's part to realize this claim, beyond sending bills from April, 1901. These bills were not recognized in any way by the libellant, who, on the contrary, says that he informed the Secretary of the Company, when the first of the bills came to him, that he was not liable in such respect. The Secretary's denial of this testimony is weak.

This claim of the respondent has been treated by the parties as a set-off, in which case the burden of establishing it would be upon the respondent. *Waterman on Set-Off*, p. 92. In *Freeland v. Man & Moody*, 1 *Smedes & M.* 531, 535, cited in support of the text, it was said:

"It was the business of the defendant to have made clear and certain his legal right to have the benefit of the set-off, if he desired to avail himself of it."

In the *Amer. & Eng. Enc. of Law* (2d Ed.) v. 25, p. 488, set-off is defined:

"A set-off is a counter-demand, generally of a liquidated debt, growing out of an independent transaction for which an action might be maintained by the defendant against the plaintiff, exhibited by the defendant to counter-balance the plaintiff's recovery, either in part or in whole, and, as the case may be, to recover a judgment in his own favor for the balance."

What has been called the set-off in the case at bar, arises out of the same transaction as that which constitutes the libellant's claim and partakes more of the character of a defence, and it is questionable if such a claim can with propriety be deemed a set-off in this court. The ordinary set-off—out of which an affirmative judgment can elsewhere be obtained—is not cognizable in admiralty, except so far as it relates to the particular transaction which is the subject of the libel and goes to reduce or overcome the original demand. *O'Brien v. 1,614 Bags of Guano* (D. C.) 48 Fed. 726; *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 116 Fed. 857, 54 C. C. A. 207. But whether regarded as an affirmative defence or a set-off, the burden was not upon the libellant, but rather rested with the respondent, whose testimony principally tends to show that other dumps adopted

a rule with regard to labor, similar to that which the respondent contends for, and does not establish the claim that it was intended to be adopted here.

The libellant is entitled to a decree for \$1,720, with interest.

ALDRICH v. CRUMP.

(Circuit Court, E. D. Pennsylvania. March 31, 1904.)

No. 351.

1. JUDGMENTS—DEFAULT—APPLICATION TO OPEN—LACHES.

Plaintiff, though properly served with summons by leaving a copy with an adult member of her family, knew nothing of the suit, or a judgment subsequently recovered by default, until an attachment execution was issued, 11 years after the judgment had been taken by default. She did not authorize an appearance to be entered in her behalf, though such authority was given in form by her husband without her knowledge, and immediately on learning of the judgment she applied to open the same. *Held*, that plaintiff was not guilty of laches, and that her application should be granted.

A. T. Johnson, for plaintiff.

Charles F. Warwick, for defendant.

J. B. McPHERSON, District Judge. It must be conceded that this is a close case. I am satisfied, however, that the defendant did not have actual notice of the service of the summons, although a legal service seems to have been made upon an adult member of the family; that she knew nothing about the suit, or the judgment, until an attachment execution was issued in August, 1903, 11 years after the judgment was taken by default; and that she did not authorize an appearance to be entered in her behalf, although such authority was given in form by her husband without her knowledge. Immediately upon learning of the judgment she applied for this rule, and she must be acquitted, therefore, of the charge of laches, for she acted as soon as the facts were actually brought to her notice. On the merits, the application is open to some criticism, as I have already indicated, but on the whole of the evidence I think enough appears to justify me in permitting the defendant to submit her defense to a jury.

The rule to open the judgment is therefore made absolute; and it is further ordered that the defendant's affidavit, upon which the rule was granted, shall stand as an affidavit of defense, and that the defendant plead to the plaintiff's statement on or before the 15th day of April.

In re JOYCE

(District Court, M. D. Pennsylvania. January 8, 1904.)

No. 406.

1. BANKRUPTCY—PERISHABLE PROPERTY—SALE BY RECEIVER—EXEMPTION.

Where a bankrupt's receiver was ordered to sell the bankrupt's property, as perishable, before the time arrived for the appointment of a trustee, the bankrupt was entitled to have certain of the property selected by him to make up the amount of his state exemption set aside and held by the receiver until his right thereto could be determined.

In Bankruptcy.

Petition by bankrupt to have goods claimed as exempt set aside by receiver. The petition of the bankrupt set forth:

That involuntary proceedings were instituted against him December 28, 1903, and the same day a receiver appointed. That afterwards an order was made for the sale of his property as perishable, in pursuance of which the receiver had advertised to sell it at public sale on January 12th. That the petitioner desired to retain certain goods, to the amount of \$300, under his state exemption right, to wit:

One cash register valued at	\$125
One refrigerator " "	125
Hanging meat racks " "	50
	<hr/>
	\$300

—The values being those which were affixed by the appraisers appointed by the court for the receiver. That no trustee had yet been selected, and, there being no means by which he could avail himself of his right to retain and exempt the said goods, except by the order of the court, he therefore prayed that an order be made directing the receiver to set them aside, to await the making and disposition of his exemption claim.

Charles P. O'Malley, for bankrupt.

This practice is new, but we rely on the suggestion of this court in the Le Vay Case, 125 Fed. 990. It is the only way the right of the bankrupt to retain specific articles which is given him by the state law can be preserved. The time for selecting a trustee has not yet come, so that the bankrupt is precluded from making his claim, and having it set off to him in the way provided by the bankrupt act. If, then, the receiver goes on and sells, the bankrupt will be remitted to the money realized, which is not what he wants. This is a court of equity, and can mold the practice so as to protect the rights of all parties; and this it is bound to do in behalf of the bankrupt in the present instance.

A. V. Bower, for creditors.

There is no objection to the order asked for, but it should not be absolute, allowing the exemption, but conditional, to have the goods set aside to await the result of the bankrupt's claim when made.

The court (ARCHBALD, District Judge) made an order the same day directing the receiver to set aside and hold the articles named.

See In re N. Shaffer & Son, 128 Fed. 986.

In re N. SHAFFER & SON.

(District Court, M. D. Pennsylvania. March 4, 1904.)

No. 416.

**1. BANKRUPTCY—RECEIVERSHIP—EXEMPTION—PROPERTY SET ASIDE TO AWAIT
—DELIVERY TO BANKRUPT UNDER BONDS.**

Where a receiver in bankruptcy has been appointed, the court, on petition of the bankrupt, in order to preserve his rights to specific property which he wishes to exempt, and which otherwise would be sold, will direct the receiver to set aside such property to await the result of his exemption claim, and, upon giving bonds for its return, will under some circumstances authorize its delivery to such bankrupt meanwhile.

In Bankruptcy.

The petition of N. Shaffer, a member of the firm of N. Shaffer & Son, addressed to the court, set forth as follows:

That involuntary proceedings were instituted against said firm January 14, 1904, and the same day, on due application, Moses Salsburg was appointed receiver, and took possession of the goods, merchandise, and property of the alleged bankrupts; that among such property was one bay horse, of the value of \$65, one covered delivery wagon, of the value of \$40, and one set of single harness, of the value of \$5; that the articles so mentioned did not belong to the estate of N. Shaffer & Co., but were the individual property of the petitioner, and that at various times he had notified the receiver of this fact, and demanded that the same should be turned over to him, and that, along with other individual property, he desired to have the same set aside to him under his \$300 state exemption; that his personal effects, over and above the property mentioned, consisted of a few household goods, not exceeding the value of \$150, which, on filing his schedules, he also proposed to claim as exempt. He therefore prayed that the receiver should be directed to set aside and deliver over to him the property in question, as belonging to him under his exemption claim.

B. W. Davis, for petitioner.

Unless the bankrupt can have this property set aside to await his exemption claim, the receiver may go on and sell it under the order of sale which he has obtained; and, while this may not defeat his right under the decision of this court in the Le Vay Case, 125 Fed. 990, the state exemption gives the debtor the right to choose specific articles, and this ought not to be abridged. It is also intimated in the case referred to that the bankrupt might, under such circumstances, petition the court in advance, and have the goods which he wished to retain set aside and held by the receiver to await the selection of a trustee and the disposition of his exemption claim. We understand that this practice was recently pursued in this court in the Joyce estate, and thus is expressly sanctioned.

B. L. Levy, for the receiver.

We have no objection to the goods being set aside and not sold. But the receiver and the creditors contest the claim that the horse and wagon belong to the petitioner, and not the firm; and we ask that, if the property is to be turned over to him, he give bonds for its return in the event that his right to it or to his exemption is not made good.

The court (ARCHBALD, District Judge) made the following order:

Now, 4th day of March, 1904, the receiver in bankruptcy, Moses Salsburg, is directed to set aside the property described in the petition, viz., one bay horse, one covered delivery wagon, and one set of single harness, in order that the same may be delivered over to the trustee to await the action of court as to the right of petitioner, Nathan Shaffer, to the same as a part of his exemption; and in case the petitioner, Nathan Shaffer, shall furnish security in the sum of \$200, double its appraised value, conditioned for the return of said property to the trustee in the event his right to exempt the same shall not be sustained, then the receiver is directed to turn the same over to the petitioner, Nathan Shaffer.

PEPPER v. ROGERS.

(Circuit Court, D. Massachusetts. March 1, 1904.)

No. 1,789.

1. FEDERAL COURTS—REMOVAL OF CAUSE—RIGHT TO REMAND—WAIVER.

Where, on the removal of a cause to the federal court, plaintiff, simultaneously with the filing of the case in such court, moved to remand, he could not be held to have waived his right thereto by appearance or otherwise.

2. SAME—RIGHT TO REMOVE—FEDERAL RECEIVERS.

Where the issues in an action brought by a federal receiver of a corporation in a state court did not raise any federal question, the fact that plaintiff was a receiver and was appointed by a federal court did not authorize defendant to remove the case to such court.

3. SAME—STATUTES—CONDITIONS—CONSTRUCTION—WAIVER.

So much of Act Cong. Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], conferring jurisdiction on federal courts, as relates to the amount in controversy, and prohibits suits by assignees, etc., which could not have been maintained by their assignors in the federal courts, is jurisdictional, and cannot be waived, but that part prohibiting the arrest of a person in one district for trial in another, and prohibiting the bringing of civil suits against any person in any district other than that whereof he is an inhabitant, except that, where jurisdiction is founded on diversity of citizenship, the suit may be brought in the district of the personal residence of either plaintiff or defendant, relates entirely to the personal interests of the parties, and may be waived, even in a removed case.

4. SAME—ACTION BY NONRESIDENT RECEIVER.

Where a citizen of Pennsylvania was appointed receiver of a corporation by the United States Circuit Court sitting in Massachusetts, he was authorized to bring suit in the federal courts against a citizen of New York in the district of his residence; and hence, such receiver having brought the suit in the Massachusetts state courts, the defendant was authorized by Act Cong. Aug. 13, 1888, c. 866, §§ 1, 2, 25 Stat. 433, 434 [U. S. Comp. St. 1901, pp. 508, 509], to remove such cause to the federal circuit court sitting in that state.

† 4. Suits by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 28 C. C. A. 49.

In Equity.

Whipple, Sears & Ogden, for complainant.

Burrage & Hayden and Alfred Hemenway, for defendant.

PUTNAM, Circuit Judge. This is a motion to remand a case removed from the state court. All the elements authorizing removal are conceded to exist, except with reference to the citizenship of the parties to the controversy. The plaintiff sues as a receiver of a corporation, constituted as such by this court. He is a citizen of the state of Pennsylvania. The defendant, who removed the case from the state court, is a citizen of the state of New York; and whatever other parties there are to the suit, if any, are citizens of other states than Massachusetts. The plaintiff, simultaneously with the filing of the case in this court, moved to remand, as we have said. Consequently there is no possibility that we can find a waiver, as we did in *Philadelphia & Boston Face Brick Co. v. Warford* (C. C.) 123 Fed. 843, where, in accordance with our practice giving effect to decisions of the various Circuit Courts of Appeals in other circuits, we followed *Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 80 Fed. 766, 26 C. C. A. 146. We are now compelled to go deeper into the construction of the statute governing these questions than we did at that time.

The fact that the plaintiff is a receiver appointed by a federal court does not aid the defendant, because the issues involved in the case do not raise any federal question. Therefore *Gableman v. Peoria Railway Company*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, is decisive against any right to remove the suit on that account. Indeed, no claim is made otherwise by either party.

The counsel on either side have cited to us a long list of decisions pro and con, many of which are grouped conveniently in *Foulk v. Gray* (C. C.) 120 Fed. 156. Only two of these decisions have authoritative weight with us. These, moreover, harmonize with the natural reading which we give the statute, which is sections 1 and 2 of the act of August 13, 1888, c. 866, 25 Stat. 433, 434 [U. S. Comp. St. 1901, pp. 508, 509]. We make no reference to any earlier statute, because, as this statute was intended to codify the law, with an undoubted further intention of modifying it, little aid can be procured from previous legislation on this particular point. Also the proposition so often urged, that this statute intended to narrow the jurisdiction of the federal courts, does not illuminate to any great extent. Such a proposition cannot contravene clear phraseology, and, more than that, while the general purpose of a statute may be in a certain direction, there may be subordinate purposes in another. In this case, while the general purpose may well be held to narrow the jurisdiction of the federal courts, yet, in regard to some particulars, it is not violent to presume that it intended to wipe out previous inequalities and inconsistencies, even though so doing involved broadening jurisdiction to a certain extent. However all this may be, we find no assistance in the interpretation of this statute arising from the application of the general proposition referred to.

The first section, which defines the jurisdiction of the Circuit Courts of the United States, has been many times commented on by the federal courts, and sufficiently for our purpose has been thus commented on by the Supreme Court. It is thoroughly settled that some portions of the section are jurisdictional in the strict sense of the word, while others relate simply to the convenience of persons who are sued or may be sued. The former cannot be waived, the latter may be. This view of the section is involved in the decisions of the Supreme Court which hold that the mere question of the district in which suit is brought may be waived by the parties, while no waiver can affect the proper jurisdictional elements, such as diversity of citizenship, amount involved, and the prohibition of suits by an assignee which could not have been maintained by the assignor. With reference to this proposition, section 1 is easily divisible into parts. The first portion imposes a condition of a sum involved of \$2,000. With that exception, it vests in the Circuit Courts a full constitutional jurisdiction, using the phraseology: "The Circuit Courts of the United States shall have original cognizance" "of all suits of a civil nature" "in which there shall be a controversy between citizens of different states;" and then follows a description of other controversies, filling out the full constitutional extent to which the Circuit Courts may be given jurisdiction. Following this are provisions prohibiting the arrest of a person in one district for trial in another, and prohibiting the bringing of civil suits against any person in any district other than that whereof he is an inhabitant, except only that, where the jurisdiction is founded on the fact that the action is between citizens of different states, the suit may be brought in the district of the residence of either the plaintiff or the defendant. This, which may be regarded as the second division of this section, has uniformly been held by the Supreme Court to relate entirely to the personal interests of parties, which may be waived by them—especially by the defendant if sued out of the district of which he is an inhabitant. Then follows the third division of the section, which prohibits suits by assignees under certain circumstances. This third division is clearly for the protection of the courts, especially to render nugatory schemes to give federal tribunals jurisdiction over suits of which otherwise they would have none. It has therefore been held as strictly jurisdictional, and, like all other matters which are intended for the protection of the courts, beyond the power of the parties to waive. This was the substance of the decision in *Mexican National Railroad Company v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

In the case last cited, at page 208, 157 U. S., page 565, 15 Sup. Ct., 39 L. Ed. 672, the opinion rendered in behalf of the court made some explanation of the propositions which we have stated. It is there said that the jurisdiction of a Circuit Court on removal is "limited to such suits as might have been brought in that court by the plaintiff under the first section," which we have been analyzing. This language might possibly have been held to be so broad as to have reference to the whole of the section, including the second division thereof, which prohibits suits except in certain districts. That such was not the intention, however, is made entirely plain by what follows: "The

question is a question of jurisdiction, as such, and cannot be waived." This last sentence applies to the case then under consideration, which was a suit brought by an assignee, and therefore, as we have said, in the third division of section 1, and strictly jurisdictional.

Turning now to the second section, which provides for removal, it opens as follows:

"Any suit of a civil nature" "arising under the Constitution or laws of the United States," "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section" "may be removed by the defendant." "Any other suit of a civil nature" "of which the Circuit Courts of the United States are given jurisdiction by a preceding section" "may be removed" "by the defendant or defendants therein, being non-residents."

There is nothing in this section which contains any limitation with reference to the portions which we have cited; and this language is as broad as that of the first division of section 1, which, subject to the limitation of the amount involved, and subject also to the limitation as to suits by assignees contained in the third division of the same section, confers, as we have said, the entire constitutional jurisdiction. Therefore, inasmuch as the mere question of districts in which suits are to be brought is a personal matter, which does not affect the courts themselves, there is no reason why the language of the second section, which, with the exception of substituting the equivalent word "jurisdiction" for the word "cognizance," uses precisely the language of the first division of the first section, should be narrowed on account of the second division of that section. Therefore, as we have already said, the second section reads naturally into the first division of the first section, subject only to the limitations contained therein, and to those in the third division of which we have spoken, and which are the only strictly jurisdictional limitations found in that section.

This is a just construction of the law, which it is not presumptuous to hold that Congress had in view, because it balances the privileges of the parties. The plaintiff in this case might have gone into the federal courts by suing the defendant in the district of his residence; and that privilege is equalized by permitting the defendant to go into the federal courts if the plaintiff, for some reason peculiar to himself, avoids both the district of his own residence and that of the residence of the defendant, and goes into a district of which neither of them is an inhabitant.

This natural reading of the statute is in harmony with the only decisions which we are accustomed to follow. Observing the practice to which we have referred, according to which we give effect to the decisions of the Circuit Courts of Appeals of other circuits, *Memphis Sav. Bank v. Houchens*, 115 Fed. 96, 102, 52 C. C. A. 176, decided by the Circuit Court of Appeals for the Eighth Circuit, is quite authoritative, although the line of reasoning therein is not entirely satisfactory. *Memphis Sav. Bank v. Houchens*, it may be well to observe, was decided in March, 1902, which was subsequent to *Mexican National Railroad Company v. Davidson*, *ubi supra*, so that the latter case does not impugn its authority. The most satisfactory decision, however, and one which is quite authoritative so far as we are concerned, as it was decided by Mr. Justice Gray in the Circuit Court for

the District of Rhode Island, is *Amsinck v. Balderston*, 41 Fed. 641, 642. This rests on the natural reading of section 2 into the first division of section 1 of the jurisdictional act, as we have already explained. In those portions of the opinion in *Mexican National Railroad Company v. Davidson*, at page 208, 157 U. S., page 565, 15 Sup. Ct., 39 L. Ed. 672, which we have already referred to, the chief justice, speaking in behalf of the court, cites from *Tennessee v. Union Bank*, 152 U. S. 454, 461, 14 Sup. Ct. 654, 38 L. Ed. 511, the expression which we have already considered. That we have given this expression the true construction apparently follows from the fact that Mr. Justice Gray delivered the opinion in *Tennessee v. Union Bank* on March 19, 1894, without any indication that he intended thereby to disturb the rule which he had previously stated in *Amsinck v. Balderston*.

We have cited all the decisions which are authoritative with us, and, in view of them, and of the natural reading of the statute as we have explained it, we conclude that the suit was properly removed to this court.

The motion of the plaintiff to remand the case to the Supreme Judicial Court for the county of Suffolk and commonwealth of Massachusetts, from which it was removed, is denied.

FOURNIER v. PIKE.

(Circuit Court, D. Massachusetts. March 24, 1904.)

No. 1,349.

1. TRIAL—EXPLANATION OF CHARGE IN ABSENCE OF COUNSEL.

It is not the duty of a court to send for counsel of a party before answering questions asked by a jury, during their deliberations, in explanation of the charge previously given, although usually the court will not, in the absence of counsel, give further instructions as to the correctness of which there can be any question.

2. MASTER AND SERVANT—PLACE TO WORK—BUILDING NEW STRUCTURES.

An employer is not under the same duty with respect to providing a safe place for the employé to work, where the work is the construction of a new building, as he would be if the building were complete and fitted for use, and he cannot be held to the same degree of care with respect to temporary floors, or other structures, mainly constructed by the workmen for their own use, for purposes which are constantly changing as the work progresses, and which uses cannot in all cases be foreseen by the employer.

3. SAME—INJURY OF SERVANT—NEGLIGENCE OF FOREMAN.

A foreman, having direction of mechanics and other workmen engaged with him in the construction of a building, is a fellow servant with such workmen in such sense that their common employer is not liable for an injury to a workman on the ground that the foreman was negligent merely in permitting the men to do work in a certain way which was more dangerous than another, but which was not adopted by his orders.

†3. Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Canadian Pac. Ry. Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286.

On Motion for New Trial.

Norman F. Hesseltine and Amos W. Shepard, for plaintiff.
Knox, Coulson & Currier, for defendant.

PUTNAM, Circuit Judge. This is a motion for a new trial by the plaintiff, the verdict having been rendered for the defendant. The motion contains several alleged grounds therefor which were not insisted on before us, and which, therefore, need not be noticed. Those insisted on are alleged improper charge to the jury not in the presence of the plaintiff's counsel, and errors of law in the charge and instructions to the jury which prejudiced the jury against the plaintiff. With reference to the alleged improper charge to the jury in the absence of plaintiff's counsel, all that is now said about that is as follows:

"I trust that your honor will appreciate my embarrassment in reference to what was charged the jury when I was not present, and if your honor is sure of just what was said, there is nothing to be said on this point."

This relates to prior informal conversations between counsel and court in regard to this particular topic. On the occasion referred to, the jury desired some explanation by the judge, and they were allowed to come into court for that purpose. It is neither the practice of this court, nor is it its duty, to send for counsel on such occasions, it being clearly the duty of counsel to remain in attendance until the jury is discharged with reference to a verdict. The practice of the presiding judge, however, is either to send for counsel if not in attendance, or to decline in their absence to do more than answer some questions with reference to mere formalities, or to make some observation in the precise language contained in the charge, or possibly some observation as to which there can be absolutely no question. At the time, it transpired that a gentleman who is in the office of the counsel for the plaintiff was in court on the occasion to which the plaintiff refers, and he heard all that was said. Nevertheless the court was not advised of any question in reference thereto until some weeks afterwards. The matter then being brought to the attention of the court, the court was at that time clear in its recollection that it had not departed from its usual practice, but observed to the plaintiff's counsel that, having been informed immediately of what had taken place, he should have brought the matter to the attention of the court promptly if he made any question in reference thereto. Under the circumstances, the court considered itself justified in dismissing the matter from any further consideration, and is still satisfied that it did no injustice, and gave no ground for complaint. This being a matter somewhat personal to the presiding judge, he desires to add that, on the conclusion of all that was said on this topic, plaintiff's counsel expressed himself as fully satisfied in reference thereto.

The other propositions made in the motion for new trial relate to matters as to which the plaintiff had saved exceptions, and he could have had ample relief by writ of error in case any exceptions were well taken. The plaintiff, however, desires this court to pass upon them, and, in accordance with paragraph 2 of our rule 15, he expressly waives all exceptions. As, therefore, our decision, in the event

it should be adverse to the plaintiff, would be final as against him, we have held the plaintiff's propositions under advisement, and given them careful consideration.

The propositions of law which the plaintiff has in view in this motion are not raised on the face of the pleadings. The plaintiff's declaration alleged that he was employed as a laborer by the defendant in the erection of a factory building, and, while so employed, and in the line of his duty, he was engaged in carrying stone across the floor of the structure, and, while so engaged, owing to the negligence of the defendant in not providing proper and safe flooring over the elevator well, over which the stones were to be moved, he was, by the breaking of the flooring, precipitated down into the well, and severely injured.

Growing out of the fact that the plaintiff was employed in or about the erection of a building, it appeared that the floor to which the allegations of the declaration relate was constructed by merely laying down temporarily certain planks crossing the elevator well referred to. These planks were analogous to temporary stagings used in the construction or repair of buildings. Of course, without reviewing the authorities, we can say that it is well settled that the rule with reference to providing a suitable and safe place for the use of employes does not apply to buildings in course of erection or under repair, in the same way as to those which are complete and in use for practical purposes. Whether temporary floorings are safe depends on the changing uses to which they are put. Such temporary supports are mainly constructed according to the judgment of the mechanics engaged on the premises, and the employer is therefore not under the same obligations in reference thereto as in regard to structures in buildings which are supposed to be completed or in order; but, aside from that, in view of the fact that the contingencies of construction or repair are constantly changing, it is ordinarily impossible for employers to foresee all the purposes to which temporary supports may be applied, and to hold them in readiness therefor. In the present case, the work out of which the injury occurred, and the use of the flooring complained of, were under the eye of one Challis, who apparently was in charge of several gangs of laborers in and about the premises, engaged in the work of construction.

The propositions in behalf of the plaintiff are that Challis was not a mere foreman, but a superintendent and vice principal, and that, whether what was done was done by his order or through his negligence, the defendant was responsible therefor. In behalf of the defendant, it is claimed that the accident occurred in connection with the movement of some dimension stones, which Challis had directed to be moved over the elevator well on rollers; that, prior to the stone which was being moved when the injury occurred, the stones had been moved by the rollers, and with perfect safety; that the flooring was entirely safe for the use of rollers; that, contrary to orders given by Challis, the gang of laborers, which included the plaintiff, used a truck, instead of rollers, for the particular stone which was being moved when the injury occurred; that the central planks were of oak, and sufficiently strong, but were narrow; that adjacent to the central

planks were thinner planks of spruce or pine, which were weak; that, through fault on the part of the laborers, including the plaintiff, the wheels of the truck passed from the central oak planks to the weak spruce planks, and the latter thereupon broke, and threw the truck and stone and the plaintiff into the elevator well, whereby the plaintiff was injured; and that all this occurred without any fault on the part of Challis. The defendant, of course, further maintains that, even if Challis had been at fault, he was, for the purposes of this case, a fellow servant of the plaintiff. It is further claimed by the defendant that the fact that the spruce planks were weak was an apparent risk which the plaintiff was bound to guard against. In response, the plaintiff maintains that, while the method of covering the elevator well was substantially as stated by the defendant, the tread of the truck was so wide that, even with the use of reasonable care, the wheels were liable to run off upon the weak spruce planks, and that reasonable care was used, and that the wheels ran off notwithstanding the same; that, even if Challis did not give orders to use the truck, he was present when it was used, and acquiesced in its use, and thus impliedly, if not expressly, assumed charge of the work as it was being done; and that, in any event, as he was present, and knew the way in which the floor was being used, the defendant was responsible for his negligence.

On this motion, the plaintiff has pressed on us that Challis was a superintendent, in the sense in which the word "superintendent" implies large powers, to such an extent that, with reference to the duties performed by him, he must be held to be a vice principal. We should observe that the case before us is at common law, and not in any sense statutory. In view thereof, and in view of the decisions of the Supreme Court which we will cite, this is merely a question of fact. We can only say that we have carefully reviewed the circumstances, and that we, nevertheless, adhere to the opinion which we formed at the trial, namely, that it cannot be held that Challis was a superintendent in the large sense of the word, or that he represented the principal to any larger extent than the conductor in *New England Railroad Company v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. On this topic we charged the jury according to the following extracts:

"I wish to repeat to you that a person employing other persons to labor for him, mechanics, or whatever they may be, is not responsible to one of those mechanics or laborers on account of an injury happening to him through the negligence of another mechanic or another laborer, also employed by the same employer. Under the decisions of the Supreme Court [referring to *Alaska Mining Company v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, and *New England Railroad Company v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181] I am compelled to instruct you that, for many purposes in this case, the foreman who testified on the stand was a collaborer with the plaintiff; and I instruct you that, to the extent of a mere matter of negligence on the part of the foreman, the defendant is not liable for the injuries which might have occurred therefrom. The foreman and the men under him were engaged in a common employment, having in view a common purpose, and therefore they stood within the rule of law which I have explained to you, by virtue of which ordinarily a person employing mechanics or laborers is not liable for an injury happening to one of them through the negligence of another. I need not point out to you in all particulars just how the foreman stood with ref-

erence to the plaintiff and defendant in this case. Nevertheless, though, on a mere question of negligence on the part of the foreman, he stood as a collaborer with the plaintiff, yet, so far as he gave directions which were within the scope of his authority, so far he stood as the defendant, and the defendant is responsible for his acts, provided other things occurred necessary to impose liability. The orders given by the foreman were the orders of the defendant, and the defendant stood, so far as they are concerned, as though given by him in person. A mere matter of negligence on the part of the foreman was the negligence of a collaborer, and there is nothing in this case which requires any further instruction as to anything of that kind. I wish you to keep that clearly and firmly in mind. So far as he gave orders, the orders were of the defendant, and so far the defendant must answer, provided other things concurred to make him responsible; but beyond that the defendant is not responsible."

"You see the defendant was not bound to provide for all kinds of methods which the men might see fit to select. Therefore it follows, and I instruct you, that, unless you find that the foreman ordered this man to use the truck, you must return a verdict for the defendant."

"Apparently, when they [meaning the laborers] were using the truck to move the second stone, the foreman was there. It is for you to say whether he was there before they got the stone on the truck or not; but, if you find as a matter of fact that he had before ordered them not to use the truck, then the mere fact that he was there, and lent a hand, especially if he came after they laid the stone upon the truck, would not change the condition of things so far as the question of an order was concerned. You must find more than that he was present when the stone was laid on it, or that he was merely lending a hand. You must find that he was there ordering them to use the truck, because, if he only came there and found them preparing to use it, and merely lent a hand, or merely did not object, he stands, not as the defendant giving orders to use the truck, but as a collaborer, uniting with the men in what was a negligent way of moving the stone, so that the defendant is not liable for negligence in co-operating."

"It is claimed by the plaintiff that the mere fact that he was there, or lent a hand, or that he said something, amounted to an order; that the defendant is bound, not only by what the foreman did, but by what he did not do—bound not merely by an order, but by his acquiescence. If that were a correct proposition, the whole doctrine which I have called to your attention, the rule which makes those persons collaborators, would be useless; because, if a foreman, uniting with the other men under him in doing a piece of work, is thereby to be assumed to stand in the place of the defendant, and to give orders for doing the work as it was done, there would be no opportunity for the operation of this rule. Therefore you must understand that the mere facts that he was there, that he acquiesced after the men commenced work with the truck, that he lent a hand, that he did not object, did not of themselves alone amount to an implied order to do the work with the truck. What would amount to an implied order I will not undertake to say. I must leave that to you to a certain extent. I leave this to you to determine, in all the testimony in the case, which is probably fresher in your minds than in mine. I do not know that I can say anything further that will add any light; but you must find, from all the circumstances, that the foreman ordered these men to use that truck, or you must return a verdict for the defendant."

The propositions made by the plaintiff, so far as they rest on the claim that Challis was a superintendent in the sense to which we have referred, we have already disposed of. With reference to any question which may arise on the point whether Challis, in what occurred while he was present at the time of the injury, gave directions, express or implied, we are of the opinion that the question was properly left to the jury as a question of fact, with instructions which were sufficiently favorable to the plaintiff, and of which the plaintiff cannot complain.

With reference to the only questions of law which the plaintiff presents in regard to the extracts we have made from the charge, we

need refer to no authorities except *Northern Pacific Railroad Company v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; *Alaska Mining Company v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; and *New England Railroad Company v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. These supersede all decisions of the state courts cited by the plaintiff; and *New England Railroad Company v. Conroy* was subsequent to the federal cases to which he refers us.

The proposition of the plaintiff with reference to the instructions to the jury which prejudiced the jury against the plaintiff refers to the following portion of the charge:

"I have a right to comment on the facts, but you are not bound by what I say, especially as, in this case, I did not pay close attention to the opening testimony of the plaintiff, nor to his cross-examination; but, so far as I remember the testimony, I do not recall anything which in my judgment would justify you in finding that the foreman gave orders to use that truck. So far as I recall the testimony, his orders were the other way, and he gave you a reason for it. He did not wish to run the risk of destroying the stones. No matter what his reason, the question is, did he or did he not direct the men, either in terms or by implication, to use the truck? Unless you find that he did, you will return a verdict for the defendant, and that is the last of it."

The court is unable to perceive that the jury could infer from this that we had any particular views as to the facts. Any possible implication, if it can be conceived that there was any, was, in the way the matter was put to the jury, clearly within the province of the court according to the federal practice. Moreover, the court properly stated to the jury, with sufficient clearness, the fact that orders might be implied from what was done, even when not put in express terms; and it fully explained this in the portions of the charge already quoted with reference to the effect of the presence of Challis at the time the injury occurred. Taking it altogether, we are unable to see anything in this of which the plaintiff could justly complain.

The motion for new trial is denied.

THE J. EMORY OWEN.

(District Court, E. D. Wisconsin. April 11, 1904.)

1. SALVAGE—AWARD—DETERMINATION.

Where the need of salvage service is imminent, and the salvors are prompt and effective in giving their best efforts, without which the steamer and cargo saved would have been speedily destroyed, a liberal reward should be made, which, however, must be reasonably measured by all the circumstances, and not alone by the emergent need or the value of the saved property.

2. SAME.

Where a vessel was saved from speedy destruction by the acts of salvors, but at the time the service was rendered the vessel was not a derelict, the amount of salvage should not be determined by an application of the

¶ 1. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

See *Salvage*, vol. 43, Cent. Dig. § 57.

rules covering the apportionment of the value of a derelict saved; nor should the allowance equal what the owner, in the presence of the disaster, might offer for the rescue of the same.

3. SAME—GOVERNMENT VESSELS.

Where, after salvors had rendered services in extinguishing a fire on a vessel, a government steamer approached and rendered efficient services in the extinguishment of the fire, but made no claim for salvage by reason thereof, the value of the services of such steamer must be excluded in determining the salvage reasonably due to other vessels.

4. SAME—EVIDENCE.

Evidence reviewed, and held to authorize an allowance of \$3,900 to two steamers for the saving of another steamer and cargo from destruction by fire, to be apportioned two-thirds to one and her crew, and one-third to the other and her crew.

5. SAME—APPORTIONMENT.

Where salvage earned by the saving of a vessel and cargo from destruction by fire was largely the result of the fire equipment of the vessels performing the service, and not from acts of heroism on the part of the crew, the amount of salvage should be apportioned two-thirds to the owners of the vessels, and one-third to the crew.

In Admiralty. Libels in rem filed by the owners, respectively, of steamers Ann Arbor No. 2 and Burnham, to recover salvage against the steamer J. Emory Owen and her saved cargo of grain.

C. E. Kremer, for the Ann Arbor No. 2.

M. C. Krause, for owners of the Burnham.

C. W. Noble, for crew of the Ann Arbor No. 2.

G. D. Van Dyke, for cargo of the Owen.

F. S. Masten, for the Owen.

SEAMAN, District Judge. The fact of meritorious salvage service is undisputed, and the general circumstances under which it was rendered and the measure of success in the venture are equally undisputed. The wooden steamer J. Emory Owen was bound down the lakes from Manitowoc, laden with about 100,000 bushels of barley and oats, early in the afternoon of December 5, 1903, when a fire started aft, and was speedily beyond control, disabling her engine, pumps, and steering gear. The burning steamer was then 8 or 10 miles southeasterly of the entrance to Sturgeon Bay Canal, and was discovered about the same time by the respective libelants' steamers, Ann Arbor No. 2 and George Burnham—the former on her course from the canal to Frankfort, and the latter bound for Milwaukee from Menominee, lumber laden. Each was prompt in starting for relief at full speed, and the ability and effort on the part of the Ann Arbor No. 2 in reaching the Owen and taking off the crew of 18 men are noteworthy. The Burnham arrived soon after the men were taken off. While the cabin and all aft of the iron boiler house were ablaze, and the master of the Owen expressed the belief that the vessel could not be saved, both steamers took positions to make the effort—the Ann Arbor No. 2 on the starboard, and the Burnham on the port side—with a light wind slightly over the starboard bow of the burning steamer. The Ann Arbor was well equipped for the service, with five steam pumps and hose (as a car and passenger ferry, 260 feet in length), while the Burnham was a freighter of 149 feet keel, with smaller pump and hose; but both

were served effectively with men placed on the decks of the Owen, and fire extinguishers were also used by the mate of the Burnham. The fire was partially subdued after working an hour or more, and the rescuing steamers proceeded with the Owen for the canal entrance; the Ann Arbor performing the main service therein, if not substantially all the towage, and each keeping the pumps at work, with streams of water on the fire below deck. When about a mile from the canal entrance, the government steamer Hyacinth came to assistance, with excellent fire apparatus and service, taking the place of the Burnham on the port side; sending men with her hose into the engine room of the Owen, where the fire was making forward. For this work the Owen was held outside the entrance about an hour, and then proceeded up the canal, with the Ann Arbor on the starboard, furnishing the motive and guiding power; the Hyacinth on the port side working her pumps; and the Burnham astern of the Owen, throwing some water, but hindering the progress of the tow. On reaching the landing place, near Sturgeon Bay, about 9 p. m., the Owen stranded. During the night, watch was kept by each of the salving steamers, and streams of water were thrown at times to quench fire, which still appeared in places, up to 9 or 10 a. m., when the fire was out, and no further service was required. The Ann Arbor and Burnham remained some time longer before proceeding on their respective voyages, but without cause, so far as concerned the salvage service. No salvage claim is presented, or probably allowable, on behalf of the Hyacinth, but the value of this service can neither be disregarded, nor counted in favor of the libelants.

The grain which comprised the cargo of the Owen was greatly damaged by water, but a representative of the insurers, taking prompt measures to that end, saved about 16,000 bushels. The cargo was then sold, upon bids, at Sturgeon Bay, for \$10,600, after incurring \$1,000 of expense in removal and care, so that the net recovery was \$9,600. Contract was let for raising the steamer and delivering steamer and cargo at Milwaukee—"no cure no pay"—for \$3,500, of which the agreed share to be borne by the cargo was \$1,750, and the contract was duly performed. After arrival in Milwaukee the wreck was appraised, under order of court, at \$12,000; and this valuation, less \$1,750 for the expense of raising and delivery, is adopted as just for the purposes of the controversy, rejecting the opinion evidenced as to the value at Sturgeon Bay while grounded. The valuations thus adopted aggregate \$10,850 for the salvaged property.

The amount which may justly be awarded for salvage depends upon numerous conditions, and the solution is never free from difficulty when meritorious service appears; and the present case is further complicated both by the unusual diversity of interests involved, and by the absence of well-defined precedents for apportionment under existing conditions of steam navigation on the Great Lakes. The general rules which govern the award are well settled and require no recapitulation. The need of salvage service was imminent, and the salvors were prompt and effective in giving their best efforts. Without such service the steamer and cargo were doomed to speedy destruction. A liberal reward, commensurate with their action in the emergency, is due, under all the authorities, by way of salvage allowance; but it must be reasonable,

measured by all the circumstances, and not alone by the emergent need for aid, nor the value of the saved property. The contention for an allowance equal to the share which an owner might offer, in the presence of the disaster, for rescue of his vessel or cargo from inevitable destruction, cannot receive sanction; and I am satisfied that the further contention that the case is one of derelict, and within the rule commonly applied in such instances, is untenable. The circumstances do not establish a derelict, in the strict sense of that term. The Hyderabad (D. C.) 11 Fed. 749, 755. And no just ground appears for an arbitrary apportionment of share as a derelict to the salvors.

Both steamers were speeded to the rescue on the instant of discovering the fire, with pumps and hose put in readiness for use; and this element is entitled to substantial recognition in the award, although indifference in such case would violate a common dictate of humanity. Another important element was the rescue of the crew, who were thus saved the hardship and possible perils of a long pull ashore in their yawl, which was in readiness; the weather being cold, though not stormy. The conclusion to stand by and attempt to put out the fire, notwithstanding the hopeless report of the master of the Owen, together with the excellent equipment of the salvors for that purpose, especially on the part of the Ann Arbor, are potent factors. I am satisfied that these means were well served by both, though the witnesses on behalf of each unite in attempted belittlement of such service on the part of the other steamer—a spirit which must be deplored, although not unprecedented in maritime cases. The important element of peril involved in the undertaking on the part of the salvors remains to be considered, and I am constrained to the view that neither the steamers and cargoes of the libelants, nor the men who served in fighting the fire, were at any stage placed in imminent peril; that the direction of the slight wind, and location of the fire, aft of the iron boiler house and cargo bulkheads, made it unnecessary to expose the steamers to serious danger; that the men engaged on the burning vessel were exposed to no more peril than is commonly met by the fire department on land, and made no venture into the hold, beyond the openings in the deck, nor was this attempt deemed necessary, so far as appears, until made by the men from the Hyacinth after entering the canal.

The circumstances thus stated present a salvage case of unquestionable merit, and the libelants are justly entitled to fair rewards for efficient and successful services, beyond a quantum meruit for the expenses, time, and use of means. I am of opinion, however, that no award should be made of aliquot share in the saved property or its value, under these findings, whatever sanction appears for such allowance in various decisions involving derelicts or other extreme conditions. While the value of the property saved enters into determination of the value of the salvage service, as an essential element, and the maritime law intends encouragement of gallantry and adventure in the relief of distressed vessels, it is not the policy of that law to grant awards which tend to excite greed or promote unreasonable pretensions on the part of salvors, nor to disregard in any measure the interests of the owner of the rescued property.

The term of salvage service extended from about 2 p. m. to the morning of the next day, or less than one day. On the basis of expense and use of steamer and means, a mere quantum meruit allowance would not probably exceed \$300 for the Ann Arbor No. 2, and \$130 for the Burnham; and I deem \$500 a liberal estimate of the actual service engaged, including the Hyacinth. The service was rendered, however, in the month of December, with both steamers deviating from their voyage to render assistance. When the crew of the Owen were taken off, the only encouragement to further delay and effort was the mere possibility that joint and immediate use of their fire equipment might control the fire, with slight ground for expecting success, in view both of the destruction then raging, and of the master's judgment that it was beyond control. While serious peril was not involved in the attempt, the venture was doubtful, and, except for the excellent preparation made to that end on their run to the burning steamer, followed by good work, the steamer and cargo would have been a total loss. Considering these facts and the amount of the saving thus effected, my conclusion is that \$4,000 is a just and adequate allowance by way of bonus for the aggregate salvage service, making the total estimate for such service, with the \$500 estimate before mentioned, \$4,500. In this amount I estimate the share of the service on the part of the Hyacinth at \$600, which must be deducted from the aggregate so estimated, as the claimants are entitled to the benefit of such share, and not the libelants. The remaining sum of \$3,900 is primarily apportioned two-thirds (\$2,600) to the Ann Arbor and crew, and one-third (\$1,300) to the Burnham and crew, as that is deemed the fair proportion of one with the other, both in the capability of steamer and equipment, and in actual salvage service. Without disparagement of the worthy service of both, however, I am constrained to comment upon incidents which baldly appear in the testimony, and tend to show a spirit of selfishness and jealousy on the part of salvors, not deemed sufficient to influence the award, but so manifest that they cannot be passed over by silence. The true spirit and duty of this chivalrous service appear to have been misconceived by both of the primary salvors in the objectionable features referred to, but the most flagrant violation was on the part of the Burnham (1) in the treatment of the Hyacinth when that steamer came to their aid; and (2) in hooking on astern of the Owen during the difficult passage up the canal, hindering the tow, with little help, if any, in subduing the fire in that position. The minor (but notable) instances were (1) the exclusion of the master and men of the Owen from aiding in the work, when they came aboard presumably for that purpose, such treatment being plainly indicated by the conduct of the salvors throughout the service, and was forcibly expressed in at least one instance; and (2) persistence in exclusive watch and ward over the wreck, not only after grounding, but long after such service was needless. Whatever the incentive to either of the courses of conduct thus mentioned, each is disapproved, to say the least; and, if it had appeared that the result of the service was materially affected thereby, I should not have hesitated in reduction of the award. But

I am of opinion that the allowances stated are just, notwithstanding these deplorable incidents.

The difficult question which remains to be solved is the rightful share of the crews, respectively, in the general award. Within the purposes of the bounty and the principles of award, the apportionment between the owners of the steamer and her crew in any case must be governed by the circumstances of the particular service. As the circumstances are multifarious, so are the adjudicated cases, and I deem it unnecessary to review or analyze the numerous citations presented in the briefs. The era of steam navigation has revolutionized the means and methods of commerce—and the changed conditions are most evident on the Great Lakes—so that maritime rules have necessarily conformed to existing conditions. Salvage apportionments under the era of the sailing vessel and small tonnage are not now applicable as general precedents, and the later cases, if not entirely harmonious, are quite uniform in modifying the rulings thereupon of the earlier cases. In the case at bar the chief factors in the salvage service were the power and fire equipment of the steamers, and not individual heroism or potency. It is equally true that the services of the men were indispensable in extinguishing the fire, and that instances of salvage wherein difficult towage was the main ingredient are not analogous. I am satisfied, therefore, that the case is fairly within the line of authorities granting about two-thirds of the award to the owners and one-third to the crew, and so apportion to the libelant Ann Arbor Railroad Company, owner of Ann Arbor No. 2, \$1,740, and to the libelants Adolph Green and Fred. Schwerman, owners of the Burnham, \$870. The sum of \$860 is awarded to master and crew of the Ann Arbor and apportioned in two parts: (1) \$360 to constitute special awards, \$100 to the master, \$60 to the chief engineer, \$40 to the assistant engineer, \$50 to first mate, \$40 to second mate, \$25 to steward Hawley, \$25 to waiter Cooper, and \$20 to deckhand Morris; (2) the remaining \$500 to be divided among the master and crew, each member receiving such share thereof as his rate of wages bears to the aggregate pay roll. The sum of \$430, awarded to master and crew of the Burnham, is apportioned in two parts: (1) \$180 in special awards, \$60 to the master, \$40 each to the engineer and mate, and \$20 each to seamen Litzler and Green; (2) \$250 to be divided among master and crew, each receiving such share as his rate of wages bears to the aggregate pay roll.

Let decree be prepared accordingly.

UNITED STATES v. MCKEE et al.

(District Court, N. D. California. March 25, 1904.)

No. 1,628.

1. BOUNDARIES—ORIGINAL MONUMENTS—FIELD NOTES.

Where, in an action involving a disputed boundary line, there were no original monuments or standard corners west of a certain section corner to be found on either one of the lines claimed as the southern boundary of a township, in the absence of other evidence showing its location, the court was required to look to the field notes of the original survey for the purpose of determining where the line was originally run.

2. SAME.

Where a re-establishment of a township line in courses and distances agreed with the field notes of the original survey, and the difference between that line and the line fixed by other surveyors, contended by defendants to be the proper line, was too great to be accounted for on the supposition of an inaccuracy of measurement or error of computation in running the original line, and in addition defendant's line crossed a certain river twice, which fact was not mentioned in the field notes of the original survey, defendants' line will be disregarded.

3. SAME—PUBLIC LANDS—TRESPASS—BARK—CONVERSION—DAMAGES.

Where bark was taken by defendants from trees on the public domain by reason of defendants' misapprehension of the true location of a township boundary line, and three surveyors had erroneously located the line before the alleged trespass in accordance with defendants' contention, proceeding on an erroneous theory, and there was no evidence that defendants knew or believed that such line was erroneous, or that the true boundary line was that fixed by a previous resurvey, they were not guilty of willful trespass, and were therefore liable only for the stumpage value of the bark.

E. J. Banning, Asst. U. S. Atty.
Goodfellow & Eells, for defendants.

DE HAVEN, District Judge. This action was brought by the United States to recover damages for alleged trespass by the defendants upon certain public lands situate in township 5 south, range 2 east, Humboldt meridian. The complaint alleges that the defendants in the year 1900 went upon the lands described, and cut a large number of oak trees, and removed bark therefrom, of the value of \$9,000, and converted the same to their own use. The alleged trespass is denied by the defendants. The controversy grows out of a question relating to the boundary of the lands described in the complaint, and its decision depends upon the true location of the south boundary of township 5 south, range 2 east, Humboldt meridian. The contention of the government is that this boundary should be located in accordance with an approved survey made by one Chandler on May 22, 1902, under the authority of the United States, for the purpose of re-establishing such boundary; while the defendants insist that the line where it strikes the western boundary of the township is 28 chains and 25 links north of the Chandler line. That part of the southern boundary of the township commencing at the Pacific Ocean and extending east to the quarter section corner of section 34 was surveyed by G. H. Perrin, a gov-

ernment surveyor, in the year 1876; and the other part of the line, beginning at the quarter section corner of section 34, and ending at the southeast corner of the township, was within a few months thereafter surveyed by J. R. Glover, a United States surveyor. There is no dispute as to the location of that portion of the Glover line which forms the southern boundary of sections 35 and 36, and the evidence in the case is sufficient to show that in running west from the southeast corner of the township his survey closed upon the quarter section corner of section 34 set by Perrin. In other words, the quarter section corner of section 34 was located in the same place by the Perrin and the Glover surveys. The evidence also shows that the line surveyed by Chandler in its courses and distances agrees with that run by Perrin as shown by the field notes of the latter's original survey, but none of the standard corners set by Perrin west of this quarter corner were found upon the line as re-established by Chandler. The contention of the defendants that the Chandler survey does not properly locate the south boundary of the township in which the land described is situate is based upon the following facts shown by the evidence: The township immediately south was sectionized by Perrin, the United States surveyor, at or about the same time he ran the southern boundary of township 5 south, range 2 east, Humboldt meridian, and as actually surveyed by him the northern tier of sections in the township south extended north of the Chandler line; section 1 about 38 chains, and section 4, upon the western side of the township, 28 chains and 25 links. The northern corners of these overlapping sections were properly marked as closing corners, and the defendants contend that they are upon the southern boundary of township 5 south, range 2 east, Humboldt meridian, as originally run by Perrin. No standard corners, however, are to be found upon this line, although one of the witnesses, a surveyor, testified that he found a stake properly marked as a standard corner at the point claimed by the defendants as the southeast corner of section 31; but it was shown by another of defendants' witnesses that this stake was not actually set by Perrin, but by the witness himself, about seven years after the original survey of the southern boundary of the township; and this witness further testified that it was marked by a government surveyor then engaged in sectionizing the township, and that he set it up by direction of that surveyor. This stake, then, is in no sense an original monument, and cannot be looked to as evidence of the original location of the standard corner of which it purports to be a memorial.

The case, then, as presented, is one in which no original monuments or standard corners west of the quarter corner of section 34 are to be found upon either one of the lines claimed as the southern boundary of the township, and in such a case, in the absence of other evidence showing its location, the law seems to be settled that the court must look to the field notes of the original survey for the purpose of determining where the line was originally run. Thus, in *Nelson v. Hall*, 1 McLean, 518, Fed. Cas. No. 10,107, it was held that, where the original corners and lines are established, they must control courses and distances, but courses and distances called for must govern where there are no established objects to control them; and in the case of

Hanson v. Township of Red Rock, 57 N. W. 14, the Supreme Court of South Dakota said:

"The rule that fixed monuments will control courses and distances only prevails when the boundaries are fixed and known, and unquestioned monuments exist; and where the boundaries are not fixed and known, and the location of the monuments themselves is, uncertain, or left in doubt by the evidence, then courses and distances will be considered in fixing the boundaries."

Chief Justice Marshall, delivering the opinion of the Supreme Court in *Chinoweth et al. v. Lessee of Haskell et al.*, 3 Pet. 92, 7 L. Ed. 614, after stating what the law requires to be done in making a survey of public land, proceeded to say:

"The description of the land thus made by a survey is transferred into the grant. It consists of the courses and distances run by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed. The courses and distances are less certain and less permanent guides to the land which was actually surveyed and granted than natural and fixed objects on the ground; but they are guides to some extent, and, in the absence of all others, must govern us. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us, and must be used."

The application of this rule to the case under consideration leads to the conclusion that the township line was properly re-established by the Chandler survey as claimed by the plaintiff. That survey, in its courses and distances, agrees with the field notes of Perrin's original survey, and is about two miles and three-quarters in length, while the line contended for by the defendants is 32 chains and 38 links longer; a difference which is too great to account for upon the supposition of inaccuracy of measurement or error of computation in running the original line, and can only be reasonably explained upon the assumption that the line surveyed by Perrin and that for which the defendants contend are not the same. In addition to this, the latter crosses the Mattole river twice, a fact of which no mention is made in the field notes of the original survey. It is highly improbable that, if the line actually run by Perrin crossed that river twice, such fact would not have been noted by him, because in surveying public lands the surveyor is required to make and return field notes showing "all rivers, creeks, and smaller streams of water which the line crosses." *Zabriskie's Land Laws*, p. 528.

The next question to be considered is that in relation to damages. The complaint alleges that the defendants cut down a large number of oak trees standing upon the land described, and removed 500 cords of tan bark therefrom, and converted the same to their own use. This allegation is sustained by the evidence, and the government claims that the trespass was willful, and that under the rule announced in *Wooden-Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, and *Benson Mining Co. v. Alta Mining Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762, the defendants must respond in damages for the full value of the bark at San Francisco, where it was sold by them, without any deduction for the expense and risk incurred in removing it from the tree and shipping to the point where

it was sold. But I am of the opinion that the evidence is not sufficient to justify the court in finding that the trespass was willful and intentional, within the meaning of this rule. At the time of the alleged trespass there was a difference of opinion in the neighborhood as to the lines of the original survey. The standard corners west of the quarter section corner of section 34 were not to be found, and the government has deemed it necessary to re-establish the south boundary of the township west of that quarter corner, and three surveyors, who were witnesses upon the trial, had before the alleged trespass located the line in accordance with the contention of defendants. It is true that in doing so all of them but one proceeded upon the erroneous theory that the boundary of the township could be ascertained by starting from a well-recognized section corner of the township immediately south, and none of them thought it necessary to extend the Glover line west according to the field notes of the original survey, which, under the circumstances, was what ought to have been done. While they knew the method which was followed by these surveyors in making the surveys upon which they rely, there is no evidence showing that the defendants knew that such method was erroneous, or that they knew or believed that the true boundary of the township was where it is fixed by the Chandler survey. My conclusion therefore is that the evidence is not sufficient to justify the court in finding that the trespass was a willful one, and, as it was not, the government is only entitled to recover the value of the bark in place upon the tree; that is, its stumpage value. I regard the testimony of English, a witness for the government, as entitled to the most weight upon that point, and shall find in accordance therewith. His experience was such that he was better qualified than any other witness to testify upon the subject, and his estimate was evidently based upon the selling price of bark at the point of shipment, the cost of hauling, cutting, and peeling, and the allowance of a reasonable profit for carrying on the business of placing it upon the market. In the absence of direct evidence of the market price paid for bark upon the standing tree, these were all proper matters for consideration in fixing a reasonable stumpage value. The value fixed by him is \$5 per cord.

It follows from what has been said, that the plaintiff is entitled to recover the sum of \$2,500 as damages, with interest thereon from the 30th day of September, 1900, and costs.

PEACOCK, HUNT & WEST CO. v. THAGGARD et al.

CAMP et al. v. PEACOCK, HUNT & WEST CO.

(Circuit Court, S. D. Florida. March 14, 1904.)

No. 1,308.

1. EQUITY PLEADING—CROSS-BILL—SUIT TO FORECLOSE MORTGAGE.

Where rights exist between codefendants in a suit to foreclose a mortgage in respect to the property involved which are affected by the matters alleged in the bill, and on account of which one defendant may be compelled, in order to obtain his full rights, to demand affirmative relief

against complainant, such as the cancellation of the mortgage on a part of the property, he is not confined to the allegations of his answer, but may file a cross-bill.

2. SAME—SUFFICIENCY OF CROSS-BILL—GROUNDS FOR AFFIRMATIVE RELIEF.

A cross-bill filed by a defendant in a foreclosure suit, setting up an executory agreement for the sale and transfer of a portion of the mortgaged property to him by his codefendant, the mortgagor, at a future date, states no ground on which the court can grant him present affirmative relief, and is demurrable.

3. JURISDICTION OF FEDERAL COURTS—SUIT BY ASSIGNEE—CITIZENSHIP OF ASSIGNOR.

Where a mortgage was given to secure a prior indebtedness from the mortgagor to the mortgagee, who were citizens of different states, the jurisdiction of a federal court of a suit to foreclose the mortgage is not affected by the fact that it also secured other indebtedness owing by the mortgagor to a third person, who was a citizen of the same state, which had been assigned to the mortgagee.

4. MORTGAGE TO SECURE FUTURE ADVANCES—PRIORITY OF SUBSEQUENT LIEN—NOTICE.

To entitle one to assert a lien on property superior to a mortgage thereon made to secure future advances to the mortgagor, by virtue of an unrecorded contract made by him with the mortgagor subsequent to the mortgage, but before advances had been made thereunder, the burden rests on him to prove notice to the mortgagee of his contract before the advances were made.

5. SAME—FORECLOSURE—ATTORNEY'S FEES.

Where a mortgagee is entitled to recover reasonable counsel fees in case of foreclosure, he is entitled to an allowance based on the actual services required in the suit, although the bill was taken pro confesso as against the mortgagor, and the litigation resulted from the contentions of a codefendant, who is the only party contesting the allowance.

Upon Demurrer to Cross-Bill.

Cooper & Cooper, for Peacock, Hunt & West Co.

L. E. Roberson and J. N. Stripling, for R. J. & B. F. Camp.

LOCKE, District Judge. The original bill filed herein is for the purpose of foreclosing a mortgage upon a large tract of real estate and certain items of personal property on account of certain indebtednesses which had arisen between the complainants and the defendant Thaggard and wife, ranging through a series of years. In such bill it is alleged that the codefendants Camp, who have since filed this cross-bill, claimed to have some interest in certain portions of the real estate, and asked that they be summoned to appear and answer, and show what right and interest they have, and what cause, if any, they have why a decree granting the prayer of the bill should not be made. These codefendants filed an answer, alleging that at a certain time previous to the accruing of some of the items of indebtedness alleged to have been the basis of the mortgage herein a contract between the codefendant Thaggard and themselves was duly executed, by which Thaggard bound himself to sell and convey to said orators in said cross-bill certain portions of the lands covered by the mortgage, after a certain

¶ 2. See Mortgages, vol. 35, Cent. Dig. §§ 1329, 1330.

¶ 3. Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.

lapse of time, for \$1 per acre; that such contract was made and entered into prior to certain items of indebtedness which are included in the mortgage sought to be foreclosed; that at the expiration of the time at which the transfer of the land was to be made by the Thaggards and paid for by their codefendants Camp a supplementary agreement was made by which the agreement was continued to be in force three years longer, and that at the expiration of that time the Thaggards were bound to convey to the Camps some several thousand acres of land, and the Camps were bound to pay therefor the sum of \$1 per acre; that the Thaggards were permitted to continue in possession of the lands until it was to be transferred in accordance with said contract. In addition to said answer, said defendants Camp have filed a cross-bill stating the substance of the allegations of the answer, alleging that this contract of sale was prior to certain advances included in the amounts for which the mortgage is sought to be foreclosed, and that by such contract they took a prior right to and interest in such property, and prayed that the matter be inquired into, and that not only they be held to have a prior right, under such contract and agreement, to such lands, but that the mortgage to that extent should be held and declared to be void and of no effect as against them, and should be canceled. To this cross-bill a demurrer has been filed, contending that the right of the codefendants could not be litigated in a suit for the foreclosure of a mortgage, that all the allegations of benefit to the defendants Camp could have been made and relied upon in the answer, and that no affirmative relief could be granted as against the complainant or the codefendant Thaggard under such cross-bill.

I think the law may be plainly and briefly stated that, where the allegations of a cross-bill show facts which would, upon any reasonable construction, justify the cancellation of a contract or agreement which has been made the basis of the original suit, or where any defendant wishes affirmative relief by transfer to him of the legal title of the whole or a portion of the premises in question, a cross-bill will lie; that where rights exist between codefendants growing out of and involved in the matters and things alleged in the original bill, and by which one defendant may be compelled, in order to gain his full rights, to demand affirmative relief, he need not be confined to the allegations of the answer, but may go further, and demand that all questions involved in the suit be passed upon by the court. In this case not only does the cross-bill seek to set aside the effect of the mortgage sued upon, but prays that such mortgage be declared void and of no validity as against their rights in the property covered by the contract.

It is claimed in the demurrer that the original agreement to sell and transfer by the defendant Thaggard was suspended for three years, which time has not yet arrived, and that the only right the orators in the cross-bill could demand would be that they be permitted to enforce their rights at the expiration of the three years from the time of making the supplementary agreement; but a careful examination of that agreement does not show that the parties of the second part agreed to continue the time for the delivery of the lands to all lands, but limited such extension to "such lands as the party of the first part shall not have turpented." There is no allegation that there are parts of the

lands which have been turpented, or upon which the turpentine has been completed; but such question remains indefinite and uncertain. Under the allegations of the original bill the court has taken possession of the property by the appointment of a receiver, and the business of the defendant Thaggard is being conducted by him. If it should appear upon a hearing upon the cross-bill and answer thereto that there were certain lands that should be transferred under the contract, and that the mortgage, upon determining the priorities of interest, does not reach such land, might not the court in removing the receiver restore such lands to the Camps, rather than to defendant Thaggard? In the case of *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047, the complainant claimed to own certain real estate by inheritance from his father, to whom the defendant had conveyed by deed absolute, and prayed for a decree establishing his title. The defendant, by cross-bill, alleged that the deed was made for the purpose of placing the title in a trustee for one of the defendants. The questions submitted were held to be germane to the original bill. In the case of *Morgan Co. v. T. C. Ry.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, the facts seem to be very similar to this case. This was a suit for the foreclosure of a mortgage. A defendant was permitted to file a bill which was properly styled a cross-bill, in order to a complete decree upon the whole matter in dispute, and it was held that where, on the bill of the original complainant, possession of property had been taken by the Circuit Court of the United States, jurisdiction of the court had attached for all purposes, and in disposing of and determining the title of the property the court would examine the entire question presented, and grant affirmative relief wherever prayed in the cross-bill if found to be valid. In this case the original bill was for the foreclosure of certain mortgages. The orator in the cross-bill alleges prior rights to the property covered by the mortgages, and prays not only that the enforcement under the proceedings for foreclosure be denied, but that such mortgages be considered invalid and canceled. Such affirmative relief could not be given on an answer in the absence of a cross-bill. The property is in the possession of the court. It is for the interest of all parties that the title be finally determined. It is true that the allegations of the cross-bill have not shown a present right of possession or equitable title to the property in question, but whether the cross-bill may not be so amended as to show that certain portions of that property should be conveyed to the cross-complainant in event their allegations are shown to be true, and such construction of law as is asked for may be placed upon the relations existing under the contract, cannot be at present determined.

The allegations of the cross-bill as to the purpose of the agreement or the insolvency of the defendant Thaggard can give no right or immediate possession to or enforcement of transfer of title to the cross-complainants, but it would appear by an examination that possibly they may be entitled to some portions of that land in event the indebtedness of the defendant Thaggard to the complainant is shown to be subsequent to the rights of the complainant in the cross-bill, in which event it would seem that such cross-complainant is entitled to affirmative relief to some extent. Wherefore, although the allegations of the cross-bill do not

show a valid right at present for relief, yet it is considered that they show that there may be such a condition of affairs as, if properly alleged, may justify affirmative relief.

It will therefore be ordered that the demurrer to the cross-bill be sustained, with leave for the cross-complainant to have 10 days to amend the same, if so advised.

An amended cross-bill having been duly filed, a demurrer was sustained thereto, whereupon issue was joined between the complainant and the defendants Camp upon the original bill and answer thereto, and the matter duly referred to a master. The matter then coming on for a hearing upon the master's report, exceptions thereto, and a final decree, the following opinion and decree was pronounced:

LOCKE, District Judge. This cause has come on to be heard upon the several exceptions to the master's report. The first three exceptions are based upon the contention that the suit was brought upon an assignment of debts due to a citizen of the same state as the complainant. It is not considered that this is the case. It is true that the origin of the indebtedness, being an indebtedness to a third party, is set up in the plea; but the history of the transaction between the complainant and the respondent herein shows that the suit is not brought upon these assigned choses in action, but upon an indebtedness between the parties themselves, and the subsequent mortgage covers these items. The suit does not depend upon the rights of action assigned, but such rights of action had been recognized by the defendant herein, and the amounts thereon had been merged in and security given for an indebtedness between the two parties. *Superior City v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914. It is considered that this suit is brought upon a new contract, not involving a question between citizens of the same state.

This applies also to the fourth and fifth exceptions, which are based upon the same point, although in different words.

The sixth and seventh exceptions are based upon the principle that in a case of a mortgage to secure future advances the lien of a subsequent mortgage may be held prior to advances made after the notice has been given to the prior mortgagee. The integrity of this contention rests entirely upon the question as to when the complainant in this case may be held to have had notice of the contract between Thaggard and Camp. This contract, so made, was subsequent to a prior valid and existing lien upon the property claimed to have been transferred, and was subject to all the equities and rights of such mortgage. It is well settled that a mortgage covering future advances for the purpose of carrying on a special business will constitute a valid lien. Such advances as were made upon the prior mortgage were protected thereby, unless the mortgagee was informed and had knowledge that the party had executed a subsequent mortgage or contract constituting a lien. This contract was signed on the 28th of September, acknowledged by one of the parties on the 30th, and by the grantor on the 5th of October, but was not placed on record until the 23d of March the subsequent year. In the meantime advances were being made until

at the date of the recording of said contract the amount due on the prior mortgage exceeded that which has been found by the master to be due. Whenever a party alleges notice of an important transaction upon which the rights of the parties depend, prior to the time of the placing of such contract on record, the burden of proof is upon the party making such allegations. The presumption is that notice to the public is only given by a recording of the document in the official records, and whoever alleges a prior notice and knowledge must substantiate such allegation by proof. In this I consider the defendants Camp have failed. They have introduced no testimony in their own behalf, but have attempted to procure from the testimony of the complainant's witnesses an admission to that effect, but the nearest approach to such an admission has been that the witness thinks it was about the time of the contract being placed upon the record that he first knew of it. He declares positively that they objected to the making of the contract, and presumed and supposed that it was not made at the time it was. If the information had been given, or the knowledge of it could have been brought home to the complainant in any way, it was the duty of the Camps to show such to be the case; which they have failed to do. It is not sufficient to contend that because a party could not state positively the time that he was first informed of a fact that it must have been at a time different from that which he represented according to the best of his knowledge and recollection. It does not appear that the defendants Camp made any examination of the amounts of advances due the complainant by the defendant Thaggard, but relied upon report and hearsay; nor has it been shown that in any way they gave notice to the original mortgagee. I therefore must find with the master that there was no reason shown why the advances made between the 28th of September and the 23d of March were not made in good faith, and upon the security of the existing mortgage.

It is also contended that there were certain large amounts paid between these dates which could not properly be classed as advances. The testimony shows that the payments were made upon drafts properly drawn by the defendant Thaggard, and were in the direct line of the business in which he was engaged, viz., purchasing land and timber for turpentine purposes. I therefore find that lien of the outstanding mortgage was superior to the contract of the defendants Camp.

The ninth exception presumes a finding that I do not think is justified by the record. I fail to find that any of the advances made after the knowledge of the contracts had come to the complainant herein have entered into the amount found by the master. It was within the discretion of the complainant to credit the amounts received from the defendant Thaggard upon such portions of the accounts, if they had been kept separate, in the absence of any direction or request to the contrary, as would protect the creditor to the greatest extent. In the event of a secured and an unsecured indebtedness, he had the right to credit the payments to his unsecured indebtedness, and leave the security on the amount still due.

It has been contended in behalf of the tenth exception that the amount of labor required from the complainant's counsel in the contest

between the complainant and the defendant Thaggard did not justify the amount of fee allowed by the master, because the bill was taken pro confesso, and that no continued litigation was required, and that there should not be taken into consideration, in determining such fee, the amount of labor which has been necessitated by the contest between the complainant and the defendants Camp. I cannot accept this view of the case. The defendants Camp have necessitated a large amount of litigation, which the counsel for the complainant have been compelled to meet, and I consider that the master was fully justified in finding that the fee allowed was a reasonable one for the nature and amount of labor performed by complainant's counsel. It will therefore be ordered that the exceptions to the master's report be overruled, and such report confirmed, and that the amounts found due therein be considered and held justly due by the defendants to the complainant, and fully secured by the mortgages alleged in said bill.

But while the complainant is entitled to the amount found to be due, there appear to be certain equities in regard to the sale of the lands involved in this suit which would justify a recognition by this court, and I know of no authority of law or principle of equity that permits the mortgagee to determine the mode and manner or order of sale of different pieces of property which might result to the injury of another, unless the same is required by a necessity of protecting the mortgagee in his entire rights. I have heretofore held in this case that the lands covered by the contract of the Camps only passed to them either at the option of the grantor, Thaggard, or by the lapse of three years from the time of making the supplemental contract (the 28th of September, 1903). If the lien of the complainant can be satisfied by the property not involved in that contract and the use of such timber land for turpentine until that time, the complainant has no reason to object. It will therefore be ordered that, if the amounts found due by the master are not paid within 10 days, the master shall proceed to advertise and sell all of the property covered by the several mortgages in said bill alleged, but in such sale the property not included in and covered by the contracts of Thaggard with the Camps be offered first in such lots as will bring the highest amounts; that then there be offered the right of working, for turpentine purposes, the lands covered by said contract, up to the 28th day of September, 1903; that, if the proceeds of such sales do not equal the amount found to be due by the master, the defendants Camp be permitted to redeem such lands as are covered by their contracts and remain unsold by paying to the complainant any residue of the indebtedness which may then remain due. The right of occupation of such land not to attach until the 28th of September, 1903. It is further ordered that if such defendants Camp, for the space of three days after the residue remaining due is settled and determined, fail and refuse to so redeem such lands, the master will then proceed to advertise and sell the same, and pay therefrom the residue of the indebtedness thus found, together with all the interest, costs, and charges herein incurred and expended.

UNITED STATES v. WALKER et al.

(District Court, E. D. Pennsylvania. April 7, 1904.)

No. 2.

1. BONDS—LIABILITY OF PRINCIPAL—EXTENT.

Where, in an action on a bond, the verdict is less than the penal sum, with interest, it is no objection to the recovery, so far as the principal debtor is concerned, that the verdict exceeds the sum named on the face of the bond.

Motion for a New Trial.

James B. Holland and William M. Stewart, for the United States.
William E. McCall, Jr., for defendant.

J. B. McPHERSON, District Judge. This was a suit upon a bond in the penal sum of \$250, given to secure the faithful performance of a contract to deliver certain machinery to the Mare Island Navy Yard. The verdict is for \$370, made up of \$220.84 principal, and \$149.16 interest thereon for about 11 years, and the question for consideration is whether the plaintiff may recover more than the penal sum named in the bond. So far as the surety is concerned, the limit of its liability may perhaps be the penal sum—no such question is now raised in its behalf—but I think that the principal is liable for the full amount of the verdict. This seems to be settled, both in Pennsylvania (*Perit v. Wallis*, 2 Dall. 253, 1 L. Ed. 370; *Weikel v. Long*, 55 Pa. 238; *New Holland Turnpike Co. v. Lancaster Co.*, 71 Pa. 442), and also in the federal courts (*U. S. v. Meeker*, Fed. Cas. No. 15,757; *U. S. v. Arnold*, Fed. Cas. No. 14,469; *Randle v. Barnard* [C. C.] 99 Fed. 353). See, also, the very careful and elaborate notes in *Fraser v. Little*, 87 Am. Dec. 745, and in *Griffith v. Rundle*, 55 L. R. A. 381, where the whole subject is so clearly and satisfactorily treated that nothing more need now be said about it. No doubt there is a good deal of conflict among the decisions, but the modern cases seem to be decidedly in favor of the principal's liability beyond the penal sum of his bond. Indeed, in view of one of the provisions of the contract under consideration, the amount of the verdict might perhaps have been the penal sum itself, with interest thereon either from the date of suit or from the actual breach; for one of the covenants of the contract is as follows:

"If said party of the first part shall fail in any respect to perform this contract on his part, it may at the option of the United States be declared null and void without prejudice to the right of the United States to recover for defaults herein or violations hereof, and for such default the United States may demand and recover of said party of the first part and his representatives aforesaid as liquidated damages a sum of money equal to the penalty of the bond accompanying this contract."

Without insisting upon this point, however, I think the weight of authority supports the position that since the verdict is less than the penal sum with interest it is no objection to the recovery, so far at

¶ 1. See Bonds, vol. 8, Cent. Dig. § 243.

least as the principal debtor is concerned, that the verdict exceeds the sum named on the face of the bond.

On the merits, also, the motion for a new trial must be denied. This litigation has been pending for 11 years. There have been two verdicts, both in favor of the government, and the time has come, I think, to bring the dispute to an end.

A new trial is refused.

EDISON v. THOMAS A. EDISON, JR., CHEMICAL CO.

(Circuit Court, D. Delaware. March 28, 1904.)

No. 236.

1. TRADE-MARKS—REGISTRATION.

Act March 3, 1881, c. 138, 21 Stat. 502, 1 Supp. Rev. St. p. 822 [U. S. Comp. St. 1901, p. 3401], providing for the registration of trade-marks and their protection, does not create any trade-mark, but on its face presupposes the existence of a valid trade-mark which may be registered on compliance with the requirements of the law.

2. SAME—INFRINGEMENT.

If, owing to non-compliance with the provisions of the act, the registration of a valid trade-mark be void, the trade-mark is not thereby nullified or injuriously affected, but still retains the nature and properties of a common law trade-mark, for the infringement of which suit may be maintained in the federal courts, if the requisite diversity of citizenship exists and the requisite jurisdictional amount is involved.

(Syllabus by the Court.)

In Equity.

Howard W. Hayes, for complainant.

William B. Whitney, for defendant.

BRADFORD, District Judge. The Thomas A. Edison, Jr., Chemical Company, a corporation of Delaware, has demurred to a bill brought against it by Thomas A. Edison, a citizen of New Jersey, for alleged infringement of a trade-mark. In substance the bill is to the effect that the complainant was December 15, 1897, and ever since has been, and now is domiciled in the United States, and was on that day, and ever since has been, and now is "the owner of a trade-mark for phonographs, phonographic supplies, kinetoscopes, kinetoscope films, numbering machines, batteries, X-ray apparatus, electromedical appliances, and other philosophical and scientific apparatus, then and still used by your orator in commerce with foreign nations," including, among others, Great Britain, France and Germany, "consisting of the autographic name 'Thomas A. Edison,' the words and letter being formed in characteristic autographic script with the loop of the first letter extending above and over the other letters constituting the mark, the essential feature of which is the word 'Edison' formed in characteristic autographic script"; that the complainant having in all respects complied with the provisions of law and the regulations prescribed by the Commissioner of Patents relating to the registration of trade-marks, duly obtained June 19, 1900, the registra-

tion and a certificate of registration of his above mentioned trade-mark for use in connection with "phonographs, parts of phonographs, phonographic blanks, kinetoscopes, kinetoscope-films, numbering-machines, batteries, X-ray apparatus, and electromedical appliances"; that since the registration of his trade-mark the complainant has manufactured and sold large numbers of batteries and electromedical apparatus and other scientific apparatus both in the United States and in many foreign countries, and the defendant, without his license, has manufactured and sold a large number of batteries and electromedical apparatus called the "Magno-Electric Vitalizer," having substantially the same descriptive properties as the batteries and electromedical apparatus referred to in the registration of the trade-mark, upon each of which was placed or caused to be placed by the defendant the complainant's trade-mark, or a copy, counterfeit or colorable imitation, so nearly resembling it as to be likely to cause confusion or mistake in the mind of the public and to deceive purchasers; that this suit is between citizens of different states; and that the matter actually in controversy exceeds the sum or value of \$2,000, exclusive of interest and costs. The bill contains the usual prayers. The causes of demurrer are that "the registration of the complainant's alleged trade-mark and the certificate of registry of the said alleged trade-mark issued to the complainant, as set forth in said bill, and each and every part thereof, are void and of no effect in law, because that the statement which the complainant caused to be recorded in the Patent Office did not comply with the conditions and requirements of the law in such case made and provided, and further, because that, without authority of law and contrary to the provisions of the statute in such case made and provided, the said registration was had, and the said certificate of registry was issued, for a trade-mark for, and comprising more than a single class of merchandise." Whatever may be the ultimate determination of this case, I am satisfied that the demurrer should not be sustained. It is confined to the allegations of the bill touching the registration of the trade-mark. If it be assumed that the registration did not conform to law and was a nullity, it would by no means necessarily follow from that fact that no bill could be maintained for an infringement of the trade-mark. The Act of March 3, 1881, c. 138, 21 Stat. 502, 1 Supp. Rev. St. p. 322 [U. S. Comp. St. 1901, p. 3401], providing for the registration of trade-marks and their protection, does not create any trade-mark. Upon its face it presupposes the existence of a valid trade-mark which may be registered on compliance with the requirements of the law. Registration under the act does not affect in any manner the nature or function of the trade-mark. Its only effect is to confer upon the owners of trade-marks certain benefits or privileges which they would not otherwise possess. If, owing to non-compliance with the provisions of the act, the registration of a trade-mark be void, the trade-mark is not thereby nullified or injuriously affected, but still retains the nature and properties of a common law trade-mark, for the infringement of which suit may be maintained in the federal courts if the requisite diversity of citizenship exists and the requisite jurisdictional amount is involved. Here both appear upon the record.

There is no ground of demurrer, nor has it been contended by counsel, that the alleged trade-mark of the complainant is not in its nature or characteristics a mark, word or symbol capable of appropriation as a valid common law trade-mark. Assuming it to be valid, it could be appropriated and affixed by the complainant as well to many articles as to only one, and could be infringed as well with respect to only one as to many; and the allegations of the bill and its prayers are broad enough to support a decree for the complainant even on the assumption that the registration of his trade-mark was a nullity. On the whole I think that this case should be decided not on the demurrer but only after a hearing on proper pleadings and evidence. The demurrer must, therefore, be overruled with costs, and the defendant required to answer or plead to the bill by the first rule day in May next, with the right to set forth in its pleadings the matters referred to in the causes of demurrer.

SPERRY & HUTCHINSON CO. v. MECHANICS' CLOTHING CO.

(Circuit Court, D. Rhode Island. March 10, 1904.)

No. 2,651.

1. PRELIMINARY INJUNCTION—GROUNDS FOR MODIFICATION.

A preliminary injunction restraining defendants from using trading stamps issued by complainant, based on a finding that a portion of the stamps in defendant's possession were obtained in fraud of complainant's rights, will not be modified on application of defendants to permit them to use stamps acquired by them after its issuance in a different and lawful manner, where the question of their right to use stamps, even when so obtained, is in issue, and was expressly reserved for determination on final hearing.

In Equity. On petition for modification of a decree for a preliminary injunction.

See 128 Fed. 800.

Tillinghast & Murdock and W. Benton Crisp, for complainant.
Edward D. Bassett, for defendant.

BROWN, District Judge. The defendants seek to modify the preliminary injunction, not upon the ground that it was improvidently issued, but because of matters that have occurred subsequent to the entry of the decree. Assuming, for this petition, that the defendants have duly advertised their lack of authority from the Sperry & Hutchinson Company to issue trading stamps, and that this is generally known, is this a sufficient reason to move this court to affirmative action? By their wrongful acts the defendants were brought under injunction, and therefore, upon this petition, have not the advantages of a defendant resisting a preliminary injunction on the ground of doubt as to a legal right, but become moving parties, with the burden of showing cause for a modification of the injunction. The injunction was granted on the ground of unfair and fraudulent interfer-

ence with the complainant's contracts and with its property. The advertisements containing a representation of authority from the complainant were but one feature. In addition to this was the inducement of breaches of contract, and the procurement of trading stamps by this means, as well as by offers of redemption. While the court was of the opinion that the complainant had failed to show title to the stamps which the defendants had acquired from the general public, the question of the effect upon this case of the doctrine stated in *National Telegraph News Co. v. Western Union Telegraph Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, was expressly reserved to final hearing. While it was said that this point was doubtful and debatable, yet it cannot be said that the contention of the complainant that it is entitled to restrain the use of trading stamps for advertising purposes by persons not authorized by the Sperry & Hutchinson Company is frivolous, or manifestly unsound. The case is a novel one, and no decision has been cited which touches the precise questions raised. The complainant has an extensive advertising business. One of the instruments of this business is the trading stamp. To employ it otherwise than in the manner intended would doubtless result in a serious damage to the complainant's business, without corresponding advantages to persons competing with the complainant as these defendants have done. The defendants, in effect, now ask that this question be decided before final hearing, not to protect rights which accrued to them before the entry of the injunction, but presumably because, since the injunction, they have procured, or because they propose to procure, trading stamps other than those impounded in this court. Being under an injunction against the use of trading stamps, and having notice of the question reserved for final hearing, they have voluntarily chosen to acquire these stamps, knowing that, until they could move this court to affirmative action, they could not dispose of them.

In *General Electric Co. v. Re-New Lamp Co.* (C. C.) 121 Fed. 164, 170, it was said:

"With full knowledge it assumed a new risk, * * * and the further risk of litigating novel points of law. Under such circumstances we think that a risk voluntarily assumed before litigation may be continued until the rights of the parties are established on final hearing."

This is applicable to a defendant who seeks affirmative action of the court based upon matters arising since the granting of an injunction.

It has already been said that the defendants are not deprived of any lawful rights in losing the benefit of their previous advertisements. Upon this petition, therefore, they stand simply in the position of persons who have acquired trading stamps in reliance upon their views of a legal question which has been expressly reserved for final hearing. To grant this petition would involve a decision of the point reserved; and, if the decision on the interlocutory motion should be in favor of the defendants, and that rendered on final hearing were in favor of the complainant, the complainant thereby would suffer irreparable damage, while the result of denying the petition would be

to preserve the status quo without subjecting the defendants to any other inconvenience than that of the delay incident to the preparation of the case for final hearing.

In *Cotting v. Kansas City Stock Yards Co.* (C. C.) 82 Fed. 850, Judge Thayer, though deciding to dismiss a bill, yet continued an injunction in order to maintain the status quo, and to prevent irreparable injury pending an appeal. See, also, *Hovey v. McDonald*, 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888; *Allison v. Corson*, 88 Fed. 581, 32 C. C. A. 12.

In *Rogers Co. v. International Silver Company*, 118 Fed. 133, 55 C. C. A. 83, it was urged that the interlocutory injunction was too broad, in that it might prevent the pursuit of a legitimate business under some future contingencies; yet the Circuit Court of Appeals for this Circuit said:

"It is impossible for courts, with reference to proceedings of this character, to anticipate all future possibilities, so that temporary injunctions relate ordinarily to conditions as they exist when the injunction is ordered."

While, upon a proper showing affecting the grounds upon which an injunction was originally issued, or setting up new matter from which it appears that to continue an injunction would result in serious or unnecessary injury, an injunction may be modified, yet, in my opinion, such showing has not been made upon this petition, since the new matter goes only to a portion of the evidence upon which the injunction was granted, and does not show a situation where serious or unnecessary injury will follow its continuance.

Petition denied.

MEMORANDUM DECISIONS.

AMERICAN SUGAR REFINING CO. v. RUTAN, Internal Revenue Collector. (Circuit Court of Appeals, Third Circuit. March 29, 1904.) No. 51. In Error to the Circuit Court of the United States for the District of New Jersey.

PER CURIAM. This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the District of New Jersey; and, stipulation of counsel being presented in open court, wherein it was agreed by counsel for the defendant in error that the judgment in said cause be reversed, with directions to the Circuit Court to enter judgment for the plaintiff, not only to the extent and for the amount awarded by the said judgment of the said Circuit Court, but also, in addition thereto, for the amount of taxes paid by the plaintiff to the said collector upon receipts from interest and dividends, with interest upon such payments from the several dates when the same were made, it is, on consideration whereof, now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is, hereby reversed; and it is further ordered that this cause be remanded to the said Circuit Court, with directions to enter judgment in favor of the plaintiff in accordance with the stipulation filed in said cause. 123 Fed. 979.

B. LOWENSTEIN & BROS. v. THOMAS et al. (Circuit Court of Appeals, Fifth Circuit. January 6, 1904.) No. 1,125. Petition to Revise and Superintend the Proceedings of the District Court of the United States for the Northern District of Mississippi. John W. Apperson, for petitioners. Wm. C. McLean, for respondents. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the former decree entered in this case, on December 14th of the present term, we erroneously affirmed, when we should have reversed. Now, therefore, said decree is recalled and vacated, and it is ordered that the following be entered in lieu thereof, to wit: The decision in this case has been withheld to await action of the Supreme Court on appeal in *Kahn v. Cone Export & Commission Company*, decided by this court March 15, 1902, and reported in 115 Fed. 290, 53 C. C. A. 92, wherein the same question of preference was involved; and, said appeal having been dismissed by reason of the decision of the Supreme Court on the points involved in *Jaquith v. Alden*, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, we now reverse the decree of the District Court, with costs, and remand the cause, with instructions to allow the claims of *Boyd, Lunham & Co.* and of the *Carlton Dry Goods Company* against the estate of *Wright & Berryhill*, bankrupts, as presented, and to allow the claim of *B. Lowenstein & Bros.* against the estate of *Wright & Berryhill*, as presented, upon the surrender by said *Lowenstein & Bros.* of the sum of \$135.04, the last-mentioned sum being the amount of actual preference received by said *B. Lowenstein & Bros.* from *Wright & Berryhill*, bankrupts, within four months prior to the adjudication in bankruptcy, and to otherwise proceed in said cause according to the opinion of this court in *Kahn v. Cone Export & Commission Co.* and the opinion of the Supreme Court in *Jaquith v. Alden*.

CITY OF CHESTER v. PETER HAGAN & CO. (Circuit Court of Appeals, Third Circuit. March 22, 1904.) No. 2. Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

ACHESON, Circuit Judge. This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and on motion of counsel for the appellant that said cause be dismissed. It is now here ordered, adjudged, and decreed by this court that the appeal from the said District Court be, and the same is hereby, dismissed at the costs of appellant. See 116 Fed. 223.

COCHRAN et al. v. MONTGOMERY COUNTY. (Circuit Court of Appeals, Fifth Circuit. April 5, 1904.) No. 1,343. In Error to the Circuit Court of the United States for the Middle District of Alabama. Edgar H. Gans, Thos. A. Whelan, Thos. H. Watts, and Alexander Troy, for plaintiffs in error. William L. Martin, John G. Finley, and J. F. Stallings, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This case has heretofore been twice before this court. On this writ of error no new questions are raised, except in regard to the allowance of interest, and as to that the Circuit Court ruled correctly, and its judgment should be affirmed; and it is so ordered. See 126 Fed. 456.

COULTER, Auditor, v. WEIR. (Circuit Court of Appeals, Sixth Circuit. February 13, 1904.) Nos. 1,222, 1,223. Appeals from the Circuit Court of the United States for the Eastern District of Kentucky. John W. Ray, for appellant. Lawrence Maxwell, Jr., for appellee. Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. These two cases involve the taxes assessed against the Adams Express Company for 1897 and 1898. They were heard with Coulter, Auditor, v. Wier, President Adams Express Company (No. 1,224; C. C. A.) 127 Fed. 897, just disposed of by an opinion which covers all the questions arising upon these appeals. The decree in each case will be reversed, so far as relief is sought against the taxes claimed by the commonwealth of Kentucky, and affirmed, so far as the defendant is restrained from certifying the valuations for local assessments, except as corrected. The costs of appeal in each case will be divided.

COULTER, Auditor, v. FARGO. (Circuit Court of Appeals, Sixth Circuit. February 13, 1904.) No. 1,227. Appeal from the Circuit Court of the United States for the Eastern District of Kentucky. John W. Ray, for appellant. Lawrence Maxwell, Jr., for appellee. Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This case involves the taxes assessed against the American Express Company for 1899, 1900, and 1901. The questions are identical with those dealt with in Coulter v. Weir (C. C. A.) 127 Fed. 897, and the result must be governed by the opinion in that case. The bill will be dismissed, so far as relief is sought against the taxes claimed against the state, being in effect a suit against the state as to those taxes. The jurisdictional amount requisite to sustain the suit for the purpose of restraining the defendant from certifying the valuations to the county court clerks of the state as a basis for local assessment is sufficient, irrespective of the amount claimed by the state, and the decree in all other particulars will therefore be affirmed. The costs of appeal will be divided.

THE GLADESTRY. (Circuit Court of Appeals, Second Circuit. February 23, 1904.) No. 118. Appeal from the District Court of the United States for the Eastern District of New York. This cause comes here on appeal from a decree in favor of libellant for injuries received while working in a gang of stevedores

discharging timber from the steamship *Gladestry*. J. Parker Kirlin, for appellant. Fredk. B. Bailey, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This cause is on all fours with *The Gladestry* (opinion in which is handed down herewith) 128 Fed. 591. Decree affirmed, with interest and costs.

HALLOCK et al. v. BABCOCK MFG. CO. (Circuit Court of Appeals, Second Circuit. March 2, 1904.) No. 138. Appeal from the Circuit Court of the United States for the Northern District of New York. Howard Denison, for appellant. Marcellus Bailey, for appellees. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. On the record as it stands we are not prepared to decide that the preliminary injunction (124 Fed. 226) should not have been granted.

LOUISVILLE & N. R. CO. v. WEST COAST NAVAL STORES CO. (Circuit Court of Appeals, Fifth Circuit. March 29, 1904.) No. 1,323. In Error to the Circuit Court of the United States for the Northern District of Florida. W. A. Blount, for plaintiff in error. Jno. C. Avery, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The questions involved on this writ of error were fully decided when this case was first before the court. See *West Coast Naval Stores Company v. Louisville & Nashville R. Co.*, 121 Fed. 645, 57 C. C. A. 671. And, as we adhere to the views therein expressed, the judgment of the Circuit Court is affirmed.

MEXICAN CENT. RY. CO., Limited, v. ROBINSON. (Circuit Court of Appeals, Fifth Circuit. April 5, 1904.) No. 1,225. In Error to the Circuit Court of the United States for the Western District of Texas. T. A. Falvey and Waters Davis, for plaintiff in error. Millard Patterson and J. A. Buckler, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the court is of the opinion that there is no reversible error in the record, and the judgment is therefore affirmed.

PARDEE, Circuit Judge (dissenting). This case was instituted in the Circuit Court on the following allegation as to jurisdiction: "The petition of H. A. Robinson, an American citizen, and a citizen of and a resident in El Paso county, state of Texas, and of the Western District of Texas, and who complains of the Mexican Central Railway Company, Limited, a railroad corporation duly and legally incorporated by and under the laws of the state of Massachusetts, and which has its residence and domicile in the said state of Massachusetts, and which has a local agent representing it in El Paso county, Texas." A duly reserved bill of exceptions shows the following proceedings before the court: "H. A. Robinson v. The Mexican Central Railway Company, Limited. No. 298. Be it remembered: That at the April term of said court, A. D. 1902, the above styled and numbered cause being called for trial, both plaintiff and defendant announced ready for trial, whereupon a jury consisting of twelve good and lawful jurors were selected by the parties and duly impaneled by the court to try said cause. That the plaintiff's counsel introduced plaintiff himself as witness, and examined him fully touching his entire cause of action as set out in his petition filed in this cause. That defendant's counsel, on cross-examination of plaintiff, showed by him that he was born in Canada, and that at the time he was born in Canada his parents lived there, his father having been born in England, and that he (plaintiff) had never taken out any citizenship papers, and he did not know whether or not his father had ever taken out any. On making such proof the defendant's counsel then made a motion in writing, which was filed on

the 15th day of April, 1902, to dismiss the cause, because the evidence showed that the plaintiff was a citizen of the Dominion of Canada, and not a citizen of the United States of America; and the court heard said motion and stated to counsel for plaintiff that he would sustain the same and dismiss this action, whereupon the plaintiff's counsel requested the court to permit him to withdraw his announcement of readiness for trial and to continue the cause on the ground of surprise, which request the court granted, and the cause was continued until the November term of this court. That defendant's motion to dismiss said cause was as follows, to wit: 'H. A. Robinson v. Mexican Central Railway Co., Limited. No. 298. Now comes defendant in the above styled and numbered cause, and moves the court to dismiss this cause for the reason that it appears at this stage of the proceedings from plaintiff's own testimony that he is a citizen of the Dominion of Canada, and not a citizen of the United States of America, or of the state of Texas, or county of El Paso. Wherefore defendant prays that this cause be dismissed at plaintiff's cost. Falvey & Davis, Attorneys for Defendant.' Indorsed: 'No. 298. In U. S. Circuit Court. H. A. Robinson v. M. C. Ry. Co., Lim. Defendant's Motion for Dismissal for Want of Jurisdiction. Filed April 15, 1902. D. H. Hart, Clerk.' That at the November term of said court, to wit, on the 8th day of November, this cause being again called for trial, there upon came the plaintiff and presented its reply to defendant's objection to the jurisdiction of the court, which reply was filed on the 5th day of November, 1902, and is as follows: 'In the United States Circuit Court, W. D. T. H. A. Robinson v. Mexican Central Railway Co., Limited. No. 298. Now comes the plaintiff herein, H. A. Robinson, and for answer to the defendant's plea or suggestion of want of jurisdiction to hear and determine this cause states the following facts to the court: That this suit was instituted in this court by H. A. Robinson on the 12th day of September, 1901; that on the same day the clerk of this court issued a citation in regular and proper form for the defendant, which was duly served upon the defendant on the 13th day of September, A. D. 1901; that on the 7th day of October, 1901, the defendant, the Mexican Central Railway Company, Limited, by its duly authorized attorneys, Falvey & Davis, appeared and filed the following answer, to wit: "In U. S. Circuit Court, W. D. of Texas, October Term, 1901. H. A. Robinson v. M. C. Ry. Co., Ltd. No. 298. Now comes the defendant in the above styled and numbered cause, by its attorneys, and, excepting to plaintiff's petition filed herein, says that the matters and things set forth therein are not sufficient in law; and of this it prays the judgment of the court. [Signed] Falvey & Davis, Attorneys for Defendant. Further answering herein, the defendant, by its attorneys, comes and says that it denies all and singular the allegations in plaintiff's petition contained, and of this it puts itself upon the country. [Signed] Falvey & Davis, Attorneys for Defendant." That at the October term, 1901, of this court, the plaintiff's counsel, C. N. Buckler, agreed with the defendant's counsel, Falvey & Davis, that for that term of the court said cause should be continued, and in pursuance of said agreement said cause was continued by the court until the next succeeding term of this court, to wit, the April term, 1902. That at the April term, 1902, said cause was duly called for trial, and both plaintiff and the defendant announced ready for trial, whereupon a jury consisting of twelve good and lawful jurors were selected by the parties and duly impaneled by the court to try said cause. That the plaintiff's counsel introduced the plaintiff himself as a witness, and examined him fully touching his entire cause of action as set out in his petition filed in this case. That defendant's counsel, on cross-examination of the plaintiff, showed by him that he was born in Canada, and that at the time he was born in Canada his parents lived there. Upon making such proof the defendant's counsel then made a motion in writing, which was filed on the 15th day of April, 1902, to dismiss the cause because the evidence showed that the plaintiff was a citizen of the Dominion of Canada, and not a citizen of the United States of America, and the court heard said motion and stated to counsel for the plaintiff that he would sustain the same and dismiss the action. Whereupon the plaintiff's counsel requested the court to permit him to withdraw his announcement of readiness for trial, and to continue the cause, on the ground of surprise, which request the court

granted, and the cause was continued until the present term of the court. That the defendant has never pleaded to the jurisdiction of this court, and has never by any proper pleading asserted its right to be sued in the district of its domicile. That by appearing at the October term, 1901, of this court, and filing a general answer, and agreeing that the cause should be continued, and at the April term, 1902, of this court, announcing ready for trial, assisting in impaneling the jury, it waived its right to be sued in the district of its domicile, and cannot now be heard to assert such right for the purpose of defeating the plaintiff's right to a trial of this cause in this court. And the plaintiff expressly pleads said fact as constituting such waiver. Wherefore the plaintiff prays the judgment of the court upon this his plea, and also prays that he may be permitted to proceed with the trial of this cause in this court. Patterson & Buckler, Attorneys for the Plaintiff.' It was admitted that the cause was continued by agreement at the October term, 1901. That upon the reading of said reply defendant, by its attorneys, came and asked leave to withdraw its answer, filed at the previous term of said court, and asks leave to insist upon its motion to dismiss said cause for want of jurisdiction, stating that at the time it had filed its original answer it was not aware that plaintiff was a citizen of Canada, but believed that he was a citizen and resident of the state of Texas, and of the Western District of Texas, as alleged in his petition. The court refused to permit defendant to withdraw said answer, and refused to permit it to file and further plead to the jurisdiction in this cause, but sustained plaintiff's motion, to which action and order of the court defendant then and there in open court excepted."

In *Hunt v. Howes*, 74 Fed. 657, 21 C. C. A. 356, this court mulcted with costs the plaintiff in error (defendant in the court below) because his counsel did not seasonably make objection to the fact that the plaintiffs in the Circuit Court did not allege in their pleadings the essentials of jurisdiction; and in an elaborate opinion the court laid down a high standard of ethics which "the noblesse of the robe" imposed upon counsel. I quote a fragment: "It is certain, however, that it was the business of the defendant's counsel to deal openly and fairly with the court. The day of brilliant strategical displays in judicial trials has departed, nor is a court of the United States a congenial spot for surprisals and ambuscades." The propriety of the judgment in *Hunt v. Howes* has been very seriously questioned in other courts. See *Houston v. Filler & Stowell Co.*, 105 Fed. 538, 44 C. C. A. 583. But it remained for a majority of this court to overlook the ethical standard therein promulgated. In the instant case the record shows that the appearance and answer of the defendant railway company were obtained under false allegations as to the citizenship of the plaintiff. I think the objection was made seasonably, and the relief asked for should have been given. As the record stands, it presents a case where the jurisdiction of the court was based on false representations, and, in my opinion, unfairly retained. The letter and spirit of section 5 of the act of 1875 (18 Stat. 472) should have been applied.

ROSS v. SAUNDERS. (Circuit Court of Appeals, First Circuit. April 26, 1904.) No. 505. Appeal from the Circuit Court of the United States for the District of Massachusetts. Action by Thomas W. Ross against Andrew J. Saunders, trustee of the bankrupt estate of George W. Ross and Patrick J. Flemming. The complainant sought to enforce a lien upon a liquor license formerly belonging to the firm of George W. Ross & Co. Wm. Henri Irish, for appellant. Calvin P. Sampson, for appellee. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. The appeal is dismissed, without costs, per agreement of counsel. See 123 Fed. 737.

SOUTHERN BUILDING & LOAN ASS'N v. CAREY et al. (Circuit Court of Appeals, Sixth Circuit. March 19, 1904.) No. 1,268. Appeal from the

Circuit Court of the United States for the Western District of Tennessee. Thomas M. Scruggs, for appellant. Thomas W. Brown, for appellee. No opinion. Affirmed, with costs. 117 Fed. 825.

BRUNSWICK-BALKE-COLLENDER CO. v. KLUMPP et al. (Circuit Court, S. D. New York. January 11, 1904.) Motion for Leave to Withdraw Answer. For former opinion, see 126 Fed. 765. S. L. Moody, for the motion. Jos. C. Clayton, opposed.

LACOMBE, Circuit Judge. No good reason for withdrawing the answer is shown. If defendants decide that further prosecution of the defense is not worth its cost to them, they may offer to submit to a decree in the usual form, sustaining title and validity of patent, finding infringement, and for injunction and accounting. This will relieve them from liability for any subsequent costs for taking testimony and printing record. They cannot escape accounting by no longer litigating the main issues; but there seems no doubt, in view of what was said on the argument, that a fixed sum for each alley may be agreed upon, and possibly also the number of alleys made or sold which embody the device of the patent as found by the decree.

EDISON PHONOGRAPH CO. v. SWITKY. (Circuit Court, S. D. New York. February 18, 1904.) Frank E. Bradley, for the motion. Waldo G. Morse, opposed.

LACOMBE, Circuit Judge. Complainant may take injunction as to machines. As to the records, defendant asserts under oath that all that he has offered for sale were bought secondhand from persons who had paid the full retail price for them. If this be so, the questions raised should be left for final hearing. But, in view of the fact that defendant advertises new records for sale, his affidavit cannot be taken as conclusive, without giving his adversary opportunity of cross-examination. If complainant wishes to cross-examine on the averments of the affidavit, he may take an order, sending it to Robert C. Beatty, Esq., as special master to conduct such examination and report his conclusions with the testimony, and upon the coming in of his report this motion may be renewed. If complainant prefer not to cross-examine, the motion as to the records will be denied. If defendant fail, after being duly notified, to appear for cross-examination, the motion for preliminary injunction will be granted.

L. E. WATERMAN CO. v. JOHNSON. SAME v. LOCKWOOD et al. (Circuit Court, D. Massachusetts. February 8, 1904.) Nos. 1,221, 1,222. In Equity. Walter S. Logan, for complainant. Oliver R. Mitchell, for defendants.

LOWELL, District Judge. The items in controversy in the taxations of costs in above cases have been fully considered in the opinion in cases Nos. 951, 1,223, and 1,224 between the same parties (128 Fed. 174); and the taxations are to be modified in accordance with that opinion.

END OF CASES IN VOL. 123.

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